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EU Border Security in a Time of Pandemic

Restoring the Schengen Regime in the Face of Old Conflicts and New Requirements for Public Health

Raphael Bossong

The massive mobility restrictions in the Schengen zone that were imposed to control the Corona pandemic are to be lifted from mid-June onwards. If a second wave of infections does not follow suit, the German EU Council Presidency may oversee the end of all remaining internal border controls. The reform of the Schengen regulation, which has been overdue since the migration crisis, can be relaunched. The link between secure external borders and internal freedom of movement should have already been reappraised. Looking forward, targeted checks on persons for reasons of public health must be better coordinated. The forthcoming EU pact on migration and asylum will be even more difficult to agree on, however. Access to asylum procedures must be guaranteed without fail, despite national responsibility for public health.

In February 2020, when Italy imposed the first mobility restrictions due to the Covid-19 pandemic, the EU Commission rejected the introduction of internal border controls in the Schengen zone. This was in line with the then insufficient risk assessments of the Covid outbreak among other EU and Schengen member states. The World Health Organization (WHO) also recommended keeping international borders open.

However, when the rapid spread of the virus throughout Europe — fuelled by ski tourism — became apparent, and the overloading of the Italian health system reached dramatic proportions in March, 15 EU states and the additional Schengen members Norway, Iceland, Lichtenstein, and Switzerland announced measures to close their borders. These unilateral national decisions led to serious economic and social disruptions, particularly with regard to the cross-border supply of medical goods and the role of foreign workers and commuters. It was initially not clear how severe the restrictions on the free movement of persons and goods would have to be or how long they would last, nor whether the European internal market would be able to cope.

Some economic costs and intergovernmental coordination problems could be curbed or defused rather quickly. For example, the European Council agreed in mid-March on a general ban on entry at Europe's external borders in order to avoid secondary movements within the Schengen zone. Shortly thereafter, so-called green lanes for maintaining the smoothest possible cross-

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border movement of goods were installed at the suggestion of the Commission. Member states were initially reprimanded by the Commission and heeded its subsequent instruction to not impose any intra-European export restrictions or to competitively buy up scarce medical goods.

Member states furthermore agreed to allow the cross-border movement of workers in critical sectors and to allow all EU citizens to travel home, even if they had to cross other member states with closed borders by land. Finally, a coordinated global repatriation programme for almost 600,000 European citizens was completed in mid-April. Ten per cent of the costs involved were financed directly through the EU Civil Protection Mechanism.

The widely shared impression that the EU totally failed in the first phase of the Covid crisis, therefore, does not quite hit the mark. Member states did not fundamentally turn away from the right to free movement and tried to limit the damage through sustained European dialogue. Nevertheless, the EU and Schengen member states still present a very mixed picture when it comes to permissible domestic and international mobility. Under these conditions, the Schengen zone and the internal market remain under threat. The fragmentation of the flow of people and goods could become entrenched.

Reasons for Persistent Divergences

The remaining differences in national restrictions are evidently not only due to the geographical concentration of Covid infections, but also divergent political assessments. For example, it has not been finally settled whether Sweden failed with its alternative strategy of openness or how restrictive the national lockdowns had to be. In any case, the EU does not have the legal competence in the area of public health — in contrast to the agricultural sector — to issue orders for uniform disease control. The advantages and disadvantages of a decentralised organisational structure in these matter are already apparent in Germany. While the regionally varied approaches to contact restrictions are being criticised, local mobilisation and the related considerations of individual circumstances have proven to be great advantages in containing the virus.

Similarly, the objection that border controls are not an effective tool for combating pandemics cannot itself justify a common policy in the EU. When faced with direct human-to-human transmission and the lack of a vaccine, it is difficult to convey to the public that massive restrictions on local freedom of movement have to be accepted, while at the same time cross-border mobility is hardly impacted. The nation-state is still the primary frame of reference for citizens to voice their demands for protection — or in which they negotiate the risks that are to be borne by society as a whole or by the individual. Without ignoring the reality of our global risk society, which has been highlighted once again by the Covid pandemic, the risk management of international organisations, including the EU, must be based primarily on national and local structures. The tracing of infection chains, for example, functions much less efficiently in cross-border contexts.

Although European law spells out strict conditions for border controls, only EU-wide recommendations can currently be justified in the sensitive area of public health. The political responsibility and democratic legitimacy for limiting fundamental rights in the name of protecting human lives remain at the national or regional level, as do the risks associated with relaxation. Strong pro-European appeals are of no help in view of the high levels of uncertainty.

A Summer of Opening

This explained the cautious tone of the Commission communications from mid-May to support a gradual reopening of borders between member states. The re-

gional epidemic patterns and the capacities of the national health care systems with regard to the detection of infection paths, the registration of infection rates (e.g. via Covid tests), and the management of the progression of severe diseases (number of available intensive care beds, etc.) should be the decisive factors considered for lifting border controls. These parameters should be collected and evaluated in all EU countries with the support of the European Centre for Disease Prevention and Control (ECDC). Various measures for occupational safety and contact minimisation should underpin a restoration of the freedom of movement.

The European added value of these recommendations, however, is questionable if no clearer benchmark can be clearly agreed upon (similar to the German compromise on the upper limit of 50 new infections per 100,000 inhabitants, above which mobility restrictions should be brought back).

Nevertheless, there is a clear tendency to safeguard the economic interests of member states and revitalise tourism this summer. The remaining political tensions over the divergent national approaches to relaxing the current restriction should be overcome in the coming weeks.

Driven by debates between its regions, Italy has already opened borders with other EU member states as of 3 June. Yet, neighbouring countries did not immediately join in, even though Germany, Austria, and Switzerland already agreed on facilitating their respective cross-border traffic in May. Similarly, the Scandinavian states decided to lift their mutual controls, excluding borders with Sweden.

Germany, though, declared that it would lift its nation-wide travel warning from mid-June and allow entry from all other EU and Schengen states — i.e. also without "good" reason, as is currently the rule. Almost all other EU and Schengen member states have adopted similar outlooks. As a rule, they had announced internal border controls for three months until the end of May, and since then they have only continued these controls for short periods of time, if at all. France had, as an exception, originally planned to maintain comprehensive Covid-related controls until October, but now it wants to join the openings from mid-June. Spain (late June) and Norway (until mid-August) should follow suit with a slight delay.

Against this background, the EU Council of Ministers decided on 5 June to extend the general entry ban at the EU's external borders only until early July. The Commission has since then invited the member states to draw up and regularly update a common list of third countries — based on an agreed checklist of criteria — from which travel to the EU and the Schengen zone could be allowed. According to the Commission, at least the Western Balkans should be exempted from the entry ban for non-essential travel as soon as possible.

In the event of a sustained containment of infection rates, the Schengen zone should thus be largely open again by the middle of summer. This step should be combined with the abolition of the general quarantine requirement after entry, not least because the tourism industry would otherwise be decimated. However, national authorities reserve the right to carry out targeted health checks on any persons after entering the country.

The EU Commission ensures the principle of non-discrimination with respect to all national decisions to lift mobility restrictions. Preferential treatment between states that are close to each other — as was discussed among the Baltic states in May — should be avoided. Yet, the warning of Commission Vice-President Margaritis Schinas against the formation of new "mini-states" has not come to pass.

From autumn onwards, further reforms of the Schengen regime may come into view under these circumstance. If the pandemic does indeed subside, national room for manoeuvre should again take a back seat to the common EU legal framework.

Old Conflicts in the Schengen Zone

However, political reservations about open borders represent an unresolved problem (see SWP Comment 44/2018). Norway, Sweden, Denmark, France, Germany, and Austria have been carrying out controls at sections of their internal borders since the end of 2015. On a practical level, these security measures have become less and less perceptible. Germany, for example, generally monitors only two border crossings with Austria. However, this does not affect the legal debate on these measures. In regular statements to the EU Commission, the six states insist that weaknesses in the EU's external border protection and terrorist threats justify such internal border controls. As things stand at present, these controls are to be continued until at least November 2020.

Articles 25 to 28 of the Schengen regulation state that the member states may restrict cross-border traffic for up to six months due to special security requirements, as is currently the case in the Covid crisis. Semi-annual "chain extensions" of such controls are not explicitly prohibited, but they are clearly not provided for. This can be derived from the provision (Art. 29), introduced only in 2013, that internal border controls are permitted for up to two years if the EU Council of Ministers determines that the entire Schengen zone is systematically endangered. This mechanism was exhausted at the end of 2017. Since then, irregular immigration and the threat of international terrorism have declined significantly, so that the deadline for lifting internal border controls can also be justified on substantive grounds.

During the last legislative period, a reform of the Schengen regulation, which was intended to define clear time limits and tighten the proportionality check on internal border controls, failed. At the end of 2019, the new EU Parliament set up a special committee on Schengen to keep these issues on the agenda.

The experience of the Covid crisis could steer the debate in a new direction. In the case of health risks, which are difficult to predict, it seems questionable to set fixed deadlines for mobility restrictions. The national responsibility for public order, which also includes protection against serious health risks, cannot be limited in time. However, the emergency-related deviation from the regular Schengen regime should be as short and targeted as possible.

In this respect, it is unreasonable to maintain national exemptions for internal border controls for several years if there is no concrete and exceptional threat over that period. It is true that the six controlling states are confronted with a continuous so-called secondary migration of asylum applicants from countries of first arrival, which may justify institutional and legal reforms of the Schengen zone. However, the irregular immigration that is still taking place at present clearly poses no threat to public order in these countries.

In view of the harsh pushback of persons who have attempted to cross the Turkish-Greek land border irregularly from February onwards, or the continually tightened restrictions on sea rescue operations in the Mediterranean, the lifting of internal border controls cannot plausibly be made dependent on ever more stringent EU external border controls.

Asylum and Irregular Migration

The Covid crisis could thus provide a window of opportunity and a chance to shift the political positions of the member states on asylum and irregular migration. While the EU states were primarily concerned with restricting irregular immigration from 2015 onwards, the value of open borders is now coming back to the fore. The crisis has also highlighted the economic contributions of foreign workers, including irregular migrants. Italy, for example, adopted a decree that opens up work permit channels for illegally employed third-country nationals.

Overall, however, there is a risk that the situation of persons seeking protection will

worsen further. International as well as non-governmental organisations warn that the Covid crisis should not lead to a denial of the fundamental right to asylum. The appeal is primarily, but by no means exclusively, directed at the countries of first arrival in southern Europe. For example, Italy and Malta declared in March that their ports could no longer be considered safe due to the Covid pandemic, and that it would therefore not be appropriate to disembark asylum seekers.

The notion that people who were rescued in the international waters of the Mediterranean should instead be returned directly to Libya can currently be justified even less so than in previous years. At the end of May, militias are said to have shot 30 inmates of a camp with irregular migrants. Military violence in Libya has been escalating for months (see SWP Comment 25/2020), all while there is virtually no medical capacity available to control the Covid pandemic.

The EU Commission itself is involved in many measures that shift migration control into the European neighbourhood. As recently as the beginning of March, Ursula von der Leyen praised Greece's tough action of sealing off its land border with Turkey. However, in view of the continuing border closures due to the Covid crisis, the Commission has partially corrected its position since then. It is now taking a more proactive stance to uphold the right to asylum enshrined in the EU Charter of Fundamental Rights. The Commission maintains that only procedural restrictions and delays in the application process are justifiable.

If key provisions of the Common European Asylum System are not respected, even after the first phase of the Covid crisis has subsided, new infringement procedures could be envisaged. Though, experience has shown that the necessary time span for complete infringement proceedings does not suffice for the practical challenges at hand. This April, for example, the European Court of Justice came to a final judgement on the matter, according to which all member states should have implemented the one-time EU decisions of 2015 on the distribution of persons seeking protection.

Therefore, the key issue is how member states assess their recent experiences with unilateral security measures and border closures. The past few years have provided ample evidence for the negative impact of "beggar-thy-neighbour" policies, i.e. the consequences of efforts to shift the costs or supposed burdens of irregular immigration onto other states without contributing towards overcoming the problem as a whole. For example, a few dozen or hundreds of persons apprehended by NGOs or other ships at sea led repeatedly to paralysing haggling between the member states.

The Covid crisis has put a halt to migratory movements of all kinds around the world. Yet, in just a few months, a significant increase in irregular immigration can be expected again due to various socio-economic distortions and possible new conflict dynamics. Even before the Covid outbreak, the situation of refugees in Turkey (see SWP Comments 22/2020) and Lebanon was very precarious. The domestic crises in these host countries have since worsened massively. The need for a common, resilient approach to irregular immigration and a common guarantee of asylum for those in need of protection is therefore more urgent than ever. However, this realisation and the numerous appeals for more European solidarity during the Covid crisis are probably not enough.

The EU Commission wanted to present a new pact for asylum and migration at the beginning of April in order to overcome the political blockade that had lasted for years, and to achieve a more crisis-proof, resilient European system of burden-sharing. This did not happen because of the Covid outbreak. The presentation is now expected in parallel with the lifting of internal border controls in June.

A central element of this pact is to be the development of border procedures in "controlled" or closed facilities. There, a rapid preliminary assessment of asylum applications is to take place in order to then initiate either direct repatriation or distribu-

tion to other EU member states, where a complete asylum procedure would then be carried out. The catastrophic conditions on the Greek islands make it clear that new first arrival camps must be planned with the utmost care and must also guarantee health protections.

It is not only because of such requirements that the new pact on migration and asylum will remain highly controversial. Those states that have so far been fundamentally opposed to an obligatory distribution of asylum seekers will hardly have to show any willingness to compromise. Instead, the current crisis strengthens their tactical negotiating position. The threat that states which do not wish to participate in EU asylum policy could lose full access to the benefits of the Schengen zone has not materialised in recent years. The eastern European states have an important role to play in the reconstruction following the Covid crisis, as they must approve all pan-European financial packages and have come through the past months with comparatively little economic damage. Especially for Germany, further distortions of cross-border supply and production chains do not seem to be bearable. It is therefore hardly conceivable that the restoration of freedom of movement and openness in the Schengen Area can be made dependent on solidarity in asylum matters.

In the foreseeable future, other EU states and the European Parliament must therefore allow for a very flexible participation in burden-sharing in the European asylum system. This makes it all the more important to uphold generally binding principles and standards of asylum law and to actually end crisis-related exceptions. This applies in particular to offering the chance to submit an application for protection at the EU's external borders.

Border Controls and Health Protection

A new reform of the Schengen regime could be launched from autumn onwards, independently from the politically salient discussion on the European asylum and migration pact. In its current version, the Schengen regulation mentions dangers to public health only in the margins. For example, the entry of third-country nationals may be prohibited for reasons of public health protection (Article 6 (1)). Non-EU citizens may also be subject to systematic checks for this purpose (Article 8 (3)). EU citizens and third-country nationals with long-term residence status can also be subject to checks at the EU's external borders on a non-systematic basis, also with a view to protecting public health (Article 8 (2)). However, this must not lead to a refusal to return home.

The "Free Movement Directive" (2004/38/EC), which also applies to EU citizens of countries that are not full members of the Schengen zone, contains some additional information (Articles 27 & 29): Accordingly, health checks can be carried out up to three months after entry if there is justified suspicion of a threat to public health. Comprehensive border closures and police measures are not covered by this provision. Rather, it forms the basis for a targeted regime of contact tracing by public health authorities.

Newer EU actors such as the ECDC are not yet mentioned in the 2004 Free Movement Directive. The ECDC has so far had rather limited resources, and its work depends on information provided by member states. However, the ECDC's work — the compilation of an overview of the European infection status and the standardisation of disparate national data — could be better supported and utilised, in cooperation with the WHO regional office.

The primary competence of the member states would not be curtailed if the interactions between intra-European checks on persons and public health protections were to be defined more precisely. So far, only non-binding and mostly critical assessments of the ECDC have been available on the question of whether instruments such as health questionnaires, fever measurements, or "immunity passports" should be used sensibly when entering the EU. National

decisions for or against such instruments will determine how citizens and third-country nationals will soon experience cross-border travel in the Schengen zone.

It must be clarified whether reliable testing for Covid infections can be carried out and what capacities are available to the Schengen states for health checks at their external borders. So far, the Commission has only issued a recommendation on how the member states should resume visa processing, once the general entry ban for non-essential travel to the EU starts to gradually be lifted. This mainly revolves around the increasing technical challenges to ensure public health during the application process, whereas the decision cannot be made dependent on individual health checks due to the time gap between the granting of (often longer-term or multiple) visas and actual travel. There have been some internal discussions whether the coming system for an electronic entry permit (European Travel Information and Authorization System, ETIAS) for travellers who are exempt from visa requirements might also be used more extensively for the purposes of public health protection. ETIAS would, in the future, apply to all citizens of North and South America, where the Covid pandemic is currently raging. Yet, it now seems certain that the launch of ETIAS will be substantially delayed from 2021 to late 2022.

The EU border agency, Frontex, will have to gear its work and risk assessment more closely to public health criteria, however. At the end of 2019, a further, far-reaching reform of the agency was decided upon — the implementation of which will entail many challenges (see SWP Comment 47/2019). Initial approaches to integrating health care for people seeking protection into regional contingency plans have not been substantially developed since 2017. The current situations demands a reprioritisation, especially when Frontex begins increasingly carrying out repatriations under its own responsibility, as foreseen in the new regulation. The lifting of the general EU entry ban does not mean that the health situation in third countries can be disregarded.

Whether international travel can be resumed will ultimately depend on the prospect of a vaccine being available and swiftly distributed globally over the next two years. Even though WHO is critical of border controls to combat the pandemic, it is now likely that technical measures such as fever measurements at airports will become established. The United States, for example, is currently planning procedures with private operators. The EU has not yet formulated a clear position on this point. Since the EU has served, after China, as the second major platform for the global spread of the Covid virus, further possibilities of exit controls could be considered to make it easier for third countries to reopen their borders.

Outlook and Recommendations

The forthcoming end of the EU entry ban will be accompanied by wide-ranging relaxations within the entire Schengen zone. National public health powers and a sustainable containment of Covid infections will take precedence over the restoration of full freedom of movement within the EU. However, if only local outbreaks are to be dealt with from this summer onwards, the German Presidency will provide to be a window of opportunity for removing all remaining mobility restrictions. This phase-out should explicitly extend to those internal border controls that have been maintained by six states, including Germany, since the migration crisis of 2015.

This would send a political signal about the value and crisis-proof nature of the Schengen zone. In addition, this step would support the Conference on the Future of Europe, which is now due to start in September. EU citizens value freedom of movement as a particularly important achievement, especially now after the restrictions they have experienced.

However, the conflicts of principle in EU migration and asylum policy, which are

closely linked to border security and freedom of movement in terms of both content and politics, will not be defused in the coming months. The central issue of how asylum seekers are to be distributed within the EU can probably only be circumvented through voluntary coalitions. Reception centres and preliminary assessments near the border will be even more difficult to implement with a view to the new requirements for health protection. Before new approaches for a more crisis-resistant European asylum system are pursued, it is imperative that the remaining access possibilities for persons seeking protection be maintained. This applies to all EU and Schengen states.

The reform of the Schengen Borders Code should be relaunched in autumn. Beyond fixed time limits, coordination between the Schengen states must be improved. For example, the EU mechanism for "integrated political crisis management" based on the solidarity clause (Art. 222 TFEU) could be used more systematically. In particular, the proportionality of prolonged internal border controls should be more closely reviewed. The dialogue between the EU Commission and neighbouring states affected by national measures can be structured more efficiently and made more binding.

Finally, member states must agree on the procedures or tools to be used for health-related checks on persons. The ECDC could play a greater role and be taken into account in provisions of the EU's Free Movement Directive. Frontex must also expand its remit to protect the health of refugees and its own staff.

The Covid crisis could thus be used to strengthen the common legal framework and the European value of the free movement of Union citizens.

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