

New Crisis, Same Attitude? EU External Border Measures and Third-Country Nationals in Pandemic Times¹

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Abstract

At the time of the COVID-19 pandemic outbreak, the European Union restricted the movement of third-country nationals into the EU. The aim of this study is to provide an overview of the tools the European Union used to promote a more effective role for the EU's external borders in managing the crisis. The study looks at the nature of the measures, i.e., restrictive or non-restrictive, to understand the policy of crises management and the measures relations with each other and assesses them within the EU legal framework. The study points out that the mobility restrictions of third-country nationals brought up the memory of the 2015 migration crises, which was also unexpected and thus prevented the EU from taking the lead in coordinating Member States' actions. The study emphasises that, although the EU was still not ready with an advanced crisis management response, the external borders system offered an opportunity to facilitate a more coordinated response by Member States. This opportunity has been seized in light of the present crises, almost offsetting the delayed EU actions in connection with the unilateral actions made by Member States on their internal borders.

Key Words:

European Union, external borders, third-country nationals, COVID-19, mobility

1 Introduction

As a consequence of the COVID-19 pandemic, Member States have adopted national responses, and one of the central pillars of the response to the pandemic has been to encourage the restriction of social contact to reduce the infection rate in the population, a principle which has been translated into public policy measures to reduce mobility within and across borders (Zaiotti & Abdulhamid, 2021). At the same time, some Member States created border corridors for thousands of seasonal workers, which was a major departure from the general idea that free movement should be temporarily sacrificed for the sake of public health (Ramji-Nogales & Goldner Lang, 2020). According to the Schengen Borders Code, border controls are not only in the interest of those Member States at the external borders, but also all Member States that have abolished border controls at their internal borders. Controls can help, among others, against illegal immigration and human trafficking and prevent threats to internal security, public policy, public health and

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international relations of Member States. One could say this set the direction for the management of the pandemic, as border measures were used as an immediate solution to prevent the cross-border spread of COVID-19.

It is noteworthy to mention here that at the beginning of the pandemic, the World Health Organisation (WHO) did not generally consider travel restrictions to be the most effective way of combatting the pandemic, nor did it agree that proof of vaccination should be a condition for entry into another country (World Health Organization, 2021).³ It did not recommend the introduction of travel or trade restrictions, based on the data available at the beginning of the pandemic (World Health Organization, 2020). Indeed, it considered that banning travel to affected areas or denying entry to travellers from affected areas is generally ineffective in preventing the introduction of infection, but can have a significant impact on the economy and society (World Health Organization, 2020a). WHO later updated its recommendations on the management of the pandemic, highlighting measures that better balanced the benefits and unintended consequences of their application (World Health Organization, 2020b). Although we can observe an increased role of emergencies over the past two decades in the EU, the Member States' response to the first wave of the pandemic was surprisingly uncoordinated, and national measures limited the EU's effectiveness in fighting the disease, jeopardising the proper functioning of the single market and the Schengen area (Beaussier & Cabane, 2020). During the 2015 migration crisis, it was clear that the lines between border controls and other internal security measures were becoming increasingly blurred in many countries as seen in the Netherlands, where Article 23 of the Schengen Borders Code has been used in the context of increased police controls in response to growing irregular migration, or in Hungary and Austria, where border fences have been built (Guild et al., 2016).

2 Soft Law for Mobility Management

On supranational level, we can notice that soft law instruments are increasingly used by the EU institutions in forms of action programmes, communications, codes of conduct, guidelines, notices, recommendations etc., that contain policy goals in various areas with the common feature that they do not have legally binding effects. The European Commission uses many soft law instruments as guidance for Member States, and the competence of the Commission to adopt soft law has already been long established by Article 211 of the Treaty establishing the European Community, whereby Article 292 of Treaty on the Functioning of the European Union (TFEU) contains the provision that the Commission shall adopt recommendations. The European Parliament also stressed that 'soft law' constitutes a widely accepted interactive form of EU regulatory policy along with coordination, cooperation, negotiation and hierarchy, stressing that EU institutions must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take (European Parliament, 2007). There is a rich case law concerning the nature of soft-law, and the European Court of Justice (ECJ) has already stated in *Grimaldi* that recommendations are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures

³ The organisation opposed the requirement for proof of vaccination because of the unanswered questions about whether the vaccination was effective in reducing the spread of infection and, therefore, recommended that vaccinated persons should not be exempt from other measures to reduce the risk of travel.

or when they consider that it is not appropriate to adopt more mandatory rules⁴ and that Article 155 of the Treaty Establishing the European Community (EEC Treaty) gives the Commission the right to formulate recommendations or deliver opinions which, according to Article 189 of the Treaty, are not binding.⁵

Following the outbreak of the pandemic, the European Council and the European Parliament sought to find the most coherent, consolidated and united institutional response possible – a common vision, an effective strategy (Ciot & Sferlic, 2021). Although at the beginning of the pandemic, there was already an EU decision on serious cross-border threats to health,⁶ an EU governance framework was being developed and the European Centre for Disease Prevention and Control (ECDC) was in place as an EU agency, the latter did not have sufficient powers for an effective coordination of the Member States (Renda & Castro, 2020). However, because of the lessons learned and the need to further strengthen the options, the European Council and the European Parliament started to move towards a draft regulation on serious cross-border threats to health⁷ aimed at among others to response measures by the Union and the Member States in the event of cross-border threats to health.⁸

As for the pandemic, timing was a key factor influencing the effectiveness of the measures, and a number of studies have supported the view that if the measures had been implemented in China a few weeks earlier, it is likely that the spread of the virus would have been significantly less within the country and internationally (Grépin et al., 2021). Due to the spread of the virus, the European Commission proposed in its March 2020 Communication⁹ that Member States temporarily restrict non-essential travel from third countries to the EU+ for one month. This included a pause to visa processing and issuing by EU consulates and embassies.¹⁰ Member States agreed on coordinated action

⁴ See ECJ, Judgement of 13/12/1989, *Salvatore Grimaldi v Fonds des maladies professionnelles*, C-322/88, para. 13.

⁵ See ECJ, Judgement of 13/11/1991, *French Republic v Commission of the European Communities*, C-303/90, para. 30.

⁶ Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC (Text with EEA relevance) (*OJ L* 293, 5/11/2013, pp. 1–15).

⁷ Council of the European Union. (2022c). *Press Release Provisional agreement on new EU law on serious cross-border threats to health*. <https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/provisional-agreement-on-new-eu-law-on-serious-cross-border-threats-to-health/>.

⁸ Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU (Text with EEA relevance) (PE/40/2022/REV/1, *OJ L* 314, 6/12/2022, p. 26–63).

⁹ European Commission. (2020b, March 16). *Communication COVID-19: Temporary restrictions on non-essential travel to the EU*, COM(2020) 115 final.

¹⁰ The Communication complements the previously issued Guidelines on border management measures to ensure the protection of health and the availability of goods and essential services (COVID-19 Directive), which were published when Member States unilaterally introduced measures restricting the free movement of persons across the EU's internal borders. The guidelines set out principles for an integrated approach to the use by Member States of exemptions for the effective management of borders to protect health. It states that health checks on all persons entering the territory of the Member States do not require the formal introduction of internal border controls (see in more details: Friedery, 2022b).

at the external borders as recommended in the Communication, and non-essential travel was limited to 30 days from 17 March. In this context, the Commission adopted two new Communications in April¹¹ and May,¹² proposing a one-month extension of the non-essential travel restrictions, which were agreed upon by the Schengen Member States and the four Schengen associated states, and the entry ban was extended until 15 June 2020. The scope of the travel restriction covered non-essential travel from third countries to the EU+ area, but also included exemptions and exceptions. Exemptions applied to travel by all EU citizens, all nationals of Schengen associated countries and their family members, third-country nationals who were holders of a residence permit under the Long-Term Residents Directive and persons who held a right of residence or a national long-stay visa under other EU directives or national legislation. Exceptions were made for persons with an essential function, such as health professionals, and persons with a need, such as persons in need of international protection.¹³

However, the European Commission also tried to coordinate exit strategies for both internal and external borders¹⁴ with the publication of an exit roadmap in April where the EU's priority was also indicated: Member States would coordinate the removal of measures, but the primary objective of these decisions was to remain the protection of public health in the short and long term. The roadmap foresaw a second phase of reopening the external borders to allow non-EU citizens to enter the EU, taking into account the spread of the coronavirus outside the EU and the risk of reappearance. In addition, the need to restrict non-essential travel to the EU was to be kept under review to ensure compliance with the measures taken by EU Member States and Schengen-associated countries to restrict social contacts. In June 2020, the Commission proposed that Member States harmonise visa procedures, as the entry ban and restrictions were slowly being lifted in Member States. It also called for a uniform way of processing visa applications and the introduction of a coronavirus test as a prerequisite for visa procedures.¹⁵ Next to this, also in June, the Council proposed the lifting of restrictions for residents of the 14-15 countries listed in its recommendation and proposed the review of this list in every second week. Member States could make this subject to the health

¹¹ European Commission. (2020c, April 8). Communication from the Commission to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020) 148 final.

¹² European Commission. (2020d, May 8). Communication from the Commission to the European Parliament, the European Council and the Council on the second evaluation of the application of the temporary restrictions on non-essential travel to the EU, COM(2020) 222 final.

¹³ The following persons were included: health professionals, health researchers, elderly care professionals, border commuters, transport staff and, to the extent necessary, other transport staff engaged in the carriage of goods, diplomats, staff of international organisations, military personnel and humanitarian aid workers in the performance of their duties, transit passengers, passengers travelling for compelling family reasons, persons in need of international protection or other persons travelling for a permitted stay for humanitarian purposes (European Commission, 2020b, March 16).

¹⁴ European Commission. (2020, April 17). Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01 (C/2020/2419, OJ C 126, 17/4/2020, p. 1-11).

¹⁵ European Commission. (2020e, June 12). *Communication from the Commission Guidance for a phased and coordinated resumption of visa operations*, 2020/C 197 1/01 (C/2020/3999, OJ C 197I, 12/6/2020, pp. 1-4).

situation, restrictive measures and economic and social considerations.¹⁶ But it is necessary to emphasise that although Member States agreed on a list for lifting restrictions, only a few applied it.

Another step towards an unified approach was the adoption on 13 October of a coordinated approach to restrictions on free movement.¹⁷ This stated that any measures restricting free movement taken to protect public health must be proportionate and non-discriminatory and, if the epidemiological situation allows, should be lifted. The recommendation identified four key areas for coordinated action by Member States: a common system based on a colour code (green, orange, red, grey), common criteria for Member States when deciding whether to introduce travel restrictions, clearer measures for travellers from higher risk areas (testing and voluntary quarantine) and clear and timely information to the public.¹⁸ Several criteria have been set out: the possible lifting of restrictions must take account of the epidemiological situation in the EU, their effectiveness depends on coordination, Member States cannot decide unilaterally, and they can only be lifted gradually and with full transparency.

We shall conclude that the harmonisation of restrictive measures on free movement by Member States has been a key priority in almost all EU documents, precisely because at the beginning of the pandemic, Member States introduced measures on internal borders independently and without coordination. However, on the issue of the EU's external borders, i.e. restrictions on third-country nationals, there was a high degree of coordination. This was underlined by the so-called emergency brake mechanism,¹⁹ under which the Commission acted very swiftly on the COVID-19 mutation in the southern part of the African continent, with flights from the affected African region being stopped and travellers from the region being placed under strict quarantine. The mechanism meant that if the epidemiological situation in a third country or a region deteriorated rapidly, and in particular if a variant of the virus of concern emerged, Member States had to introduce urgent temporary restrictions on all travel into the EU.²⁰

¹⁶ Council of the European Union. (2020a). Council Recommendation (EU) 2020/1186 of 7 August 2020 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (ST/10095/2020/INIT, *OJ L* 261, 11/8/2020, pp. 83–85).

¹⁷ Council of the European Union. (2020b). Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance) (*OJ L* 337, 14/10/2020, pp. 3–9).

¹⁸ The recommendation insisted that Member States should not restrict the free movement of persons to and from green areas, should respect the differences in the epidemiological situation between orange and red areas, should act in accordance with the principle of proportionality and should not, in principle, refuse entry to persons entering from other Member States. Member States that consider it necessary to introduce restrictions may require that persons entering from non-green areas are quarantined or tested upon arrival.

¹⁹ Council of the European Union. (2022a). Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (Text with EEA relevance), (ST/5400/2022/REV/1, *OJ L* 18, 27/1/2022, pp. 110–123).

²⁰ The emergency brake mechanism did not apply to EU citizens, long-term residents in the EU and certain categories of persons travelling on grounds of essential need. On 10/1/2022, the use of the "emergency brake mechanism" ended.

3 “Pandemic” Technology for Mobility Management of Third-Country Nationals

EU public health emergency coordination presupposes the existence of common methods for collecting data on the spread of the virus, the characteristics of infected and recovered persons and their possible direct contacts, a common testing strategy at the EU level for cross-border health emergency response; these are, in practice, the exclusive health competences of each Member State (Alemanno, 2020). One of the results of the pandemic is that Member States and the EU have turned to digitalisation to deal with the crisis. Putting new disease detection technologies at the heart of EU health security initiatives has been instrumental in the emergence of a new EU-wide combined health surveillance practice (Roberts, 2019).

On 14 June 2021, the European Parliament and the European Council adopted Regulation (EU) 2021/953, which set up the framework for the issuance, verification and acceptance of the interoperable EU digital COVID certificate,²¹ initially only until 30 June 2022 but later extended until 30 June 2023²² in line with the epidemiological situation.²³ In this context, Regulation (EU) 2021/954 was adopted,²⁴ which extended the EU digital COVID framework to third-country nationals residing legally in a Member State and who are, in accordance with EU law, entitled to travel to other Member States.²⁵ This means that the framework applied to EU citizens, their family members and third-country nationals who were legally residing in the territory of a Member State and met one of the following criteria: they had been vaccinated, or had recovered from COVID-19 or had tested negative. Accordingly, the issuing, cross-border verification and acceptance of three types of digital identity cards were allowed: vaccination cards, test cards and health cards.²⁶ The Regulation emphasised the harmonisation of restrictive measures on free movement as restrictions on free movement were mostly introduced unilaterally by Member States without coordination between themselves or at EU level (see for more details Friedery, 2022b).

²¹ In the 27 EU countries plus Iceland, Liechtenstein, Norway and Switzerland.

²² Regulation (EU) 2022/1034 of the European Parliament and of the Council of 29 June 2022 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 (Text with EEA relevance) (PE/27/2022/REV/1, OJ L 173, 30/6/2022, pp. 37–45).

²³ European Commission. (2022b). *Proposal of 2 February 2022 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*, COM(2022) 50 final.

²⁴ Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic (Text with EEA relevance) (PE/26/2021/REV/1, OJ L 211, 15/6/2021, pp. 24–28).

²⁵ 1.7 billion cards were issued by 22 June 2022 (Schengenvisa News, 2022a).

²⁶ Passengers who tested negative for antigens were given a certificate of recovery, which was not possible before (Schengenvisa News, 2022b).

As mentioned above, due to the still present virus and certain travel restrictions within the EU, the European Commission proposed to extend the COVID Regulation by Regulation (EU) No 2022/1034 and to introduce several amendments. First, the Regulation reintroduced the obligation for the Commission to submit a detailed report by 31 December 2022; Regulation (EU) 2021/953 had already required the Commission to publish a report. The report provided an overview of, inter alia, the implementation of the Regulation and other developments regarding the EU digital COVID certificate and its domestic use by Member States.²⁷ In addition, it clarified that vaccination certificates must include all doses administered, regardless of the Member State in which people received the vaccine. The EU also introduced an extension of the range of authorised antigen tests used to qualify for the digital COVID certificate, the possibility to issue a certificate of cure following antigen testing and the possibility to issue a certificate of vaccination to persons participating in clinical trials. It should be pointed out that no prior impact assessment was carried out when the Regulation was extended, which would have highlighted the effectiveness and proportionality of the measures affecting fundamental rights. This would have been particularly important as the certificate required the processing of personal data (European Data Protection Board [EDPB] & European Data Protection Supervisor [EDPS], 2022).

Thus, this digital certificate scheme opened up to non-EU countries²⁸ meaning that countries could apply for an equivalence decision issued by the European Commission, allowing non-EU countries (and territories) that joined the scheme to have their cards accepted directly under the same conditions as the EU digital card.²⁹ This solution facilitated the mobility of third country nationals and EU citizens vaccinated outside the EU to enter the EU.³⁰ But we shall emphasise that the Recommendation containing these changes allowed, but did not oblige, Member States to issue an EU digital COVID certificate to a non-EU national wishing to enter the EU on request, provided that the applicant presented reliable proof of vaccination. Additionally, the extension of Regulation (EU) 2021/954 to third-country nationals could have been foreseen and its impact on

²⁷ European Commission. (2021). *Report from the Commission to the European Parliament and the Council pursuant to Article 16(1) of Regulation (EU) 2021/953 of the European Parliament and of the Council 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* (COM[2021] 649 final). <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0649&from=EN>.

²⁸ See more: Council of the European Union. (2022b). Council Recommendation (EU) 2022/290 of 22 February 2022 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (ST/6159/2022/INIT, OJ L 43, 24.2.2022, pp. 79–83).

²⁹ See more: European Commission. (n.d.). Commission implementing decisions on the equivalence of COVID-19 certificates issued by non-EU countries. Legal documents explaining that COVID certificates issued in these countries (and territories) are accepted in the EU, and vice-versa. https://commission.europa.eu/strategy-and-policy/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate/commission-implementing-decisions-equivalence-covid-19-certificates-issued-non-eu-countries_en.

³⁰ When a country joins the scheme, its certificates automatically become valid in the EU. Validation of certificates is required for third-country travellers vaccinated with one of the vaccines authorised by the European Medicines Agency (EMA), but Member States may also choose to accept additional vaccines, such as those on the WHO's emergency use list.

fundamental rights, including the right to data protection, should have been more thoroughly assessed (EDPB & EDPS, 2022). Although all measures restricting the free movement within the EU, including the requirement for travellers to hold an EU digital COVID certificate, have been abolished since August 2022, Member States could use the EU digital COVID certificate in case the countries needed to temporarily reintroduce travel restrictions due to the pandemic situation. The EU Digital COVID Regulation extended until June 2023 and has already provided the necessary framework to address the impact of restrictions on free movement and at the same time facilitate travel.³¹

4 Refuge and Asylum during Pandemic Management?

Pandemics, like migration flows and terrorist attacks, also affect border policy (Kenwick & Simmons, 2020), and although many of the restrictions put in place were a response to the virus, it has become clear that many restrictions have been associated with or applied to other instruments to manage migration (Sanchez & Achilli, 2020). Furthermore, the impact of border policy on the EU's external borders³² as a policy to manage the pandemic appears to have affected a range of areas, such as the regulation of international travel or the processing of asylum applications. Specific attention was also paid to the effects of the COVID-19 pandemic on migrants internationally (Manca, 2022) and at the regional and national levels (Föltz, 2022).

As mentioned at the beginning of the article, the European Commission proposed in March 2020 that Member States should introduce a temporary ban on third-country nationals entering the Schengen area. As far as primary law is concerned, Article 67(2) TFEU states that the Union shall develop a common policy based on solidarity between Member States regarding the control of external borders, ensuring fair treatment of third-country nationals. Furthermore, this policy was aimed at ensuring the control of persons and the efficient monitoring of border crossings at the external borders (Art. 77[1][b] TFEU), and the gradual introduction of an integrated management system for external borders (Art. 77[1][c] TFEU).³³ Regarding the relevant secondary legislation, Regulation (EU) 2016/399,³⁴ also known as the Schengen Borders Code (SBC), contains the rules on the

³¹ European Commission. (2022a). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. EU response to COVID-19: preparing for autumn and winter 2023* (COM[2022] 452 final). <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC045.2>

³² The external border of the Schengen area is 50,000 km long, 80% water and 20% land, with a surface area of 4,312,099 km² and a population of 419,392,429. See: <https://www.schengenvisainfo.com/schengen-visa-countries-list/#the-essential-features-of-the-schengen-zone>

³³ Art. 77(2) TFEU outlines: For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing the external borders are subject; (c) the conditions under which nationals of third-country shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any form of control for persons, whatever their nationality, when crossing internal borders.

³⁴ 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 (Schengen Borders Code) (codification) (OJ L 77, 23/3/2016, pp. 1–52).

control of persons at the external borders, the conditions of entry and the conditions for the temporary reintroduction of border controls at internal borders in the Schengen area.³⁵ The SBC sets out the entry conditions for third-country nationals, allowing Member States to assess on a case-by-case basis whether third-country nationals should be considered as a threat to public health. In this context, Member States should ensure close cooperation between border control services and transport operators.³⁶

It is important to emphasise that there is no explicit ban on entry in the SBC, only on persons crossing the external borders of the EU³⁷ and the way in which checks are carried out. Article 14 of the SBC only states that entry may be refused if a person does not fulfil the conditions laid down in Article 6, including that the person does not represent a threat to public policy, internal security, public health or the international relations of the Member States. In particular, the person is not the subject of an alert in the national databases of the Member States for the purposes of refusing entry for the same reasons.³⁸ According to the Code, a threat to public health is any disease with pandemic potential according to the WHO International Health Regulations, other communicable diseases or contagious parasitic diseases, if they are covered by the protection provisions applicable to nationals of Member States (Art. 2 SBC).

Member States have a discretionary power to authorise the entry of third-country nationals into their territory who do not fulfil one or more of the conditions laid down in Article 6(1) of the SBC on humanitarian grounds, on grounds of national interest or because of international obligations. However, when looking at the wording, they may admit a person who is the subject of an alert, since the SBC only declares a notification obligation, i.e. the Member State authorising the entry must notify the other Member States. Also, we shall point out that during the pandemic, only a few States took advantage of the possibility to exempt asylum seekers from the entry ban, thus this called into question the right to

³⁵ Articles 25, 28 and 29 of the Regulation allow Member States to temporarily reintroduce border control at internal borders in the event of a serious threat to public policy or internal security. Article 29 may be used in exceptional circumstances where the general functioning of the Schengen area is threatened by persistent and serious shortcomings in external border control and where these circumstances constitute a serious threat to public policy or internal security in the area without internal border controls or in certain parts of it, the Council, acting on a proposal from the Commission, may propose that one or more Member States decide to reintroduce border control along the whole or parts of their internal borders.

³⁶ Council of the European Union. (2020a). Council Recommendation (EU) 2020/1186 of 7 August 2020 amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (ST/10095/2020/INIT, OJ L 261, 11/8/2020, pp. 83–85). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020H1186>

³⁷ According to the SBC, external borders are the land borders of the Member States, including those crossings landlocked or river waters, maritime borders and airports, river, sea and lake ports, provided they are not internal borders. Border control may be reintroduced on grounds of public policy or internal security, which clearly does not include public health, but requires a broad interpretation of public policy in the context of the current pandemic and, thus, includes public health.

³⁸ A person for whom an alert has been issued for the purposes of refusing entry under the SBC is a third-country national who is the subject of an alert in the Schengen Information System (SIS) see more https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system/alerts-and-data-sis_en

asylum as protected by the Charter of Fundamental Rights of the European Union. This position of Member States is well-illustrated by the experiences during the introduction of internal border controls. As I mentioned before, although the SBC does not mention a ban on entry, the EU has already covered external borders in its first ever guidelines on border management measures (COVID-19 Directive)³⁹ which were issued precisely because of the unilateral introduction of border controls by Member States restricting free movement within the EU. It explained that Member States have the possibility to refuse entry to non-resident, third-country nationals if they show relevant symptoms or have been particularly exposed to the risk of infection and pose a threat to public health. But alternative measures to refusal of entry, such as isolation or quarantine, can be used if they are deemed more effective.

We shall emphasise the situation of asylum seekers regarding third-country nationals. In relation to migration and to the standpoint of Member States, it is worth pointing out that Member States did not exclusively cite COVID-19 as the reason for the reintroduction of border controls, as we can observe that migration was a constant reason for border control and was used in conjunction with COVID-19 as reason to impose restrictions during the pandemic. Interestingly, in the period up to 30 October 2022, France was the only one that mentioned the virus, among others, as a reason leading to the introduction of border controls.⁴⁰ It should be stressed that according to the Code, migration and the large number of third-country nationals crossing the external borders are not, in themselves, considered a threat to public policy or internal security (see Art. 26 SBC).

Border policy affected the functioning of asylum and reception systems across the EU. This was already evident at the beginning of the pandemic with the closure of the external borders in March 2020, and this was followed by further steps taken by Member States. The EU Charter of Fundamental Rights was to be applied when Member States' measures combatting COVID-19 were linked to the implementation of EU law (European Union Agency for Fundamental Rights, 2021). When implementing measures to address public health, refusing entry to all asylum seekers or applicants of a particular nationality were not in line with the right to asylum and may have led to a violation of the principle of non-refoulement (European Union Agency for Fundamental Rights and Council of Europe, 2020). Asylum seekers faced the closure or suspension of asylum centres and access to them due to travel restrictions on travellers to Europe. For example, the Austrian Federal Office for Immigration and Asylum closed both its branches and primary reception centres shortly after the country introduced entry restrictions (European Asylum Support Office [EASO], 2020). Poland suspended access to reception centres for foreigners after 1 March 2020 due to the health and epidemiological situation (European Union Agency for Fundamental Rights, 2020b), and Greece temporarily suspended access to asylum by

³⁹ European Commission. (2020a, March 16). COVID-19: Guidelines for border management measures to protect health and ensure the availability of goods and essential services (2020/C 86 I/01). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0316%2803%29>

⁴⁰ See more: European Commission. (2023). Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code. <https://home-affairs.ec.europa.eu/system/files/2023-07/Full%20list%20of%20MS%20notifications%20of%20the%20temporary%20reintroduction%20of%20border%20control%20at%20internal%20borders.pdf>

March 2020 in response to the large numbers of migrants and refugees gathering along its land border with Turkey (European Union Agency for Fundamental Rights, 2020a).

Public health was used in anti-immigration public dialogue in Hungary when the country introduced a state of emergency and indefinitely suspended access to border transit areas for asylum seekers because of the risks related to the spread of the COVID-19, and citing the need to protect the people in transit zones and the country in general.⁴¹ Act No. LVIII of 2020,⁴² adopted following the outbreak of the COVID-19 pandemic, stated that in the event of an epidemiological risk, a third-country national must submit, in person, a declaration of intent at the Hungarian Embassies in Belgrade and Kyiv before being able to initiate the asylum procedure in the country. According to Hungary, the procedure of Art. 268- 270 of the Law of 2020 was justified on public health grounds and to hinder the spread of the virus. This declaration was to be assessed by the National Directorate General for Aliens Policing. Nevertheless, the European Commission launched an infringement proceeding, among other grounds that, though it acknowledges that the COVID-19 pandemic requires the adoption of measures to limit the spread of the virus, Member States could only take necessary and proportionate measures to protect public health. Hence, such measures cannot have the effect of preventing access to the international protection procedure.⁴³ The Court of Justice ruled that Hungary failed to fulfil its obligations under Article 6 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (para. 25). The Court found that the new legislation deprives third-country nationals or stateless persons concerned of the effective exercise of their right to apply for asylum in Hungary, as guaranteed by the Charter of Fundamental Rights of the European Union, and is not justified by the objective of protecting public health put forward by Hungary. Additionally, the measure has disproportionate interference with the right of applicants for international protection, and the obligation of third-country nationals or stateless persons to move potentially exposes them to the disease which they could subsequently spread in Hungary (para 60). Therefore, the maintenance of this system is unjustified, especially since the epidemiological entry restrictions were lifted on 7 March 2022, and the Government ended the state of danger due to the COVID pandemic on 1 June 2022 (Asylum Information Database [AIDA], 2023).

Thus, we can say that refuge and asylum were not factors taken into consideration when Member States introduced border measure to fight the pandemic, moreover, in several cases the pandemic was used to tighten the rights of asylum seekers.

5 Conclusion

The effects of the COVID-19 pandemic will be with us for years to come, as it has influenced borders and border policies along with the 2015 migration crisis. The public health crisis, following the 2015 migration crisis, has accelerated the use of new

⁴¹ Website of the Hungarian Government. (2020, March 3).

⁴² Act No. LVIII of 2020 on Transitional Rules related to the Termination of State of Danger and on Epidemiological Preparedness (A veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készületségről szóló 2020. évi LVIII. törvény).

⁴³ See: ECJ, Judgement of 22/6/2023, *European Commission v Hungary*, C-823/21, ECLI:EU:C:2023:504. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=274870&pageIndex=0&doclang=HU&mode=req&dir=&occ=first&part=1&cid=268610>

technologies to monitor and control mobility. The migration crisis led to the introduction of reinforced border control, which has remained popular ever since, regardless of the reason for its introduction, be it public security or public health.

The suspension of Schengen has meant an extension of restrictive measures on movements at internal borders in some states. The EU entry ban, the closure of external borders, was introduced as a measure to ensure that the external borders would not pose a further threat to Member States. However, the introduction of digital certificates for third-country nationals offered an alternative to lessen the restriction.

On the one hand, the evolution of the epidemic into a pandemic (World Health Organization, 2020c, March 11), namely when coronavirus spread world-wide, has highlighted the inadequacy of the current rules and the shortcomings of pre-defined responses to emergencies caused by diseases with epidemiological potential. On the other hand, it should be noted that the lack of solidarity between Member States – which is prevalent within so many topics – was present both when restrictions on travel to the EU were introduced and when they were lifted. Thus, while the EU was still not ready for an established crisis response leading to coordinated action at internal borders, the external border regime offered an opportunity for the EU to gain a leading role and for the Member States to act in a coordinated manner. The EU has been able to use this opportunity to counterbalance the delayed EU action on unilateral national measures on internal borders.

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