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Mobility policy as pandemic policy. The Schengen regime in the Corona crisis.

Abstract

During the Corona-pandemic, restricting mobility became an important means of pandemic policy. Within the European Union, this resulted in stress for the Schengen area. The essay deals with the question of how the Schengen system coped with pandemic policy and argues that the exceptions from the basic rule of free movement provided the Schengen system with the flexibility necessary to survive the pandemic. Elaborating on this thesis, the paper explores some important changes the EU-borders are likely to undergo due to the pandemic.

Keywords: Corona, selective borders, Schengen, lockdown

1. Between concern and hysteria

For years, the topic of the day: mobility policy in the pandemic. Here, border closures, because the threat comes from outside, as the populist story goes (Vobruba, 2020, 145). There, border controls, first to slow down mobility in general, then to selectively make it possible again. Obscene vaccination-apartheid whining by those unwilling to be vaccinated. Speculations about the consequences, wavering between fear and lust: National egoism swelling as a result of politically imposed closures (Krastev, 2020; in contrast, cooly pondering: Wang, 2021). Schengen in danger. If Schengen fails, Europe fails. The European Union is tottering.

The European Commission was less hysterical, but still concerned:

"The COVID-19 pandemic presents an unprecedented challenge and has placed a major strain on the Schengen area, leading many more Member States to reintroduce internal border controls, at times jeopardising the proper functioning of the Single Market. The impact of these controls has been particularly felt by the lack of coordination, especially in cross-border areas. As internal border controls were re-established, trucks faced long hours waiting in queues to cross from one Member State to another, seriously disrupting supply chains within the EU. As such, the COVID-19 pandemic brought to the forefront the economic implications of Schengen and its intrinsic relationship with the Single Market. More than this, border closures represent a real concern for citizens especially in border regions, having had a real impact on their daily lives." (European Commission 2021, 1)

What has actually changed at the inner and outer borders in the Schengen area during the Corona pandemic, and which changes will be sustainable?

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2. Key points of the Schengen Code

The political field of European mobility and border policy is regulated by the Schengen Agreement, applicable law as of 9. 3. 2016 (Schengen Borders Code). The pandemic policy thus met institutionalised European regulations. What are key points? The Schengen Agreement acts internally and externally. Within the Schengen area, it regulates the basically free movement of persons. Article 22 of the Schengen Borders Code reads: "Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. " Internally, Schengen acts as a large-scale liberalisation program (Vobruba, 2016). Freedom of movement within the country creates a common interest in controls vis-à-vis the outside world. This creates "double-coded borders", i.e. borders that are simultaneously national borders and the EU's external border (Vobruba, 2012; Hilpert, 2020). Article 5 of the Schengen Borders Code regulates the modalities at the EU's external border: "External borders may be crossed only at border crossing points and during the fixed hours of traffic." Passage of the external border by third-country nationals requires: a valid travel document, usually a visa, sufficient financial means, a recognised reason for entry, no entry in the Schengen Information System (SIS) as a person not wanted or otherwise undesirable.

Liberalisation on the inside and double coding on the outside are downright revolutionary innovations. They reconstruct a basic element of classical statehood in the direction of a "postnational border constellation." (Vobruba, 2012) Why? Through both liberalisation on the inside and double coding on the outside, member states relinquish control over their national borders, a basic element of the nation state. At the internal borders, controls are normally no longer envisaged. With regard to the external border, complex entanglements of interests and overlapping competences between the state and EU levels emerge (Eigmüller, 2007, Müller, 2014, Hilpert, 2020), with extensive border closure as the common denominator. One expression of the latter is the expansion of the competencies and financial resources of Frontex, the EU border agency.

3. Flexibility in the Schengen Code

The Schengen Borders Code provides exceptions to a certain extent for the regulation of both the external border and the internal area. Both the relaxation of entry controls at the external border and the reintroduction of internal border controls are possible under certain conditions.

> *"Border checks at external borders may be relaxed as a result of exceptional and unforeseen circumstances. Such exceptional and unforeseen circumstances shall be deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation." (Article 9 (1))*

This could perhaps be called the tourism exception. The exceptional resumption of checks at the EU's internal borders is governed by Chapter II of the Schengen Code (Articles 25 to 35). The principle is:

> *"Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat." (Art. 25 (1))*

Integrationists tend to view the derogations provided for in the Schengen Code as inconsistencies and their use as undesirable setbacks in the integration process. It seems questionable to me whether this view is without alternative. In particular, the migration crisis of 2015f. and the Corona pandemic of 2020f. have unleashed social pressures that would probably have broken the Schengen institutional complex had there not been the possibility to make use of the derogation rules. Seen in this light, the derogation possibilities in the Schengen Code are a flexibility reserve. The flexibility institutionalised by the exceptions makes it possible to absorb problems that would otherwise arguably overwhelm the institutional set. Of course, hypothetical failure is not proof of the performance of the exceptions in the Schengen Code. But at the very least, the two readings should be weighed against each other: Exceptions to free movement as a potential threat or as a flexibility reserve for European integration. The borderline between the flexible handling of the rules on freedom of movement and a threat to integration is crossed, of course, when restrictions on mobility mutate from temporary measures to a question of principle of state sovereignty. But hardly anyone does that.

4. The tendency to restrict mobility

This brings us to pandemic policy as mobility policy. Since the Schengen Code entered into force, the Commission has received 322 "Member States' notifications of the temporary reintroduction of border control at internal borders" (as of 4. 2. 2022). Overall, the frequency of notifications increases exponentially over time. From 2006 to 16. 5. 2015 there were 36 notifications. This might be called the decade of (almost) free mobility. On 13. 9. 2015, the first notification (from Germany) was made to the Commission in connection with refugee flows. From then until the start of the Corona pandemic, there was a second phase with 81 notifications – and mostly, but not exclusively, related to refugee flows. A third phase started with the first reintroduction of border controls related to Corona (by France) on 10/31/2019. Since March 2020 until 17/1/2022 there were then 197 notifications of temporary reintroductions of border controls, almost exclusively with pandemic containment as the justification (European Commission 2022). This period abruptly ended on 24/2/2022, the day of the Russian invasion of

Ukraine. However, even before the nature of border controls changed characteristically over time.

The border closures at the beginning of the pandemic took place under a huge degree of uncertainty, hence it was a kind of political scare reaction. But it very soon turned out that that neither the actual benefits nor the costs have been sufficiently considered. Blocking cross-border mobility is costly and only possible and useful to a limited extent. The possibilities of border closures are limited by transnational interdependencies of labour markets and production processes. To the extent that cross-border movement of people is economically imperative, freedom of movement was therefore soon restored. In terms of pandemic policy, mobility barriers only make sense between regions with significantly different incidences. It took a relatively long time for this to become politically relevant knowledge for action, and it is repeatedly overlaid by the political logic of retorsion: entry restrictions as a reaction to entry restrictions that are seen as unfriendly acts by other states.

After the brief relapse into general border closures at the onset of the pandemic (spring, early summer 2020), the borders were soon permeable again for special groups of people such as truck drivers, harvest workers, caregivers, commuters. However, this did not apply to the much wider circles of the population, whose mobility was restricted for the purpose of pandemic control. Here, numerous, ever-changing restrictions took effect in the form of entry restrictions, accommodation bans for those entering the country and quarantine requirements for those returning. This looks as if the free movement of persons within the Schengen area is indeed under severe threat. But the restrictions within the Schengen area by no means brought mobility to a standstill. The time of the pandemic (2020, 2021) marks a back and forth of restrictions and liberalisations, with a tendency towards a return of free mobility of persons in the Schengen area.

A few figures to illustrate. Official Statistics Austria (Statistik Austria, 2022) reports a 52.7 per cent decline in foreign arrivals in Austria in 2020. That's a steep decline, but it's still 15.09 million cases, or 30.18 million crossings of Austrian borders. The number of foreign arrivals in Germany decreased from 39.56 million to 12.45 million from 2019 to 2020 (Statista, 2022). This is a reduction of about 2 thirds – a lot for accommodation providers etc., but still 24.9 million border crossings.

5. The interest in mobility

Where does pressure come from that works toward free personal mobility and socially safeguards the Schengen achievements? On 9/4/2020, the Commission issued a set of rather feeble recommendations "on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic to improve the clarity and predictability of measures restricting free movement in the European Union." (European Commission, 2020) The Commission and EU Parliament see

themselves as guardians of free movement, but they have very limited enforcement power. So what can protect the free movement of persons? Is the Schengen area socially underpinned beyond the state commitments in the Schengen agreement?

The main mobility drivers are tourists and the tourism industry. The former are very many, the latter are very influential in some member states. The mobility potential in Europe is huge. In 2016, about 400 million trips took place in Europe. About 40 per cent of Europeans travel is abroad, most of which (about 80 %) is within Europe. Based on such figures, Jan Delhey et al. conclude that Europe is the most densely integrated mobility network in the world. "One is by no means going too far out on a limb in stating that Europe is now almost fully integrated in terms of tourism, (and EU Europe anyway)." (Delhey et al., 2020, 154, own translation) It can be assumed that transnational mobility is now seen as a kind of customary right, and that restrictions on mobility will hardly be accepted in the long run. The rules of the Schengen code provide an institutional frame for free movement people in fact use. Hence the dense European mobility network can be seen as a use case of Rainer Lepsius' famous formula: "Institution building precedes awareness building." (Lepsius, 2013, 189) And this is exactly what works back. The expectations and practices of people generated by Schengen socially prop up the Schengen institution. As a result, European integration is not irreversibly but strongly secured by the "power of contact" (Deutschmann et al., 2018). The importance of that can also be seen in the fact that free travel is an important motive for vaccination.

From what has been said so far, one could conclude that the Corona pandemic has no long-term effects on the Schengen regime. Not so fast. It is quite certain that freedom of movement will be restored. However, two lasting consequences are, so to speak, hidden from view: First, an increased technical control potential, which has been triggered by the pandemic and can be activated at the internal borders if needed. And secondly, the further intensification of the internal/external difference of the Schengen area.

6. From general restrictions to selective borders

There is a fundamental difference between all mobility restrictions in the Schengen area (the normal exceptions, so to speak) before Corona and the mobility policy in the pandemic. In the normal cases, the aim is to prevent border crossings by certain groups of people ("dangerous persons"). Impeding mobility for everyone else is collateral damage. In contrast, the purpose of border controls at the beginning and in the peak of the pandemic was to generally create obstacles to mobility and reduce incentives for mobility in order to break chains of contagion. Both versions are about "selective borders" (Eigmüller & Vobruba, 2009, 497f.; Vobruba, 2012, 103f.; Mau et al., 2012): one is about not letting specific groups through, the other is about letting only specific groups through. In one case it is about free mobility and mobility barriers for a defined group, in the other case it is about mobility

restrictions for all with defined exceptions. The difference can be thought of as a kind of reversal of the burden of proof at the border and implicates two different logics of control: In the case of "normal exceptions", the authority must prove that individuals do not meet the conditions for crossing the border. In the pandemic, on the other hand, everyone is required to prove in principle that they meet the conditions for crossing the border. Although both versions fall under the Schengen Code's exception rules, they differ significantly in the actual enforcement of border controls: in the normal case, refusal to cross the border is the exception; in the pandemic case, unimpeded border crossing is the exception.

This distinction has an important consequence: in the normal exceptional cases, it can only be a matter of border controls; in the case of mobility policy in the pandemic, there are other instruments for restricting mobility besides border controls. First, there are to some extent digital substitutes for mobility (videoconferencing, etc.). A conference can be done by video, the vocal support of a soccer team cannot. Second, policy shifted from restrictions on mobility options to mobility motives. Accommodation bans and quarantine obligations did not make border crossings impossible but unattractive. In contrast, in the case of protest tourism this is almost impossible. Third, controls occurred not only at state borders but also within individual countries. Here are examples. Austria: exit from Wiener Neustadt only with negative test (Süddeutsche Zeitung, 9. 3. 2021), in principle controls at the border of areas with seven-day incidence of more than 400; Portugal: from 19. to 21. 6. 2021 people in Lisbon were allowed to leave only for valid reasons and as foreign tourists. Italy: Multiple restrictions on mobility according to different incidences in individual regions and different immunity status (vaccinated, tested, recovered) of travellers. Finally – and most important: During the pandemic, free mobility was linked to a corresponding, verifiable immunity status. The more people have this immunity status, the more normal border crossings become again; and the stronger the incentive becomes to automate the control of the immunity status for the purpose of rationalisation and convenience for border-crossing travellers.

This is where the near future is shaping up. With the duration of the pandemic, the general restrictions on mobility in the Schengen area increasingly reverted to normal exceptions. Almost. This means that the general permeability of borders is becoming the normal state again. Restrictions on mobility are becoming the exception for people with special characteristics – in this case: for people who cannot prove that they are not contagious. This is all the more likely because it involves entry controls – that is, controls on nationals of other states whose possible opposition is not to be feared. However, this presupposes that the immunity status can in principle be determined by everyone. This can be achieved approximately by targeted random sampling, but perfectly by means of biotechnical control systems that finely sort according to mobility-relevant criteria, are hardly noticeable to the majority, or are perceived as an administrative simplification for the majority of travellers. As long as the pandemic persists, at least latently, vaccination status is an

essential selectivity criterion. Thus, vaccination refusers cement the condition they deplore as "vaccination apartheid". The return to freedom of mobility in principle in the Schengen area goes hand in hand with the further development of "selective borders" at a technically advanced level: barely visible and with high resolution. The situation at the external border tends to develop in the same way as that at the internal borders, albeit with a much higher degree of closure.

7. An asymmetrical dynamic

There is always a dynamic built into the relationship between the internal and external borders of the European Union (Vobruba, 2007). If the constellation inside the EU/Schengen area changes, this has an immediate impact on the external borders. The dismantling of internal controls gives rise to strict control interests at the EU's external border. At the latest, the pandemic has brought a complementary insight: this dynamic operates asymmetrically. Openings on the inside lead to closures of the external border. By contrast, the reintroduction of border controls on the inside in no way reduces the closure on the outside. The Commission's statement on the reinforcement and further development of the Schengen system fits into this logic. At its heart are proposals for controls at the EU's external border. "Since anyone crossing the external borders – by air, land or sea – can travel freely to and within the other Member States, Schengen's existence presupposes a high degree of trust in a robust management of the external borders." (European Commission, 2021, 4) This is in the perspective of combating so-called irregular migration, focuses on information technology upgrades, in particular focusing on Eurodac, the EU's asylum fingerprint database. At first glance, this has nothing to do with the pandemic. Similarly, the importance of cooperation with the outer periphery of the EU – in the sense of the European Neighbourhood Policy as a pre-displaced migration defense (Vobruba, 2012, 65ff) – is emphasised. Measures in the interior are aligned in the same way. The Advance Passenger Information System (APIS) is to be extended to intra-Schengen flights. "This change would extend the toolbox of compensatory measures available to the Member States allowing law enforcement authorities to enable a risk-based data-driven approach within the Schengen area." (European Commission 2021, 13) This may also include infection risks.

The Commission's 2021 paper either uses the COVID-19 pandemic only as a kind of frame narrative to continue EU border policy at a technologically advanced level. Or COVID-19 is the white elephant in the border policy idea space: as a motive for the technical upgrading of security at the EU external border and in the Schengen area itself, contagion is not mentioned, but it is meant. Even more: Pandemic policy registration and certification of immunity status (vaccination register, vaccination passport, etc.) contribute to a development push of control technologies.

There are already major differences in the mobility value of passports. EU passports are among the best in the world (ranked 3 to 16 out of 110). A German passport without a visa entitles the holder to enter 191 countries, a Croatian passport to enter 173 countries. As a contrast, an Afghan passport allows entry into 26 countries without a visa (Henley Passport Index, 2021). The disparity in immunity levels worldwide increases the attractiveness of individual destination regions on the one hand, and further lowers the mobility value of many countries' passports on the other. At the same time, the vaccination backlog outside the Northern Hemisphere becomes a cynical but effective legitimisation for EU border closures to the outside world.

8. Two conclusions

One conclusion concerns sociological theory building: borders are an essential element of the spatial reference of social processes; their sociological understanding is therefore crucial for sociological theory. Experiences with mobility politics in the face of the Corona crisis are relevant input for this. Generally speaking, the topic of border sociology has developed from border closure/opening to selective permeability of borders. For a while, experiences of border dismantling dominated the discourse, but the more clearly the sociological perspective on borders became linked to migration, the more border closures ("new walls") became the focus of sociological attention. In contrast, the issue of the selectivity of borders was initially discussed only in passing (Eigmüller & Vobruba, 2009; Mau et al., 2012). The Corona crisis is a reason to further develop this line of debate and research.

(Re)conceiving of borders simply as walls, fences, is based on a doubly truncated view: firstly, it focuses only on cross-border movement of people and thus ignores other cross-border processes that are much more difficult or even impossible to control. And secondly, this view only focuses on those persons who are (supposed to be) actually stopped. Now, it is true that there are increasingly more borders as walls, but they do not affect all cross-border processes, nor all groups of people interested in crossing borders (Mau, 2021). The selectivity of borders consists in the fact that walls have doors which simply can open for some people after being checked for their desirability (health status OK, politically unobjectionable, highly qualified, sufficiently wealthy and willing to invest). But the rules of selectivity are becoming increasingly easy to change and adapt according to personal characteristics. The refinement of the concept of selectivity is therefore further for the sociology of boundaries. After all, this is indispensable to understand the increasing inequality of mobility and life chances that is generated by selective borders. This multidimensional inequality goes so far that some fail at the border while others hardly notice it. The crucial consequence of the mobility policy in the course of the pandemic policy could be that it triggers technical and organisational upgrades of the borders within and around the Schengen area, which make the closing

function of borders activatable at any time (Schengen Information System). Similar Corona-related developments are also expected in other parts of the world (for the Australian case see Coyne, 2022).

The other conclusion is practical-political: The fact that the challenges of the pandemic were largely overcome without problems within the Schengen area cannot conceal the fact that the Schengen system urgently needs to be further developed. For the EU remains entangled in global mobility problems beyond the pandemic. Fortifying the EU's external borders and increasing the staff of the border protection agency FRONTEX is no solution. The misery of the people at the borders between Belarus and Poland, between Turkey and Greece and elsewhere shows that the European Union's external border policy is not up to date. Programmatically, geopolitically and technically and organisationally, there are considerable deficits. Programmatically, it must finally be clarified who can expect to be accepted into the EU and under what conditions beyond the right of asylum. Geopolitically, fair agreements with countries on the outer periphery of Europe are needed to absorb migration flows. And from a technical and organisational point of view, there is a lack of instruments to enforce the admission criteria in such a way that the opportunities and limits of migration become individually predictable. Such deficits affect the political and moral substance of the European Union. The Russian invasion of Ukraine may turn out to be an opportunity to change this.

References

Coyne, J. (2022). The borders will reopen – but don't expect the floodgates to follow. *The Strategist, ASPI Australian Strategic Policy Institute (9)*2. Retrieved from https://www.aspistrategist.org.au/the-borders-will-reopen-but-dont-expect-the-floodgates-to-follow/

Delhey, J., Deutschmann, E., Verbalyte, M. & Aplowski, A. (2020). *Netzwerk Europa. Wie ein Kontinent durch Mobilität und Kommunikation zusammenwächst*. Wiesbaden. Springer VS. 154.

Deutschmann, E., Delhey, J., Verbalyte, M. & Aplowski, A. (2018). The power of contact: Europe as a network of transnational attachment. *European Journal of Political Research. (57)*4. 963–988.

Eigmüller, M. (2007). *Grenzsicherungspolitik. Funktion und Wirkung der europäischen Außengrenze*. Wiesbaden: Springer VS.

Eigmüller, M. & Vobruba, G. (2009). Selektive Grenzöffnung im Rahmen der Europäischen Nachbarschaftspolitik. In: M.H.W. Möllers, R.C. Van Ooyen (Eds.), *Jahrbuch öffentliche Sicherheit* 2008/2009. Frankfurt a. M.: Verlag für Polizeiwissenschaft. 493–503.

European Commission (2020). *Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic*. Brussels, COM(2020) 499 final.

European Commission (2021). *A strategy towards a fully functioning and resilient Schengen area*. Brussels, 2.6.2021. COM(2021) 277 final. 1.

European Commission. Migration and Home Affairs (2022). *Temporary Reintroduction of Border Control*. Retrieved from https://ec.europa.eu/home-affairs/system/files/2022-01/Full%20list%20of%20notifications%2014012022_en.pdf

Heinemann, T. & Weiß, M.G. (2016). Biotechnologische Grenzregime. In: T. Heinemann, M.G. Weiß (Eds.), *An der Grenze. Die biotechnologische Überwachung von Migration*. Frankfurt a. M., New York: Campus.

Henley Passport Index (2021). Retrieved from https://www.google.com/search?client=firefox-b-d&q=The+Henley+Passport+Index+2021

Hilpert, I. (2020). *Die doppelt codierte Grenze und der Nationalstaat in Europa. Eine Untersuchung am Beispiel der Republik Italien*. Wiesbaden : Springer VS.

Krastev, I. (2020). *Ist heute schon morgen? Wie die Pandemie Europa verändert*. Berlin: Ullstein.

Lepsius, M.R. (2013). Die Europäische Union. Ökonomisch-politische Integration und kulturelle Pluralität. In: M. R. Lepsius, *I(nstitutionalisierung politischen Handelns*. Wiesbaden: Springer VS. 185–203.

Mau, S., Brabandt, H., Laube, L. & Roos, C. (2012). *Liberal States and the Freedom of Movement. Selective Borders, Unequal Mobility*. Hundmills, Basingstoke: Palgrave.

Mau, S. (2021). *Sortiermaschinen. Die Neuerfindung der Grenze im 21. Jahrhundert.* München: C. H. Beck.

Müller, A. (2014). Governing Mobility Beyond the State. Centre, Periphery and the EU's External Borders. Hundmills, Basingstoke: Palgrave.

Schengen Information System (n.d.). Retrieved from https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-information-system_de

Statista (2022). Ankünfte von in- und ausländischen Gästen in Deutschland bis 2020. Retrieved from https://de.statista.com/statistik/daten/studie/946241/umfrage/ankuenfte-von-in-und-auslaendischen-gaesten-in-deutschland/#statisticContainer

Statistik Austria (2022). Ankünfte, Nächtigungen. Retrieved from https://www.statistik.at/web_de/statistiken/wirtschaft/tourismus/beherbergung/ankuenfte_naechtigungen/index.html

Vobruba, G. (2007). *Die Dynamik Europas*. Wiesbaden: Springer VS.

Vobruba, G. (2012). *Der postnationale Raum*. Weinheim, Basel: Beltz Juventa.

Vobruba, G. (2016). Borders Within the Dynamism of Europe. European Migration Regimes Between Exclusion and Inclusion. In: D.L. Leal, N.P. Rodríguez (Eds.), *Migration in an Era of Restriction and Recession*. Springer International Publishing Switzerland. 165–174.

Vobruba, G. (2020). Einfachdenken in der komplexen Gesellschaft. Das Volk, die repräsentative Demokratie und der Populismus. In: M. Endreß, S. Nissen, G. Vobruba, *Aktualität der Demokratie*. Weinheim, Basel: Beltz Juventa. 145ff.

Wang, Zhongyuan (2021). From Crisis to Nationalism? The Conditioned Effects of the COVID-19 Crisis on Neo-nationalism in Europe In: *Chinese Political Science Review 6*, 20 – 39. doi: 10.1007/s41111–020–00169–8