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The 25th Anniversary of the Schengen Area and the Impact of COVID-19

Abstract: The analysis is concerned with the current state of the Schengen Area, its legal and institutional framework, as well as the impact of COVID-19 on its functioning. The paper demonstrates that COVID-19 has forced EU Member States to adopt unprecedented measures on mobility restriction. The author distinguishes three groups of measures in response to the COVID-19 pandemic: the temporary reintroduction of border controls at internal borders; a ban on crossing internal borders; a ban on entering into the EU for third-country nationals. All measures were taken on a national level; EU institutions do not have enough competence in this sphere, which is why they have mostly played a coordinating role. Moreover, the pandemic increases the deficit of solidarity between EU Member States. The author concludes that the COVID-19 pandemic demonstrates that the EU needs more powers to react in such a situation. Thus, the EU has to create additional legal instruments for the realization of a common policy on crises affecting the Schengen Area.

Keywords: Schengen Area, area of freedom, security and justice, border control, mobility restrictions, COVID-19

Introduction

On the 26th March 2020, in the midst of the COVID-19 pandemic in Europe, the Schengen Area celebrated its 25th anniversary. 25 years before, the Schengen agreements came into force and seven EU Member States (Belgium, Germany, France, Luxemburg, the Netherlands, Spain and Portugal) officially lifted border controls at internal borders. During the last 25 years, the Schengen area has undergone

significant changes, including the extension of geographical boundaries and competence. Moreover, it has created abroad legal basis and institutional framework.

Initially, the EU was established as an organization of economic integration; for a long time the EU was associated mainly with the internal market. EU Member States did not confer competence in internal matters to the Union; even if this did happen, then it was only on intergovernmental level. That is why the first Schengen agreements were concluded outside of the EU legal framework. The Schengen Acquis became part of EU law only in 1999, according to the Amsterdam Treaty.

The creation of the Schengen Area and its subsequent integration into the EU legal framework as a part of the area of freedom, security and justice (AFSJ) significantly changed the situation. The EU has rapidly begun to build up the institutional and legal basis of the AFSJ. From the field of cooperation between the Member States, the AFSJ has become a fully-fledged integration mechanism.

During the last five years, the Schengen Area has been faced with a number of challenges, caused by the migration crisis, the lack of solidarity between Member States, and the pandemic of COVID-19. The latter creates unprecedented pressure on the Schengen Area, which undermines the main achievements of European integration. In this situation, the question arises: does the COVID-19 pandemic mean the collapse of the Schengen Area, and how it will function after the pandemic?

The main purpose of this article is to study the readiness and possibility of the Schengen Acquis to resist the current challenges. As a part of this purpose, a number of measures will be studied, realized on national and supranational levels in response to the COVID-19 pandemic, and their impact on the further development of the Schengen Acquis.

1. The Schengen Area: The Current State

The Schengen Area is not a legal definition, but despite this it is widely used by scholars and practitioners. The Schengen Area should be understood as the territory of those states that fully apply the Schengen Acquis. In other words, the Schengen Area includes the territory of states within which there is no regular border control at internal borders, and those who implement a single visa policy. At the same time, non-EU states are also included in the Schengen Area. From a legal point of view, these countries fully apply the Schengen Acquis. As of June 2020, the Schengen area includes 26 countries with a total population of over 400 million people and a surface area of 4,312,259 square km.

The Schengen Area is not equivalent to the European area of freedom, security and justice from the legal and geographical point of view. The latter includes all 27 EU Member States and four associate Schengen countries. The Schengen Area has its own legal basis, which is historically defined as the Schengen Acquis.

Some authors use the definition “Schengen Law”¹. According to Daniel Thym², the term “Schengen Law” shall cover both the Acquis as it was integrated by the Treaty of Amsterdam and new measures building on the Acquis under EU primary law. Professor S.Y. Kashkin defines Schengen Law as a system which regulates relations in two areas: conditions of entry and movement in the Schengen Area as a whole and fighting against crime³. According to the position of Professor M.M. Biryukov, Schengen Law is a set of legal norms that are a component of European law and regulate relations related to ensuring freedom of movement of both EU citizens and third-country nationals within the Schengen Area⁴.

At the moment, more than 20 years after the integration of the Schengen Acquis into the legal framework of the EU, both definitions (Schengen Acquis and Schengen Law) could be used. The Schengen Acquis is a system of EU legal norms, which regulates the free movement of persons across internal and external borders. In this connection we can distinguish broad and narrow sense of this definition.

According to the narrow sense, the Schengen Acquis includes the rules on border crossing and visas. According to the broad sense, the Schengen Acquis consists of four parts: legislation on border control; visa legislation; immigration legislation; EU asylum law. This system of legal norms is sometimes qualified as the EU Immigration and Asylum Law⁵, which is a part of AFSJ law. In this sense, the definitions “Schengen Acquis” or “Schengen Law” and EU Immigration and Asylum Law shall be considered as synonyms.

It must be recognized that in contemporary legal literature the term “Schengen Law” is practically not used. This is due to the fact that after the integration of the Schengen Acquis into the EU legal system, it became an integral part of the AFSJ. As

- 1 См. Право Европейского Союза: учебник / под ред. С.Ю. Кашкина, 2002; Потемкина О.Ю., Войников В.В., Понятие и содержание шенгенского права // Актуальные проблемы совершенствования законодательства и правоприменительной практики на современном этапе: материалы межвузовской конференции / под общ. ред. О.А. Заячковского. Калининград, Изд-во КГУ, 2004. с. 60–70. (see.: *Pravo Evropejskogo Soiuza: utchebnik/ ed. by prof. S.I. Kashkin, M., 2020; Potiomkina O.I., Voicov V.V., Poniatie i sodierzanie Tchengienskogo prava// Aktualnyie problemy sovierchtenstvovania zakonodatielstva i pravoprimienitielnoi praktyki na sovriemnom etapie: matierialy miezvuzovskoi konfierencii/ ed. by O.A.Zaiatchkovski, Kaliningrad: Izd-vo KGU, 2004. S. 60–70).*
- 2 D. Thym, *The Schengen Law: A Challenge for Legal Accountability in the European Union*, “European Law Journal” 2008, vol. 8, p. 218, 10.1111/1468-0386.00151.
- 3 *Право Европейского Союза: учебник / под ред. проф. С.Ю. Кашкина. М., 2002. С. 782.*
- 4 Бирюков М.М., *Европейское право до и после Лиссабонского договора. М.: Научная книга, 2010, с. 118. (Birukov M.M., Evropejskoie pravo do i posle Lissabonkogo dogovora. М.: Naucznaia kniga, 2010. o. 118).*
- 5 K. Hailbronner and D. Thym, *EU Immigration and Asylum Law: A Commentary*, 2nd edition, Munich and Oxford 2016; S. Peers and N. Rogers (eds.), *EU Immigration and Asylum Law: Text and Commentary*, Leiden 2006, p.1025.

a result, the term “Schengen Acquis” (Schengen Law) began to lose its independence; in fact, it was dissolved in the framework of a larger and more ambitious AFSJ project.

2. The COVID-19 Pandemic and its Impact on the Schengen Area

The Schengen Area is currently seriously affected by the new coronavirus infection COVID-19. The announcement of the pandemic by the WHO forced the EU Member States to almost completely close the external and internal borders. Such a measure has an unprecedented character for Europe not only over the period of the Schengen Area, but also over the entire post-war period.

During the last five years, the COVID-19 pandemic became a second serious challenge for the Schengen Area after the migration crisis in 2015. Similarly to the migration crisis of 2015, the rapid spread of COVID-19 was followed by a late political reaction at the EU level. In this situation, the EU Member States adopted unilateral relevant measures on closure of the external and internal borders, and such measures were not always consistent⁶.

Carrera and Luk distinguish three groups of national measures on mobility restriction in response to the COVID-19 pandemic: the temporary reintroduction of border controls at internal borders; bans on entry to the country; restrictions on entry and exit for modes of passenger transportation⁷. From the Schengen Law perspective, the measures of EU Member States on mobility restriction can be divided into three groups: the temporary reintroduction of border controls at internal borders; a ban on crossing the internal borders; a ban on entering into the EU for third-country nationals⁸.

Among these measures, only *temporary reintroduction* of border controls at internal borders is provided by the Schengen Law. According to Art. 25 of the Regulation (EU) 2016/399⁹ (Schengen Borders Code) where, in the area without

6 Бабынина Л.О., Коронавирус: что может сделать и делает Европейский союз// Аналитическая записка (Babynina L.O., Koronavirus: czto mozet sdielat i dielalet Evropieiskii soiuz// Analiticheskaia zapiska) no. 12, 2020 (no. 195), <http://www.instituteofeurope.ru/images/uploads/analitika/2020/an195.pdf> (accessed 30.06.2020).

7 S. Carrera and N.C. Luk, Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area, “CEPS” April 2020, no. 2020–04, <https://www.ceps.eu/cepspublications/love-thy-neighbour/> (accessed 30.06.2020).

8 Потемкина О.Ю., Европейский союз: ограничение передвижения граждан как средство борьбы с COVID-19. Аналитическая записка (Potiomkina O.J., Evropieiskii Sojuz: ograniczenie pieredvizhenia grazdan kak sredstvo borby s COVID-19. Analiticheskaia zapiska) no. 14, 2020 (no. 197), <http://instituteofeurope.ru/images/uploads/analitika/2020/an197.pdf> (accessed 25.06.2020).

9 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), O.J. L 77, 23.3.2016, pp. 1–52.

internal border controls, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border controls at all or specific parts of its internal borders for a limited period.

Formally, the Schengen Borders Code does not foresee a threat to public health as grounds for reintroduction of internal border controls. EU law and particularly the Schengen Borders Code distinguish between public policy and public health, but in terms of the COVID-19 pandemic the latter was considered by Member States as a serious threat to public policy.

The temporary reintroduction of border controls at internal borders was the first reaction in response to the migration crisis in 2015. During the COVID-19 crisis, the reintroduction of border controls was less chaotic and did not cause a tangible impact on the Schengen Area¹⁰. Temporary reintroduction of border controls at internal borders does not mean a ban on entry to the territory of certain Member States. That is why the majority of EU Member States introduced different types of entry ban. For the purpose of this study, we can distinguish the travel bans in accordance with two criteria: a ban on crossing internal and external borders; a ban for EU citizens and their family members, and a ban for third-country nationals.

Union law guarantees the free movement of EU citizens and their family members across the border. However, according to the Art. 27 Directive 2004/38/EC¹¹, Member States may restrict the freedom of movement and residence of Union citizens and their family members on grounds of public health. Thus, Union law does not preclude national measures on restrictions to the right of free movement of persons.

According to Art. 6(1)(e) of Regulation (EU) 2016/399, an EU Member State may deny the entry of a third-country national on the basis of the fact that that national is considered to be a threat to public health. Art. 8 (2) of Regulation (EU) 2016/399 provides competent authorities on a non-systematic basis to carry out minimum checks on persons enjoying the right of free movement under Union law in order to ensure that such persons do not represent a threat to public health. At the same time, all decisions under the Schengen Borders Code shall be taken on an individual basis (Art. 4). It means that the collective refusal of entry is not expressly foreseen

10 Потемкина О.Ю., Влияние COVID -19 на свободу передвижения и миграцию в Евросоюзе // Научно-аналитический вестник ИЕ РАН РАН (Potiomkina O.J., Vliianie COVID-19 na svobodu pieredvizhenia i migraciju v Evrosojuzie// Nauczno-analititcheskii vectnik RAN), 2020, no. 3, <http://vestnikieran.instituteofeurope.ru/images/Potemkina32020.pdf> (accessed 06.07.2020).

11 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (O.J. L 158, 30.4.2004, pp. 77–123).

by Union law, albeit that the European Court of Justice notes that “any reference by the EU legislature to the concept of ‘threat to public policy’ does not necessarily have to be understood as referring exclusively to individual conduct”¹². In other words, the European Court of Justice distinguishes the application of the public policy exception in terms of EU citizens and third-country nationals. This interpretation could also apply to the concept of threat to public health.

As far as the ban on crossing internal borders goes, the Schengen Borders Code does not contain any provisions. Strictly speaking, Union law prohibits regular border controls at the internal border, but not closure of the border (ban on entry). Thus, the substantive and procedural conditions related to the collective ban on crossing the internal and external borders are not expressly foreseen by the Schengen Law. That is why all measures were imposed in accordance with national legislation.

Most of the EU Member States introduced restrictions on modes of international passenger transportation in March 2020. Such restrictions applied to air, rail, road, sea, and inland waterway transport. According to the Treaty on the Functioning of the EU (TFEU), the Union develops a common transport policy. Within this policy, Union law provides the common rules applicable to international transport, transport safety, and any other appropriate provisions. Moreover, the TFEU prohibits any national measures on discrimination towards the carriers of other Member States as compared with carriers who are nationals of that state. Measures on the restriction or cancellation of international transportation are not foreseen in EU law.

As was mentioned above, national measures in response to COVID-19 were not consistent and homogeneous. In this situation, on 16th March 2020 the European Commission prepared two documents, the first one concerned with the Guidelines for border management measures¹³, the second one with the Temporary Restriction on Non-Essential Travel (EU travel ban)¹⁴.

In the Guidelines for border management measures, the European Commission emphasizes the importance of protecting health while preserving the integrity of the Single Market. The Commission found the temporary reintroduction of border controls at internal borders by certain EU Member States to be justified. It was

12 C380/18, Judgment of the Court of 12 December 2019 (Reference for a preliminary ruling – Border controls, asylum and immigration – Regulation (EU) 2016/399, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:EU:C:2019:1071> (accessed 06.07.2020).

13 European Commission, COVID-19. Guidelines for border management measures to protect health and ensure the availability of goods and essential services. Brussels, 16.3.2020, C (2020) 1753 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200316_covid-19-guidelines-for-border-management.pdf (accessed 06.07.2020).

14 European Commission, Communication from the Commission. COVID-19: Temporary Restriction on Non-Essential Travel to the EU. Brussels, 16.3.2020, COM (2020) 115 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:115:FIN> (accessed 16.06.2020).

noted 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.” But the European Commission did not support measures on the entry ban of EU nationals; the Commission put special emphasis on non-discrimination between Member States’ own nationals and EU citizens from other countries. According to the Commission, a Member State must not deny entry to EU citizens or third-country nationals residing on its territory.

With regard to external borders, the European Commission clarified that border checks may include health checks. During this check, the competent authority may refuse entry to non-resident third-country nationals where they present relevant symptoms, or impose obligatory isolation or quarantine. The Guidelines underline that any decision on refusal of entry needs to be proportionate and non-discriminatory.

At the same time, in a Communication on the EU travel ban, the Commission recommends the European Council to adopt a decision to apply a temporary restriction on non-essential travel from third countries into the EU and Schengen associated countries. The temporary restriction applies only to third-country nationals, but not to EU nationals and citizens of Schengen associated countries. The next day, 17th March 2020, the European Council adopted the political decision on the reinforcement of EU external borders by applying a coordinated temporary restriction on non-essential travel to the EU for a period of 30 days¹⁵. In fact, some EU Member States adopted wider restrictions, which apply also to certain categories of EU citizens.

Thus, EU institutions did not adopt the formal rules; there is no legally binding legislative act or executive regulation underlying the travel ban¹⁶. Instead of legal acts, only Commission Communication, Guidelines and Presidency Conclusions were adopted, which are “soft law” acts. In other words, the EU institutions played a coordinating role.

Such a role of the European Union was criticized by some experts¹⁷. But in fact, acting within the principle of conferral, EU institutions could not do more. The Schengen Acquis as a part of the AFSJ falls into the shared competence of the EU. The competence on border control is realized both at national and supranational level.

15 Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/> (accessed 06.07.2020).

16 D.Thym, Travel Bans in Europe: A Legal Appraisal (Part II), <http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-ii/> (accessed 06.07.2020).

17 C. Hruschka, The pandemic kills also the European solidarity, <http://eumigrationlawblog.eu/the-pandemic-kills-also-the-european-solidarity/> (accessed 03.07.2020).

Current legislation does not authorize the EU institutions to adopt the legislative acts on travel restrictions. In any case, the COVID-19 pandemic requires a swift reaction, which was difficult to achieve at the EU level in the absence of a necessary legal base. That is why a political decision and the Commission's Guidelines could be considered as appropriate EU measures in response to the COVID-19 crisis.

To be sure, some national measures were not well enough justified and demonstrate the lack of compliance with certain requirements under EU law¹⁸, principles of proportionality and policy coherence¹⁹ between EU Member States. Apparently, some of these measures will be reviewed by the European Court of Justice on compliance with EU law. But in such an exceptional and unexpected situation, public health should have priority over the free movement of persons.

The most serious problem is a deficit of solidarity between EU Member States. The principle of solidarity is a fundamental principle of European unity²⁰ and the basic value of European integration²¹. This principle was at risk during the migration crisis of 2015. The COVID-19 pandemic demonstrates that this risk is still in force and has become more serious. The fact that most of the actions in response to COVID-19 were carried out at the national level does not preclude compliance with the principle of solidarity. But most of the EU Member States failed to act in the spirit of solidarity. This situation posed a risk for the future of the Union. During a video conference of the European Council, on 26th March 2020, the French president Emmanuel Macron warned that the EU's key projects, including the Schengen Area, could be at danger if the nations failed to show solidarity. "The risk we are facing is the death of Schengen," Macron added²². The end of Europe's borderless area has been declared by many²³. The deficit of solidarity does not mean the collapse of the Schengen system, but it creates additional obstacles for effective implementation of EU policy.

In June 2020, the Commission prepared a Communication²⁴ containing recommendations on the abolition of border controls and other restrictions on

18 Carrera and Luk, *Love thy neighbour? op. cit.*

19 Thym, *Travel Bans in Europe, op. cit.*

20 A. Pimor, *Solidarity was a founding principle of European unity – it must remain so*, <http://theconversation.com/solidarity-was-a-founding-principle-of-european-unity-it-must-remain-so-74580> (accessed 06.07.2020).

21 A. Sangiovanni, *Solidarity in the European Union*, "Oxford Journal of Legal Studies" 2013, vol. 33, p. 1.

22 *Macron to EU Leaders: We Are Facing the Death of Schengen*, March 27, 2020, <https://www.schengenvisainfo.com/news/macron-to-eu-leaders-we-are-facing-the-death-of-schengen/> (accessed 30.06.2020).

23 M. De Somer, *Schengen isn't dead – yet. The real test will be dismantling border controls again*, <https://www.euronews.com/2020/04/03/schengen-isn-t-dead-yet-the-real-test-is-still-to-come-view> (accessed 01.07.2020).

24 *Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-*

movement within the Schengen Area from 15th June 2020. With regard to external borders, the Commission invited Member States to maintain restrictions on non-essential travel to EU countries until 30th June 2020. After 30th June 2020, the restriction should be lifted for specific countries, by common agreement of the Member States, based on a set of principles and objective criteria, including the epidemiological situation, considerations of reciprocity, etc.

On 30th June 2020, the Council adopted a Recommendation²⁵ on the gradual lifting of the temporary restrictions on non-essential travel into the EU. The Recommendation set out the criteria and conditions for restrictions on travel into the EU, as well as the list of countries whose citizens should not be affected by temporary external border restrictions from 1st July 2020. This Recommendation is not a legally binding instrument, albeit it was based on 77 (2)(b) TFEU, which applies to legislative procedure. According to the Recommendation, this list of countries should be updated every two weeks based on the epidemiological situation in the third countries concerned.

3. Lessons Learned from the COVID-19 Pandemic

At the moment (July 2020), the epidemiological situation in EU countries is significantly improved, but the pandemic globally continues and intensifies. Moving forward, there will be questions of how to deal with such diseases in the future from the perspective of the free movement of persons in Europe.

The COVID-19 pandemic demonstrates the need for further development of the Schengen Acquis. As an area without internal border controls, the EU was not ready for a swift response to the pandemic. In fact, the EU did not have legal power to adopt a binding decision in response to the pandemic. The EU institutions mostly played a coordinating role. In this situation, during the first phase of the pandemic, all decisions were taken by national authorities without a clear position of the EU.

The previous crises demonstrate that the EU's response was to strengthen the supranational component of certain policies. This approach could be considered as relevant for the current situation. To be sure, in such situations, EU institutions should have more power to adopt common legally binding rules on mobility restrictions. Such an approach would provide uniform application of EU rules and

-essential travel to the EU. Brussels, 11.6.2020, COM (2020) 399 final, https://ec.europa.eu/info/sites/info/files/communication-assessment-temporary-restriction-non-essential-travel_en.pdf (accessed 20.06.2020).

25 Council Recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction. Brussels, 30 June 2020, 9208/20. <https://data.consilium.europa.eu/doc/document/ST-9208-2020-INIT/en/pdf> (accessed 06.07.2020).

enhance legal certainty for EU citizens and foreigners²⁶. One of the possible solutions is the introduction by means of regulation of a special mechanism specifying detailed provisions on mobility restrictions within the Schengen Area, including procedural and substantive standards. It could be a separate regulation or part of the Schengen Borders Code. In doing so, the EU will prove their respect for the rule of law and other fundamental principles in adoption of measures on mobility restriction in Europe.

Another issue is solidarity between EU Member States that is difficult to enforce by means of legal instruments. The European Union will have to look for a political solution to implement this principle within the Schengen Acquis, because not only the Schengen Area but the whole project of European integration largely depends on this decision.

Conclusions

The Schengen border-free area is one of the most important and perceptible achievements of European integration. This project has created huge benefits for EU citizens and third-country nationals. At the same time, during the last 25 years it has demonstrated steadiness and resilience to crises. The COVID-19 pandemic constitutes an unprecedented challenge for the functioning of the Schengen Area. At the moment, the border controls at internal borders are lifted, but restrictions for entering into the EU are still in force. The Schengen legislation did not contain an exhaustive list of Union measures towards the situation related to the spread of COVID-19. In this regard, Member States have chosen national measures, with the supporting and coordinating role of the EU. This approach was the only one possible but was not efficient enough. Taking into account the current level of integration, the EU needs a Union-based approach to resolve such crises. In these circumstances, the EU has to create additional legal instruments for the realization of a common policy on crises affecting the Schengen Area. The COVID-19 crisis may serve as a chance to make the Schengen Area more flexible and resilient in the face of new challenges, thus, the Schengen system will get a “vaccine” against different crises.

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26 D. Thym, Travel Bans in Europe, *op. cit.*

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