



# The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law

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A Commission communication of 1999 states that “*The public health reason grounds are somewhat outdated given the current level of integration of the European Union and the development of new means to handle health problems. Therefore, restrictions of free movement can no longer be considered as necessary and effective means of solving public health problems. The situation has changed radically from what it was in 1964, even though the concept of public health still forms part of Community law*”<sup>1</sup>.

The current public health crisis linked to covid-19 proves scathingly that this statement is wrong. Indeed, border controls reappeared inside the Schengen Area during the last two weeks of March 2020 in emergency<sup>2</sup> without coordination between Member States to limit the spread of the virus. By mid-April 2020, around 17 Schengen States<sup>3</sup> had officially notified the Commission on the reintroduction of internal border controls due to the pandemic, including entry bans and special health requirements like tests or quarantines. The consequence was disorder: extremely long queues of cars at some internal borders; EU citizens prevented to transit through another Member State to go back home; persons unable to know if and under which conditions they would be allowed to travel within the EU. More spectacularly, the decision was also taken simultaneously to close the EU external borders toward the rest of the world for the same reason!

A similar disorder that has been well described<sup>4</sup> happened with the lifting of these internal controls foreseen by the Commission for 15 June, 2020<sup>5</sup>. One could have expected more coherence at this stage due to the fact that a decrease of the epidemic was not an unforeseen circumstance, and Member States had the time to prepare themselves on the basis of a Commission Communication of May 13, 2020 titled “*Toward a phased and coordinated approach for restoring freedom of movement and lifting internal border controls*”<sup>6</sup>. It is only on October 13, 2020 with the second wave of the Covid-19 pandemic that a “*Council Recommendation 2020/1,475 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic*” was adopted to coordinate the measures taken by Member States within the EU<sup>7</sup>.

The implementation of the closure of EU external borders happened in a more coordinated way and led to the adoption on June 30, 2020 by the Council of a recommendation 2020/912 on the temporary

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<sup>1</sup>Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (COM (1999) 372, p. 12).

<sup>2</sup>It is interesting to note that the Council of Ministers had adopted one month before on 13 February 2020 conclusions following which measures regarding travel should safeguard the free movement within the EU (OJEU, 20 February 2020, C 57, p.6, point 15, b).

<sup>3</sup>For the full and regularly updated list of all Member States' notifications of temporary reintroduction of internal border controls since 2006, see [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf)

<sup>4</sup>VAN ELSUWEGE, P., Lifting travel restrictions in the Era of Covid-19: in search of a European Approach, Verfassungsblog, June 5, 2020: <https://verfassungsblog.de/lifting-travel-restrictions-in-the-era-of-covid-19-in-search-of-a-european-approach/>

<sup>5</sup>Commission communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU (COM (2020) 399 of June 11, 2020, p. 2).

<sup>6</sup>C (2020) 3250.

<sup>7</sup>OJEU L 337 of October 14, 2020, p. 3.

restrictions of non-essential travel into the EU and the possible lifting as from July 1, 2020 of such restriction to which a list of third countries (see below) whose residents should not be affected by temporary external borders restrictions<sup>8</sup> was attached.

How can such disorder happen at the internal borders of the Schengen area in the most integrated space of the world made of an internal market and of an area of Freedom, Security and Justice? The first element of answer to be clarified refers to the competent authority, in other words which level of power can decide to close or reopen borders of the Schengen Area? (1). The legal basis of those controls also needs to be analyzed as it is less clear than one could imagine (2). The type of the diverse restrictive measures taken is another interesting element rarely considered (3). Finally, there is the procedure to be followed by Member States when they take such decisions (4) as well as the definition of the different categories of persons targeted (5). Answering these questions is quite complex in the case of the EU because of the existence of two levels of power (national and European) and the issue of coordination of their action depending upon the distribution of competences between them, the difference between internal and external borders of the Schengen Area, and the existence of the intermediate category of European citizens between nationals and third-country nationals.

## 1. THE COMPETENT LEVEL TO ADOPT RESTRICTIVE MEASURES

When reviewing the relevant documents, one could get the impression that it is the EU that decides to open or close its borders instead of Member States as shown by the following examples:

- On 16 March 2020 in a communication to the European Parliament, the European Council and the Council, the Commission recommended<sup>9</sup>, “to the European Council to act with a view to the rapid adoption by the Heads of State or Government of the Schengen Member States together with their counterparts of the Schengen associated States, of a coordinated decision to apply a temporary restriction of non-essential travel from third countries into the EU + area”<sup>10</sup>. This passage reads as if the decision had to be taken by the Heads of the Schengen States upon the initiative of the European Council acting on the basis of a Commission recommendation. This is actually a quite complex institutional framework, in particular if the responsible body is not the European Council as an EU institution, but rather the Heads of States or of Government of the Schengen Area acting together as an intergovernmental body.
- On 17 March 2020, as a follow up of the previous point<sup>11</sup>, the European Council President stated in a video conference

that “To limit the spread of the virus globally, we agreed to reinforce our external borders by applying a coordinated temporary restriction of non-essential travel to the EU for a period of 30 days, based on the approach proposed by the European Commission”. It reads as if the European Council decided to reinforce external border controls on the basis of a proposal made by the Commission.

- On 15 April 2020, a “Joint European Roadmap toward lifting Covid-19 containment measures”<sup>12</sup> was presented jointly by the President of the European Commission and the President of the European Council including a chapter four (p. 12) titled “a phased approach for the opening of our internal and external borders”. This gives once more the impression that the EU decides, otherwise why to gather its two highest political representatives forming a rather curious and unusual team?
- On 30 June 2020, the Council adopted the recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction following which “Member States should gradually lift the temporary restriction of non-essential travel to the EU as from July 1, 2020 in a coordinated manner with regard to the residents of the third countries listed in annex 1” (point one). This list attached to the previous recommendation that has been revised on several occasions and was made of 11 third states<sup>13</sup> on 7 August 2020 reminds the so-called white list annexed to Regulation 2018/1806 by which the EU decides not to request a visa for stays of less than three months from nationals of the enumerated third countries<sup>14,15</sup>.

One point commonly agreed is that the *implementation* of border controls on the ground belongs to the competence of the Member States. The existence of European legislation about borders - the Schengen Borders Code<sup>16</sup> (SBC) in particular - does not change this. The reason is very simple: Member States are in charge of applying EU legislation in line with article 291 (1) TFEU, so that they are the only ones that can decide to open or close their borders. The creation of Frontex did not change that either: article 7 (1) of Regulation 2019/1896 states clearly that “Member States shall retain primary responsibility for the management of *their* sections of the external borders”<sup>17</sup>. The Agency is not there to replace Member States but to assist them, so that the title “European Border and Coast Guard” used

<sup>12</sup>[https://ec.europa.eu/info/sites/info/files/communication\\_-\\_a\\_european\\_roadmap\\_to\\_lifting\\_coronavirus\\_containment\\_measures\\_0.pdf](https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf)

<sup>13</sup>Australia, Canada, Georgia, Japan, New Zealand, Rwanda, South Korea, Thailand, Tunisia, Uruguay and China subject for the later to confirmation of reciprocity (see the consolidated version at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020H0912-20200811&qid=1602603621458&from=EN>).

<sup>14</sup>Regulation 2018/1806 of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJEU, L 303, November 28, 2018, p. 39).

<sup>15</sup>COM (2020) 287.

<sup>16</sup>See the consolidated version of Regulation 2016/399: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0399-20190611&qid=1602892501911&from=EN>

<sup>17</sup>OJEU, L 295, November 14, 2019, p.21.

<sup>8</sup>See the consolidated version at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020H0912-20200811&qid=1602603621458&from=EN>

<sup>9</sup>COM (2020)115.

<sup>10</sup>COM 2020(115), p.2.

<sup>11</sup><https://www.consilium.europa.eu/en/meetings/european-council/2020/03/17/>

in Regulation 2019/1896 is simply usurped<sup>18</sup>. Legally, the EU has no territory, neither borders, except the ones of its Member States.

While reading the documents quoted above, one should pay particular attention to the fact that they recommend at EU level a “coordinated” decision or temporary restriction at national level. The object of those instruments was actually not to decide anything, but to ensure that the decisions taken by Member States are coordinated. This refers to the European procedures that Member States must respect when they manage their borders (see below point four).

## 2. THE LEGAL BASES OF RESTRICTIVE MEASURES

The protection of public health is obviously the aim of the measures taken to restrict migration flows at the borders. Surprisingly, public health is not always mentioned in all EU secondary law instruments. One should distinguish between rules about the crossing of external borders (2.1.), about free movement through internal borders (2.2.) as well as the rules about the reintroduction of controls at the internal borders (2.3.).

### 2.1. The Crossing of the External Borders

The crossing of the external borders is regulated by the SBC. Article 6 refers to public health in paragraph 1(e) regarding entry conditions: a person must not be “considered to be a threat to the public health of any of the Member States (of the Schengen Area)”<sup>19</sup>. It is clear that a person might be refused entry at the border for public health reasons defined by article 2, 21) SBC as “any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization, and other infectious or contagious diseases if they are subject of protection provisions applying to nationals of the Member State” which is without any doubt the case of Covid-19. There is no differentiation made by article 8 SBC on this point between the “light” checks for persons enjoying the right of free movement under Union law<sup>20</sup> and the thorough checks for third-country nationals.

### 2.2. The Rules About Freedom of Movement Inside the EU

The rules about freedom of movement inside the EU are spread in different instruments concerning EU citizens or third-country nationals.

Regarding EU citizens, directive 2004/38 is the most detailed instrument. Article 29 allows Member States to take measures restricting freedom of movement within the limits foreseen by article 29 (2) prohibiting the expulsion of EU citizens “when the sickness appears more than three months after their arrival” and article 29 (3) allowing Member States to “impose only a free medical exam during the first three months of their stay”. For the rest, Member States may for instance, as envisaged in the recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic<sup>21</sup>, impose the completion of passenger locator forms, tests for the detection of the Covid-19 virus, periods of quarantine for persons suspected of being sick and even a prohibition to leave the territory of the host Member State in order to limit the spread of the virus. All those measures can only be taken within the limits of EU law, and in particular the general principles of non-discrimination and proportionality.

Regarding third-country nationals, all the directives organizing a certain level of mobility for stays of more than three months which remains more limited than the freedom of residence guaranteed to EU citizens<sup>22</sup>, contain a public health exception that can be opposed by the Member State where the concerned person desires to stay. The most detailed provision can be found in directive 2003/109 on long-term residents<sup>23</sup> inspired by article 29 of directive 2004/38 for EU citizens.

### 2.3. The Possibility of Reintroducing Controls at the Internal Borders

The possibility of reintroducing controls at the internal borders is regulated by the SBC. Interestingly, article 25 (1) envisages only the reasons of *public policy* or *internal security* for the temporary reintroduction of internal borders controls. One wonders why public health is not mentioned. Very interestingly, the history of the SBC informs us that “while the European Commission legislative proposal had included the threat to public health among these grounds, the European Parliament succeeded in deleting it by arguing that in the event of an outbreak (of a public health threat), the most appropriate reaction would not be border controls but rather health-related measures such as quarantines”<sup>24</sup>.

It is thus clear that public health has been voluntarily omitted by the legislator in that provision. This historical element being forgotten, nobody has defended an interpretation following which it would be forbidden to reintroduce internal controls for the protection of public health. Confronted to the absence of that specific reason, the

<sup>21</sup>See above.

<sup>22</sup>On this issue, see DE BRUYCKER, P., The European Union: from freedom of movement in the internal market to the abolition of internal borders in the area of freedom, security and justice, in Migration, Free movement and regional integration, Unesco, 2017, pp. 304–305.

<sup>23</sup>See article 18.

<sup>24</sup>This point is mentioned by Sergio CARRERA and Ngo CHUN LUK, In the name of Covid: An assessment of the Schengen internal controls and travel restrictions in the EU, Study for the European Parliament PE 659.506 of September 2020, p. 57, footnote 258. These authors refer to the preparatory work of the SBC, in particular an amendment n 171 introduced by MEP Sylvia-Yvonne Kaufmann but the precise EP document is not indicated and can hardly be found without a more precise reference.

<sup>18</sup>DE BRUYCKER, P., The European Border and Coast Guard: a new model based on an old logic, European Papers, 2016, Volume 1, number 2, pp. 559–569.

<sup>19</sup>The Schengen Convention of 1990 did curiously not mention public health among the entry conditions under article 5 (O.J.E.U., September 22, 2000, p. 21).

<sup>20</sup>Meaning two categories: (a) Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/34 applies; (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States and those third countries, enjoy rights of free movement equivalent to those of Union citizens.

Commission considered that “in an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease”<sup>25</sup>. An epidemic such as covid-19 threatening the entire population of each EU Member State for which no medical treatment exists, can indeed be considered as an issue of public policy or internal security defined by the Court of Justice as “the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”<sup>26</sup>.

### 3. THE TYPE OF RESTRICTIVE MEASURES

The nature of the measures taken by Member States at their borders has not been questioned. Almost all observers consider implicitly that they consist of ‘controls’, while more precisely they also consist of border  *closures* sometimes called travel bans. The difference is that a border closure implies logically that people are not at all allowed to cross it. In other words, there is no place for a control and more precisely for a check as defined by article 2, points 10 and 11 SBC, because people are rejected if they try to cross unless exceptional cases. Border closures that took place were however not absolute, but selective as they foresaw exceptions in relation with a certain number of categories of persons like workers in critical occupations (health professionals, workers in pharmaceutical and medical devices industry, information and communications technology professionals, transport workers, etc<sup>27</sup>) allowed to cross. It is also crucial to underline as Vincent Chetail reminds us<sup>28</sup>, that border closures can never be absolute as the principle of non-refoulement, the right to access asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination must always be respected, and this requires always at least an examination of any request to cross a border on the basis of those basic rights.

Border closures are not explicitly envisaged by the SBC that only foresees controls and checks on persons, so that one may wonder if

such measures are authorized under EU law. A first interpretation of the SBC builds upon the notions of border controls and checks defined respectively by article 2 (10)<sup>29</sup> and (11)<sup>30</sup> of the SBC. Considering that they are about the verification of the authorization of persons to cross or not a border, their definition seems large enough to include border closures.

Another interpretation emphasizes the specificity of the notion of border closures, in particular if they pretend to be absolute - *quod non* - so that there is no place anymore for border checks, and where it is then about surveillance (as defined by article 2 (12) of the SBC)<sup>31</sup> at border crossing points which is not foreseen by the SBC. Regarding external borders, one may consider that the SBC has not regulated entirely the issue of borders, so that closures are still possible because they are outside the scope of the SBC. The situation might be considered under a different light regarding internal borders. One may indeed wonder if the European legislator has not limited the prerogatives of Member States by excluding closures because of the very high level of integration of the European Union and the Schengen area in particular. A positive answer to this question has not been envisaged to our knowledge, in particular by the European Commission that has never argued in such way. Keeping in mind that following article 4 TEU the Union “shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”, pretending to deprive Member States of the prerogative of closing their internal borders would open a fundamental debate about the way sovereignty is shared inside the EU.

There is still another issue. Article 4 of the SBC states that “in accordance with the general principles of Union law, decisions under this regulation shall be taken on an individual basis”, while article 14 (2) adds that “entry may only be refused by a substantiated decision stating the precise reason for the refusal”. So, Member States would not be allowed to close borders if this means a negative decision taken without consideration of individual cases. There is no problem with selective closures as they require, by definition, individualized decisions. It is not the same with absolute border closures where all persons would automatically be prevented to cross which is legally impossible (see above). It is always possible to take individualized decisions with a standard motivation that would not transform them into prohibited collective expulsions as long as the cases of the persons rejected at the border are not different from a legal point of view.

<sup>25</sup>Commission guidelines for border management measures to protect health and ensure the availability of goods and essential services, C (2020) 1753 of March 13, 2020, p.4, point 18.

<sup>26</sup>CJEU, C-373/13, 24, June 2015, H.T., point 79.

<sup>27</sup>See the Guidelines concerning the exercise of free movement of workers during Covid-19 outbreak (C (2020) 2051 of March 30, 2020, p. 2, OJEU, March 30, 2020, C 102 I, page 12). A list of “specific categories of travelers with an essential function or need” has also been adopted in annex II to the recommendation 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (OJEU, July 1, 2020, L 208 I, p. 7). This list targets large categories of persons (health care professionals, frontier workers, transport personnel, diplomats, humanitarian aid workers, seafarers, etc including seasonal workers in agriculture, passengers traveling for imperative family reasons and even third-country nationals traveling for the purpose of study whose function can hardly be considered as essential but whose presence is in the interest of the EU (see also about this list the guidance provided by the Commission Communication COM (2020)686) of October 28, 2020).

<sup>28</sup>Crisis without borders: what does international law say about border closure in the context of Covid-19: [https://www.frontiersin.org/articles/10.3389/fpos.2020.606307/full?&utm\\_source=Email\\_to\\_authors\\_&utm\\_medium=Email&utm\\_content=T1\\_11.5e1\\_author&utm\\_campaign=Email\\_publication&field=&journalName=Frontiers\\_in\\_Political\\_Science&id=606307](https://www.frontiersin.org/articles/10.3389/fpos.2020.606307/full?&utm_source=Email_to_authors_&utm_medium=Email&utm_content=T1_11.5e1_author&utm_campaign=Email_publication&field=&journalName=Frontiers_in_Political_Science&id=606307)

<sup>29</sup>“Border control means the activity carried out at a border in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance”.

<sup>30</sup>“Border checks means the checks carried out at border crossing points, to ensure that persons may be authorized to enter the territory of the Member States or authorized to leave it”.

<sup>31</sup>“Border surveillance means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks”.

Moreover, one may consider that the exception of public health does not require individualized decisions when it is linked to a collective phenomenon like a pandemic that by nature leads to take standard decisions except in specific cases. Such interpretation is supported by the provisions of directive 2004/38 on free movement of EU citizens as article 29 does not require public health measures to be based on the personal conduct of the individual concerned, as it is the case for public order and security following article 27 (2). Public health justifications are not based on the behavior of the person but on his/her medical condition, or the existence of a general public health issue<sup>32</sup>. In other words, justifications based on public health could rely on considerations of general prevention that are forbidden by article 27 (2) second indent of directive 2004/38 regarding public order or security.

Now that most internal border controls have been lifted, the recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic<sup>33</sup> favors the use of tests or of quarantine measures instead of refusals of entry at the internal borders. Those health measures, even when they are implemented at the border, should not create a legal problem as long as they do not have an effect equivalent to border checks in the sense of article 23, 1) of the SBC, and they do not represent a disproportionate obstacle to freedom of movement.

#### 4. THE PROCEDURE FOR ADOPTING RESTRICTIVE MEASURES

If the Member States are clearly the competent authorities for implementing border controls as analyzed above, article 17 (1) of the SBC states in a general way that Member States “shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border controls” and that “they shall exchange all relevant information”. Article 27 of SBC gives further details about the procedure that Member States must follow when they reintroduce controls at their internal borders<sup>34</sup>. Firstly, the concerned Member State must notify the Commission and the other member States; Secondly, the Commission may request additional information and can issue an opinion if it considers that a consultation with the concerned Member State is appropriate; In case, consultations with the other Member States and the Commission should then take place including, where appropriate, joint meetings with a view to organizing mutual cooperation.

The vehicle used to organize the cooperation between Member States has been the EU Integrated Political Crisis Response (IPCR)<sup>35</sup> that includes informal roundtables, integrated situational awareness and analysis, a protected web platform for the exchange of information and a central 24/7 contact point at Union level. A Covid-19 Information Group - Home Affairs has also been created.

<sup>32</sup>BROSSET, E., Santé publique, in ILIOPOULOU-PENOT, A., Directive 2004/38, Commentaire article par article, Bruxelles, Bruylant, 2020, p. 460.

<sup>33</sup>See above.

<sup>34</sup>There is a similar mechanism of cooperation established in the area of health policy by a decision 1,082/2013 on serious cross-border threats to health (OJEU, November 5, 2013, L 293, p. 1).

<sup>35</sup>See Council decision implementing decision 2018/1993 of December 11, 2018, OJEU, December 17, 2018, L 320, p. 28.

The obligation to cooperate regarding internal border controls has been specified by a Council recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic obliging Member States to inform each other and the Commission prior (if possible 48 h in advance) the entry into force of the restrictions that they impose like passenger locator forms, tests, or quarantines.

The obligation of Member States is literally to “cooperate” and not to coordinate as usually mentioned. Article 28 SBC stipulates that in case of unforeseen circumstances requiring an immediate action by Member States, the notification should take place simultaneously with the reintroduction of internal controls and the consultations organized without delay. So, it seems that everything is in place in theory to have a more or less coherent border management by Member States. The report that each Member State has to produce for the Commission, Parliament and Council within four weeks of the lifting of their internal border controls, as well as the annual report that the Commission has to present on the functioning of the area without internal borders following article 33 of the SBC, could provide the occasion to evaluate Member States reactions, and to draw lessons for the future. However, it appears that those reports are not always undertaken, including those expected from the European Commission since 2015 as underlined by the European Parliament in its resolution of June 10, 2020 on the situation in the Schengen area following the covid-19 outbreak<sup>36</sup>.

#### 5. THE PERSONS TARGETED BY THE RESTRICTIVE MEASURES

As anybody can potentially be at risk and spread the Covid-19 virus, the measures taken logically target everybody. However, all persons are legally not in the same position as their relation to Member States depends upon their nationality, in particular when they are confronted to a border closure. During the pandemic, one prominent issue has been the case of persons willing to go back home known as the issue of the “right to return” to their state of nationality or of residence. A difference regarding the legal basis of this right must be made between three categories depending upon the nationality of the persons:

- First, nationals have the right to enter and stay in their country of origin which is recognized as a human right that can even be considered as absolute under the ECHR<sup>37</sup>;
- Secondly, EU citizens whose position is different. They have a right to enter, stay and return in a host Member State on the basis of EU law putting them in an extremely favourable position comparable to that of nationals, and more favourable than the position of third-country nationals. Still, they remain foreigners and can be prevented to enter or stay in their host Member State precisely for reasons of public health. However, Member States are in principle not allowed to distinguish between EU citizens on

<sup>36</sup>Document B9-0165/2020: [https://www.europarl.europa.eu/doceo/document/B-9-2020-0165\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0165_EN.html)

<sup>37</sup>See article 3, §2 of protocol 4 to the ECvHR.

the basis of their nationality, as Hungary envisaged to do, because of the principle of non-discrimination.

- Thirdly, third-country nationals have in principle no individual right to enter or stay and need therefore under national law on immigration an authorization that can also be refused for public health reasons. Once they have been admitted by a Member State, they receive a residence permit allowing them to stay on its territory and they also acquire the right to return to their host State on this basis, knowing nevertheless that they can lose their right of residence under circumstances that are broader than in the case of EU citizens. More specifically, there is among third-country nationals the category of migrants residing for a long-term<sup>38</sup>. They benefit from a human right to return to their host state that can be considered as their “own”<sup>39</sup> due to the close links that they have built with that State (in particular, but not exclusively, due to the length of their stay)<sup>40</sup>.

Refusing entry of EU citizens registered for a stay of more than three months or of third-country nationals holding a residence permit for reasons of public health could be considered disproportionate as it deprives those persons from the right to stay in their host Member State where they have settled while it should be possible to protect public health by other measures less harmful to their right of residence like quarantine. Moreover, rules foresee quite often that a sickness contracted after a certain period of time spent in the host State cannot be taken into consideration for expelling the person. In practice, Member States have generally accepted, on top of their own nationals, all EU citizens and third-country nationals residing legally on their territory to return independently of their nationality<sup>41</sup>. The criterion of residence appears indeed to be more appropriate than nationality from the point of view of public health policy. Despite the difference underlined above regarding the legal foundations of the right to enter, stay or return, it obviously makes sense that all persons are subject to the same public health measures, such as restriction of movement (confinement) on the territory of one State,

obligation to take a medical test or to be placed in quarantine, etc.

## CONCLUSION

Public health is again a relevant element for the European borders policy and the Schengen Area and could in the future become increasingly important with the apparition of new viruses due to globalization, climate change, etc. This comes as a surprise for those opposed to the use of border controls for fighting a pandemic on the basis of the idea that they do not stop viruses, and certainly for the Europeans used to benefit from the comfort of an area without internal border controls.

The disorder that the EU faced with the reintroduction of internal border controls is due to the fact that Member States remain the competent level of power to take such decisions. This system of multi-level governance that is generally admired, makes coordination more difficult in case of a crisis requiring swift actions. Due to the speedy reactions of Member States that were uncoordinated, it has been impossible for the European Commission to organize the necessary cooperation between them as it was often running after the events by producing communications, recommendations, guidelines, statements, roadmaps and assessments that were certainly useful but often came late.

Without entering in the meta-legal debate about the impossibility to genuinely share sovereignty, or the symbolic function of borders for States, some concrete lessons can be drawn from the ordeals that the European Union passed through with the covid-19 crisis.

Firstly, regarding the revision of the Schengen Borders code that will come back on the policy agenda, a debate should take place about what is necessary to protect public health in times of crisis. The minimum for the sake of clarity is to explicitly add public health to the reasons allowing the reintroduction of internal border controls, and to allow to have recourse to measures of general prevention in that case. In addition, one may wonder if the endless discussion about the maximum period of time during which Member States can reintroduce controls at their internal borders could be solved by considering that it is impossible to fix a general limit in terms of days, weeks or months due to the diversity of circumstances (for instance a pandemic) that may justify them, and instead to simply rely on the principles of proportionality and reasonableness with, as a compensation, a supervisory mechanism by the Commission that should be much stricter than it has been the case until now.

Secondly, it should be agreed once for all that nationals, EU citizens and third-country nationals having the right to reside for more than three months in a Member State have the right to go back to their country of nationality *or* of residence, despite the closure of borders, so that they should not be blocked when they have to transit through the territory of another State to go back home. Let us add that those persons can legitimately expect from EU Member

<sup>38</sup>In EU law, this refers to the category of long-term residents on the basis of directive 2003/109 (OJEU, 23 January 2004, L 16, p.44) binding this status to a legal stay of five consecutive years.

<sup>39</sup>Following article 12(4) of the UNCCPR “No one shall be arbitrarily deprived of the right to enter his *own* country’.

<sup>40</sup>CHETAIL, V., *International Migration Law*, Oxford University Press, 2019, pp. 93–95.

<sup>41</sup>See for instance the communication on Covid 19 where the Commission states that “temporary travel restrictions must exempt all EU citizens and citizens of the Schengen Associated States and their family members, and third-country nationals who are long-term residents under the long term residence directive 2003/109 and persons deriving their rights to reside from other EU directives or national law or who hold national long-term visas (COM (2020)11 of 16 March 2020, p. 2.); see also the Commission communication on “Guidance on the implementation of the temporary restrictions on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy” (C(2020)2050 of March 30, 2020, p. 4).

States that they facilitate their travel through a common area like Schengen.

Thirdly, the information placed at the disposal of people on the measures taken should be improved as it has been (and may still be) difficult to plan a journey inside the EU by consulting different websites of Member States with long information not always easy to understand (and not always available in another language than the official one!). This could be done by strengthening the interactive web platform 'Re-Open EU'<sup>42</sup> launched by the European Commission on June 15, 2020<sup>43</sup> as a central point of real-time information in the framework of the tourism and transport package of May 13, 2020.

Finally, there is no need to dismantle border controls or closures that have been put in place inside the EU at the peak of the crisis, as they have been progressively replaced by health measures imposed at the borders like completing a passenger locator form, passing a medical test, or accepting a period of quarantine, that do not seem at first look to constitute disproportionate restrictions under EU law. The good news is that those who predicted that the reintroduction of internal border controls due to the pandemic on top of the ones reintroduced to fight terrorism, is one more step toward the end of Schengen, are luckily wrong.

## DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/Supplementary Material, further inquiries can be directed to the corresponding author.

## AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

**Conflict of Interest:** The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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<sup>42</sup><https://reopen.europa.eu/en/>

<sup>43</sup>[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1045](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1045)