

## EDITORIAL

# Editorial Comments: COVID-19 – EU Citizenship and the Right to Free Movement in a Public Health Crisis

## Foreword to Vol. 9 (2021) of the Hungarian Yearbook of International Law and European Law

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### 1. Introduction

It is still a prevailing view in legal literature,<sup>1</sup> that the legal instrument of Union citizenship is in its “regressive phase”.<sup>2</sup> So far, the *Zambrano* doctrine,<sup>3</sup> developed by the CJEU just a decade ago to ensure respect for the substance of Union citizenship, has played merely a marginal role in the life of the EU citizens.<sup>4</sup> This statement is particularly true when considered from the perspective of Article 21 TFEU guaranteeing the primary right of free movement.<sup>5</sup> However, the CJEU’s

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1 On future challenges of the institution of EU citizenship see Daniel Thym (ed.), *Questioning EU Citizenship*, Hart Publishing, Oxford, 2017; Nathan Cambien *et al.* (eds.), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges*, Brill, Nijhoff, Leiden, 2020.

2 Stephen Coutts, ‘The Absence of Integration and the Responsibilisation of Union Citizenship’, *European Papers*, Vol. 3, Issue 2, 2018, p. 761.

3 The CJEU declared in connection with the status of EU citizenship in *Zambrano* that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the right conferred by virtue of their status as citizens of the Union.” Judgment of 8 March 2011, *Case C-34/09, Ruiz Zambrano*, ECLI:EU:C:2011:124, para. 42.

4 It is mostly due to the fact that the doctrine based on Article 20 TFEU may be applied only in extraordinary cases.

5 While van Eijken acknowledges the narrow scope of the doctrine but highlights its role in promoting certain fundamental rights, such as respect for family life and children’s rights, Van der Brink questions its *raison d’être*. He concludes as the *Zambrano* doctrine is also rooted in free movement, the differentiation between legal status enshrined in Articles 20 and 21 TFEU is artificial, moreover, it results in conceptual confusion. See Hanneke van Eijken, ‘Connecting the Dots Backwards, What Did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?’, *European Journal of Migration and Law*, Vol. 23, Issue 1, 2021, p. 67; Martijn van den Brink, ‘Is It Time to Abolish the Substance of EU Citizenship Rights Test?’, *European Journal of Migration and Law*, Vol. 23, Issue 1, 2021, pp. 13-28.

case-law, which shows sensitivity to Member States fears' of social tourism,<sup>6</sup> and significantly curtails the right to free movement of economically inactive citizens,<sup>7</sup> pushes more and more Union citizens to struggle with the sense of being expelled from the 'elite club' of those enjoying the advantages of free movement.<sup>8</sup>

This situation is exacerbated by the global public health crisis triggered by the COVID-19 pandemic, which is doing unprecedented harm to European mobility. The Member States' travel restrictions / bans and the reintroduction of internal border controls to control the spread of the pandemic have a direct effect on the personal life of thousands of Union citizens and their family members besides the fact that they may also lead to economic collapse and threaten the operation of the internal market.<sup>9</sup> As a result, at the time of the writing of this Editorial (May 2021), the question is not who benefits from free movement, but rather, who is affected by the limitation of this right and to what extent.

The first, rather hectic reactions of the Member States to the crisis did not only restrict individual rights, but also seemed to shake belief in the European project. The lack of delivering quick and efficient EU response made sceptic voices grow stronger: "Europe may not be as united as people would like to believe."<sup>10</sup> Apparently, it cannot be considered otherwise as the rise of Euroscepticism. What else could underlie the fact that Member States are introducing measures restricting the export of individual protective equipment and later certain drugs and drug substances with the aim of mitigating the pressure on their respective health care systems, than the lack of solidarity.<sup>11</sup> And as if this were not enough,

6 The exact reasons for the austerity measures are still disputable. Representatives of legal literature cite here the crisis process having inflicted Europe over the last one and half decades, the prolonged economic crisis of 2008, the global migration crisis, and Brexit. They also attach high importance to some internal factors, such as the restoration of federal bargaining processes related to the institution of EU citizenship.

7 This restrictive approach was realized mostly in connection with the social benefits of EU citizens and the practice of expelling them from the territory of the host country.

8 According to Davies, the members of the elite club of those enjoying the right of free movement are the people who are brave enough to improve their life by their own actions. See Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', *European Papers*, Vol. 4, Issue 3, 2019, p. 678.

9 "The spread of the virus is causing disruption of global supply chains, volatility in financial markets, consumer demand shocks and negative impact in key sectors like travel and tourism." Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, *Coordinated Economic Response to the COVID-19 Outbreak*, COM(2020) 112 final.

10 Saila Heinikoski, 'COVID-19 Bends the Rules on Border Controls – Yet Another Crisis Undermining the Schengen Acquis?' *FIIA Briefing Paper*, Issue 281, April 2020, p. 7.

11 Restrictive measures greatly varied: while export of safety glasses, medical masks or FFP2/FFP3 masks required merely a prior notification in Poland, there was an export ban on heart monitors. Likewise, Germany introduced a total export ban on protective gear, while Hungary banned exports of a pharma raw material called hidroxi chloroquine sulfat. On compliance of export bans with EU law see Tomislav Sokol, 'Public Health Emergencies and Export Restrictions: Solidarity and A Common Approach or Disintegration of the Internal Market?', *Common Market Law Review*, Vol. 57, Issue 6, 2020, pp. 1819-1842.

governments convey a symbolic message to their citizens by imposing travel bans: We have taken the fight to coronavirus, we are protecting our citizens.”

However, it would be premature to conclude that the quick and drastic Member State reactions should be regarded as a sign of dissatisfaction with the EU or, *ad absurdum*, a violation of the principle of loyalty, stigmatizing the EU as an IGO with an inability to react. It is worth bearing in mind that the EU is a multi-level system with overlapping competences of the Member States and the EU, in which public health issues, including crises, still belong under Member State competences. In the course of an unprecedented public health crisis, the excessive use of political symbolism does not come as a surprise,<sup>12</sup> for citizens, in these critical situations expect first and foremost that the national governments provide them with protection.<sup>13</sup>

The proper (and lawful) EU conduct is to take a side role and let the Member State governments use their power to manage public health emergencies to fulfil their duty of ‘serving the public good’. In this respect, one may conclude that the COVID-19 pandemic has managed to highlight interdependence and reciprocity in a completely new field: Member States are required to exercise their exclusive powers concerning public health while still abiding by EU rules. In the same way, the EU is also required to adjust to the Member States’ exercise of powers concerning public health matters. According to Coutts, the above must be carried out under Commission surveillance, monitoring available exemptions and safeguards, which the author refers to as ‘managed flexibility’. However, Coutts’ way of thinking must be slightly adjusted, for in this case, it is not only one or few Member States’ public health situation that is at stake, but that of all Member States.

Nevertheless, there is no doubt that the Member States’ restrictions on free movement described below are well-founded from the point of view of both public international law and European law. As to how they should be put into practice: that is another issue. Still, it is the preferential role of free movement as a part of integration that requires a deeper examination of controversial measures whether to ascertain whether these are in compliance with EU legal principles. Among the elements to be reviewed are proportionality and the prohibition on discrimination. Due to the limitations of the Editorial, this article focuses on travel restrictions and bans and the temporary reintroduction of internal border controls. It concentrates in particular on Member States’

12 On symbolic power of borders in crisis situation *see* Daniel Thym & Jonas Bornemann, ‘Schengen and Free Movement Law During the First Phase of the COVID-19 Pandemic: Of Symbolism, Law and Politics’, *European Papers*, Vol. 5, Issue 3, 2020, p. 1144. The authors take the example of President Donald Trump’s campaign on constructing a border wall between Mexico and the USA. President Joe Biden, the successor of former President Donald Trump, revoked the declaration of emergency situation right on the first day of his presidency, which allowed for a restructuring defense funds to finance the wall on the Mexican border.

13 It is hardly a coincidence that even the WHO refrained from raising its voice against the austerity measures.

measures introduced concerning one another, without addressing measures regarding the closing of the EU's external borders.<sup>14</sup>

## 2. National Restrictions to Prevent the Spread of the Pandemic, with Special Regard to Hungarian Legislation

Early 2020, COVID-19 spread quickly throughout Europe. Italy was the first Member State to announce a high concentration of coronavirus cases, followed by a growing number of states. By March 2020, coronavirus could be detected in every Member State. The WHO declared a pandemic, albeit after some hesitation.<sup>15</sup>

Member States gave a surprisingly quick response, taking unilateral restrictive measures affecting the operation of the internal market in an unprecedented way. In order to contain the spread of this contagious illness, most Member States<sup>16</sup> reintroduced border controls for air and road transport.<sup>17</sup> Simultaneously, Member States launched travel bans and restrictions for both entry and exit travels.<sup>18</sup> These restrictions and prohibitions were adopted in various legal forms and with different content, but generally it can be said that entry travel restrictions did not apply to own citizens<sup>19</sup> and non-citizens residing in the Member State.

*Individual entry travel restrictions* predominantly applied to foreign citizens who had COVID-19 symptoms, and the medical check / COVID-19 test showed a positive result upon entry. Currently, there is an individual entry travel restriction in force under the existing Hungarian law.<sup>20</sup> Accordingly, a person may not enter Hungary if the medical check results in a suspicion of contagion. Meanwhile, in certain cases, some Member States opted for introducing general prohibition measures that go beyond individual safety precautions against

14 On closing external borders see Luisa Marin, "The COVID-19 Crisis and the Closure of External Borders: Another Stress-test for the Challenging Construction of Solidarity Within the EU?", *European Papers*, Vol. 5, 2020, Issue 2, pp. 1071-1086.

15 The WHO was harshly criticized for underestimating the virulence of COVID-19 and hereby contributing to the accumulation of global delay in imposing safety precautions.

16 See at [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en).

17 By the second half of March 2020, 16 states had reintroduced border controls. The first Schengen country to take this step by specifically referring to COVID-19, was Austria at its common border with Italy, extending it out to its other borders as well.

18 The principle of free movement does not only ensure the right to entry, but also the exit right which has been supported several times in the legal practice of the CJEU. See e.g. Judgment of 10 July 2008, Case C-33/07, *Jipa*, ECLI:EU:C:2008:396; Judgment of 17 November 2011, *Case C-434/10, Aladzhev*, ECLI:EU:C:2011:750; Judgment of 17 November 2011, *Case C-430/10, Gaydarov*, ECLI:EU:C:2011:749.

19 This consideration is completely understandable in view of the fact that the constitutions of the European States expressly stipulate that their own citizens are entitled to return home from abroad at any time. See e.g. Article XIV(2) of the Fundamental Law of Hungary: "Hungarian nationals [...] may return from abroad at any time."

20 Government Decree No. 408/2020. (VIII. 30.) on travel restrictions during pandemic times, which entered into force on 1 September 2020.

entrants from high-risk countries. An example would be the rules in force in Hungary since March 2020, which precluded the entry of citizens arriving from Italy, that is, the center of the pandemic in Europe. In practice, this meant the suspension of passenger transport: no train, bus or civil air flight transporting citizens internationally was allowed to enter the State, with the exception of transiting vehicles.<sup>21</sup> The Romanian rules bear resemblance to the legislation described above. Here, the mass return of Romanian citizens was curbed by the suspension of air transport and later train transport between Italy and Romania, forcing Hungary to open a humanitarian corridor.<sup>22</sup> Lastly, Sweden launched a similar prohibition against entrants from Norway upon the emergence of the new UK strain.<sup>23</sup>

It is essential to distinguish between complete entry prohibition and the case when the Member States concerned formally provide for an entry prohibition, but the *high number of exceptions* imply entry restrictions (in terms of substance). The Hungarian rules in force can be mentioned here as an example, according to which “Non-Hungarian citizens are barred from entering the State, unless otherwise stipulated by laws or government decrees.”<sup>24</sup> Upon request, official exemption may be granted on the condition that the applicant substantiates that the reason of entry falls under one of the listed exemptions.

In most cases, *the Member States made rules on merely entry restrictions* (irrespective of its official denomination). Under these rules, with the exception of their own citizens and those residing there, EU citizens from other Member States are allowed to enter their territory only if the reason for the entry is listed as an exemption in the provision restricting entry. Engagement in business-economic related activity is widely regarded as a compelling reason in most Member States, yet there was no complete agreement between the Member States even on such a basic issue. Denmark refrained banned entry in general without regard to business-economic related activities for a long time. Finland allowed for entry on work or business reasons from the onset of the crisis in respect of those whose activity is essential to ensure supply and the functioning of society. Germany followed a similar route; the State turned back thousands of EU entrants at its border shared with Tirol and the Czech Republic once the UK strain had appeared. The official reasoning of the German Interior Ministry is

- 21 Government Decree No. 41/2020. (III. 11.) on the measures to be taken during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, for the elimination of its consequences, and for the protection of the health and lives of Hungarian citizens.
- 22 On effect of Romanian regulations on free movement imposed in connection with COVID-19 see Sandra Mantu, ‘EU Citizenship, Free Movement, and Covid-19 in Romania’, *Frontiers in Human Dynamics*, 2:594987, December 2020, at [www.frontiersin.org/articles/10.3389/fhumd.2020.594987/full](http://www.frontiersin.org/articles/10.3389/fhumd.2020.594987/full).
- 23 Concerns over the British coronavirus variant prompted a lot of countries to enact entry bans on those arriving from the UK. Thus, many countries suspended air travel from this state. However, considering the fact that the UK has not been a member of the EU since 1 January 2021, discussing the said regulation here is unnecessary.
- 24 Government Decree No. 408/2020. (VIII. 30.), Section 5.

that only essential workers were entitled to enter the State.<sup>25</sup> In the Member States' practice, exemptions to entry restrictions include study obligations based on students' status, important family or private reasons, *e.g.* marriage, baptism, funeral ceremony, or medical treatment, or exceptionally, the aversion of imminent damage to property.<sup>26</sup>

Measures rendering entry contingent on prior or posterior conditions *can also be regarded as travel restrictions to prevent further spread of the pandemic*.<sup>27</sup> Most Member States require a negative (PCR or antigen) COVID-19 test done within a maximum of 72 hours<sup>28</sup> before the commencement of the travel from those arriving from high-risk regions. This requirement is complemented by a compulsory quarantine following entry,<sup>29</sup> mostly in the form of domestic quarantine.<sup>30</sup> The period of compulsory quarantine was predominantly stipulated as 14 days during the first wave and 10 days during the second and third wave. Most States allow for a substitution of the quarantine with one or typically two negative tests (two-test strategy), the conditions of which diverge.<sup>31</sup> In addition, several Member States introduced a 'passenger locator form' for entrants, mostly arriving from high-risk regions. This form focuses on information on the method of travel (flight, car) and areas the entrants have visited in the two weeks preceding entry.<sup>32</sup>

Last but not least, it is also worth mentioning national restrictions in the Member States generally referred to as '*lockdown*'. This expression covers any internal restriction within the Member State's boundaries that is not essential. Examples include general curfew or domestic regional travel restrictions. Although these measures played a significant role in curbing the spread of the virus, due to their internal, non-essential nature their relevance under international or EU law is marginal.

25 See at [www.euronews.com/2021/02/16/eu-concerned-as-germany-partially-closes-border-with-austria-and-czech-republic](http://www.euronews.com/2021/02/16/eu-concerned-as-germany-partially-closes-border-with-austria-and-czech-republic).

26 Entry bans implicitly apply to transit travel, which is allowed, subject to strict conditions in most Member States. This option is normally available for a compelling reason, without stop in case of road travel, without leaving the transit zone in case of air travel, and always within a set time limit. The Member States normally provide 6-12 hours for crossing their territory.

27 The scope of measure generally depends on whether the entrant arrives from a low or high-risk area from pandemic point of view. Currently, the States uniformly apply the ECDC color ranking in contrast with the former routine when it was different country by country, furthermore, some States like Cyprus used a letter code. See at [www.schengenvisa.info.com/news/cyprus-introduces-new-categorization-of-entry-restrictions/](http://www.schengenvisa.info.com/news/cyprus-introduces-new-categorization-of-entry-restrictions/).

28 It is maximum 24 or 48 hours in some Member States.

29 Compulsory quarantine is applied by Austria, Belgium, Czech Republic, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Romania, Slovakia and Slovenia.

30 At the same time, Denmark was one of the few Member States that did not apply quarantine measures, self-quarantine was only a recommendation made by health care authorities. In other countries, for example in Finland, quarantine was obligatory but without official control.

31 Thus, exemption from quarantine is granted in Hungary if the person who is to undertake quarantine presents two negative PCR tests within 5 days following entry into the country's territory, with 48 hours difference.

32 Belgium, Cyprus, Germany, Greece, Malta, Romania, Spain and Slovakia.



### 3. Legal Assessment of Member States' Actions in Terms of EU Law

The EU is founded on open borders and free movement guaranteed by the Schengen System on the one hand, and, on the other hand, by the legal status of EU citizenship and concomitant rights of free movement. Pandemic-related safety precautions affected every area in a radical way. Meanwhile, some provisions of EU law (even if within limits) enabled the Member States to reintroduce temporary border controls and to put entry bans and restrictions into place. In the following, we will discuss their compliance with the principles of EU law.<sup>33</sup>

#### 3.1. Measures of the Member States to Reintroduce Border Controls

First and foremost, it is essential to distinguish between Member State actions to reintroduce border controls and travel bans / restrictions launched for the first time in EU history. While the former measures may cause some inconveniences for travelers but do not curb mobility between the Member States *per se* (they may merely make it more burdensome in practice), travel bans, and restrictions completely exclude or at least restrict travel.

Under the *Schengen Borders Code*,<sup>34</sup> Member States are entitled to temporarily reintroduce internal border controls in case of a significant danger to public policy or internal security.<sup>35</sup> Article 25 of the Code expressly provides for a reintroduction of border controls in case of foreseeable events. By contrast, Article 28 is applicable for unexpected, that is, unforeseeable events, where the imminent threat requires prompt action from the Member States. Thus, the two provisions complement one another and involve different procedural rules. Article 25 requires the Commission's prior written notification of the reintroduction of internal border controls, whereas Article 28 stipulates that notification shall take place simultaneously with the action. These actions may be extended for 6 months in case of foreseeable events,<sup>36</sup> and for a maximum of 2 months when introducing immediate action. Respect for time limits, the unique nature of the reintroduction of controls and compliance with the principle of proportionality<sup>37</sup> ensure lawfulness of the action. At least, in an ideal case.

During the first wave of the pandemic, altogether 17 Schengen States sent notifications regarding the reintroduction of border controls. Initially, these

33 Thym & Bornemann 2020, p. 1146.

34 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

35 The Schengen Borders Code provides for the reintroduction of border control in three cases. The specific procedure enshrined in Article 29 does not need to be closely analyzed as this applies to cases when the overall functioning of the area without internal border control becomes jeopardized due to persistent and serious deficiencies related to external border control.

36 As the main rule, the border control can be reintroduced for a maximum 30 days, or for the expected duration of the serious threat if it exceeds 30 days. If needed, this period can be extended by a further 30 days, however, it cannot exceed 6 months in total.

37 The scope and duration of the temporary reintroduction of border control shall not exceed what is strictly necessary to respond to the serious threat.

States referred to Article 28 regulating actions under unexpected circumstances.<sup>38</sup> Next, they invoked Article 25 allowing for the maximum 6 months ban after the expiry of the 2-month period. In 6 States, however, the formerly introduced border control measure was extended. Austria, Denmark, France, Germany, Norway and Sweden have maintained border controls since the commencement of the migration crisis with reference to the terror threat or danger provoked by the secondary movement of illegal migrants.<sup>39</sup>

The legitimacy of the Schengen legal order can, however, be easily undermined by shifting from one legal basis to another<sup>40</sup> for the reintroduction of border controls and ignoring the maximum time periods, *ad absurdum* the lapse of time for exercising border control.<sup>41</sup> This is particularly true as EU lawmakers<sup>42</sup> have failed to make a decision on the amendment of the Commission proposal on extending the time limit to temporarily reintroduce border controls.<sup>43</sup> As Thym and Bornemann put it, the Member States keep treating border control as their ‘*quasi* sovereign domain’ regardless of the fact whether their actions are in line with the Code or not.<sup>44</sup> Despite the fact that the European Parliament expressed its concern about the Member State actions described above several times,<sup>45</sup> the

38 With the exception of Denmark, Finland, and France that referred to Article 25 and the clause of foreseeable event, the former did so exclusively and purely as a means to curb the pandemic, whereas the latter two relied on a new justification ground for the formerly introduced measures.

39 See at [www.infomigrants.net/en/post/20754/border-checks-in-eu-countries-challenge-schengen-agreement](http://www.infomigrants.net/en/post/20754/border-checks-in-eu-countries-challenge-schengen-agreement).

40 According to Montaldo, the change in justification is highly problematic as the justifying reasons do not meet necessity and proportionality requirements in many cases. To give an example, although the number of migrants arriving in EU territory has been dramatically declining since 2016, the Member States repetitively and generally refer to a threat posed by secondary migration movement. See Stefano Montaldo, ‘The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste’, *European Papers*, Vol 5, Issue 1, 2020, p. 528.

41 “These serious threats compelled some Member States to prolong reintroduced border control several times, sometimes until the exhaustion of the current legal time frames.” See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders. COM(2017) 571 final.

42 As the Member States were unable to broker an agreement about the 2017 proposal, it has been suggested that a new Commission proposal shall be discussed as part of the Schengen strategy. See at [www.europarl.europa.eu/RegData/etudes/BRIE/2021/662622/EPRS\\_BRI\(2021\)662622\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2021/662622/EPRS_BRI(2021)662622_EN.pdf).

43 The cited Commission proposal would extend the maximum time frame of border controls from 6 months to 1 year in the case of foreseeable events. Moreover, to make the length of renewable periods more proportionate with the maximum time frame of border controls, the latter ones would be extended from 30 days to 6 months.

44 Thym and Bornemann 2020, p. 1148.

45 In May 2018, the European Parliament called upon the Commission to launch an infringement procedure, however, the Commission seems not to have attached importance to the infringement of the Code, in spite of the fact that the Commission encourages the Member States to lift internal border controls. See European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, at [www.europarl.europa.eu/doceo/document/TA-8-2018-0228\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0228_EN.html).



Commission failed to launch infringement procedures<sup>46</sup> and call the Member States to lift permanent border control.<sup>47</sup> Furthermore, it did not even request on-the-spot inspections or hear relevant Member State authorities (notwithstanding the fact that the Schengen Evaluation Mechanism expressly provides for this possibility).

The measures introduced doubtlessly proved to be a justifiable reaction to the danger to public policy and internal security triggered by the COVID-19 pandemic. This cannot be called into question even by the fact that the Code itself does not explicitly refer to public health threat as a reason for reintroducing border control. The wide interpretation of public health in this particular case includes serious public health risk. It is underlined *expressis verbis* by the Commission Guidelines of March 2020 on “Guidelines for border management measures to protect public health and ensure the availability of goods and essential service” 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>48</sup> Furthermore, the high threshold set by EU jurisdiction regarding public policy and public security exceptions<sup>49</sup> seems to be applied in light of the serious social and economic consequences of the COVID-19 pandemic.<sup>50</sup>

### 3.2. Measures Hindering the Free Movement of EU Citizens

The right to free movement, as the crux of economic integration,<sup>51</sup> has become a constitutional right after being expanded to EU citizens and enshrined in the EU Charter of Fundamental Rights.<sup>52</sup> Its limitation<sup>53</sup> requires judicial review in every single case. On the other hand, EU law counterbalances, as Király put it, rules which materially affect the sovereignty of the Member States’ right to make and

46 Implementation of the Schengen Borders Code in this specific field, parallel to the Commission’s general competence, is regulated by a *lex specialis*, that is, a regulation on the Schengen Evaluation Mechanism. See Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

47 Since the entry into force of the Schengen Evaluation and Monitoring Mechanism in 2015, a single infringement procedure was launched against Estonia, related to the Schengen rules on external borders. See at [https://ec.europa.eu/commission/presscorner/detail/hu/inf\\_20\\_1687](https://ec.europa.eu/commission/presscorner/detail/hu/inf_20_1687).

48 See COVID-19: Guidelines for border management measures to protect health and ensure the availability of goods and essential services, COM(2020) 1753 final, especially para. 18.

49 In the case-law of the CJEU public order allows for restrictions against persons directly and seriously threatening one of the society’s fundamental values.

50 Less serious epidemics may trigger travel restrictions only on individuals.

51 The development of the facet of free movement of persons has remained unbroken for the past 60 years, a stable edifice has gradually been built upon the axis of equal treatment. See e.g. Éva Gellérné Lukács, ‘From Equal Treatment to Positive Actions Through Non-Discriminative Obstacles – Regarding the Free Movement of Persons’, *ELTE Law Journal*, 2018/2, pp. 101-125.

52 See Article 45 of the Charter.

53 The Treaties have contained provisions on the Member States’ right to restrict free movement based on public order, public security and public health since the very beginning. These provisions cover every restriction on EU citizens residing in the Member States including entry and exit bans, the refusal to renew/issue residence permits and the adoption of expulsion decisions against them.

apply laws by offering a generous set of exceptions.<sup>54</sup> One of the exceptions enshrined in primary law is the justification of public health, which also appears in secondary law as part of the Free Movement Directive.<sup>55</sup> Article 29 of the directive explicitly empowers the Member States to take measures that restrict free movement if the protection of public health is at stake.

It is beyond doubt that COVID-19 can definitely be regarded as a ‘disease with epidemic potential’ that can justify restrictions on free movement. It is also obvious that public health, as a derogation from the economic freedom, must be interpreted strictly. However, the circumstances that can justify reference to public health can vary from one State to another. Thus, in this respect, the discretionary power of the Member States must be recognized or admitted.<sup>56</sup> Evidently, the question can be posed whether Article 29 provides for the introduction of public health restrictions with general effect. In other words, does it allow for restrictions not based on individual assessment, as opposed to individual threats to public policy and public security. I am convinced that the answer is in the affirmative: *in lack of opposing, expressly directive-type provisions, no individual assessment can be required in case of a public health threat.*<sup>57</sup> On the other hand, even if we accept that generalized restrictions can be justified on public health grounds, and the Member States have wide discretion in terms of how they may react to crisis, it is inevitable to examine their compliance with EU law.

When examining the *legality of travel bans and restrictions*, the concordance between the measures taken by the Member State must be assessed, that is, the internal coherence of the relevant policy of the Member State.<sup>58</sup> If there is no coherence, there are solid grounds to suspect arbitrary discrimination and the disproportionality of the measures. Lang questions the proportionality of measures due to concerns about opening humanitarian corridors from the point

54 Miklós Király, *A diszkrimináció tilalma az Európai Bíróság joggyakorlatában*, Akadémiai, Budapest, 1998, p. 208.

55 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.

56 See Judgment of 4 December 1974, *Case C-41/74, Van Duyn*, ECLI:EU:C:1974:133, para. 18.

57 This viewpoint is supported by the latest CJEU case-law which does not require the examination of the individual circumstances in every case regarding equal treatment in connection with the Member States’ restriction on social benefits based on the principle of free movement. Thus, in *Alimanovic* and *Garcia Nieto* regarding social provision of economically inactive citizens, the CJEU found that a Member State is entitled to refuse the provision applied for automatically in the first 3 months of the residence and during the period of job seeking exceeding three months, even if no individual examination is carried out, as the Free Movement Directive per se takes into account the special circumstances of the claimant. See Strumia Francesca, ‘European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative’, in Thym (ed.) 2017, pp. 149-168.

58 Thym & Bornemann 2020, p. 1168.

of view of public health, in respect of their suitability and necessity.<sup>59</sup> As far as Hungary is concerned, the issue of compliance with EU law can be raised in connection with opening humanitarian corridors to facilitate the return of Romanian and Bulgarian migrant workers.<sup>60</sup> Since the Hungarian authorities permitted the return of Romanian and Bulgarian citizens merely on one single occasion, moreover by transfer at night, *via* Hungary, one can conclude that this measure completely complies with the generally restrictive set of rules related to COVID-19.<sup>61</sup>

A similar question may be raised in connection with ‘*travel bubbles*’, which allows Member States to open their borders for travelers from one given country, while their bans or restrictions on travelers arriving from other countries are still in force. The first countries to open such a bubble were Estonia, Latvia, and Lithuania to ensure free movement of their citizens and simultaneously, they maintained quarantine requirements for other entrants.<sup>62</sup> Indeed, this practice may pose a problem from the perspective of non-discrimination and proportionality; nevertheless, it can be justified if the member states’ incidence rate shows similar numbers. The Commission underlined:

“Where a Member State decides to allow travel into its territory or to specific regions and areas within its territory, it should do so in a non-discriminatory manner – allowing travel from all regions or countries in the EU with similar epidemiological situations.”<sup>63</sup>

Obviously, the procedures for lifting restrictions must comply with the non-discrimination principle. It is clear that reference to the public health exception may not result in an arbitrary discrimination against citizens of other Member States. However, equal treatment cannot be required, either.<sup>64</sup>

Those applying these rules are faced with a much more difficult challenge related to the fulfilment of the third element of the *proportionality test*, that is, proportionality *stricto sensu*. This test requires Member States to implement laws

59 In her opinion, the public health risk generated by opening the corridor may undermine the efficiency of other precautions, that is, the suitability of the regulation is controversial. On the other hand, one may also raise the question why the same public health aim is not attainable (necessity) with less restrictive measures if the corridor can be operated by meeting public health standards. See Iris Goldner Lang, ‘Laws of Fear in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19’, *European Journal of Risk Regulation*, First View, 2021, p. 20, at [www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/laws-of-fear-in-the-eu-the-precautionary-principle-and-public-health-restrictions-to-free-movement-of-persons-in-the-time-of-covid19/56741AF86D63D0465EC1AA364CA136CB#article](http://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/laws-of-fear-in-the-eu-the-precautionary-principle-and-public-health-restrictions-to-free-movement-of-persons-in-the-time-of-covid19/56741AF86D63D0465EC1AA364CA136CB#article).

60 International law does not obligate the states to provide entry for other citizens.

61 See at <https://hungarytoday.hu/coronavirus-hungary-austria-border-transit-romania-bulgaria/>.

62 See at [www.bbc.com/news/world-europe-52673373](http://www.bbc.com/news/world-europe-52673373).

63 Communication from the Commission, ‘Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19’, C/2020/3250.

64 Judgment of 17 February 2005, *Case C-215/03, Oulane*, ECLI:EU:C:2005:95, para. 34; Judgment of 18 May 1982, *Joined Cases C-115/81 and C-116/81, Adoui and Cornuaille*, ECLI:EU:C:1982:183, para. 8.

that can prevent free movement within the EU at a significantly lower level, notwithstanding the fact that they result in a less effective protection of their rights.<sup>65</sup> To put it differently, this is the requirement of reasonability, where the right to free movement shall be weighed against the opposing social interests of the Member States. In some cases, it is obvious what can be qualified as 'reasonable'. It is beyond doubt that *the interest of employees working in essential positions must be exempt from strict travel restrictions*. This exemption is quoted in a Council recommendation adopted in October 2020,<sup>66</sup> which was passed to determine the common criteria and framework of travel regulations in light of the COVID-19 pandemic, and which obliges the Member States to frequently provide data. On this basis, the European Centre for Disease Prevention and Control (ECDC) published the weekly map of EU Member States categorized into regions shown in different colors.

The Council recommendation specifies that Member States are not allowed to curb free movement of persons into or out of green territories, however, travelers from other, non-green areas can be placed under quarantine or required to undergo a coronavirus test. It is apparent that this recommendation takes a regional approach, in other words, it does not concentrate on the Member States respectively when making a safe or less safe qualification. This way, it facilitates the fulfillment of the proportionality principle.<sup>67</sup> However, in most cases, due to the epidemic dragging out and its serious nature and its unpredictable social and economic consequences, it is hardly an easy task to decide what complies with the 'reasonability' requirement. The lawmaker must take into consideration several factors in addition to public health issues in the course of introducing or lifting restrictive measures. One of them is ensuring the continuous operation of the health care system, or the wider social effect of the implemented precautions on more vulnerable social layers.<sup>68</sup> In the same way, 'tolerance' of the society must also be taken into account, mostly if the restrictions are expected to be in force over a longer period of time, even for months. In case these different, often non-legal (and even more often expressly political) interests cannot be held in a balance, they can easily lead to government crisis.<sup>69</sup>

65 Opinion of Advocate General Poiares Maduro delivered on 13 July 2006, *Case C-434/04, Ahokainen and Leppik*, ECLI:EU:C:2006:462, paras. 23-26.

66 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

67 Due to the appearance of different and more infectious virus mutations, the Council amended the previous proposal on 28 January 2021, and introduced a dark red code to designate areas with a high-level spreading rate.

68 To name but a few: social alienation of old people, risk arising from postponement of elective health services which mainly concerns old people, or the high unemployment rate of predominantly women.

69 This situation is made worse by the fact that the different social groups prioritize different values.

I am of the opinion that *the restrictions introduced during the first wave of the pandemic met political rather than legal requirements*.<sup>70</sup> Most governments<sup>71</sup> put the emphasis on the protection of public health by citing the principle of precaution. By contrast, safety precautions adopted over the course of the second and the third wave followed a more balanced practice.<sup>72</sup> As a result, I am of the view that *the legality of travel bans and restrictions adopted in the course of the second and third wave must be approached from a different angle*. When assessing the Member States' reactions during the first wave, it is crucial to take into consideration the high level of scientific uncertainty surrounding the pandemic (which was mainly dominant during the first wave).<sup>73</sup> But also the tight time limit to make decisions resulting in a wider than average latitude for Member States to implement restrictions in the public interest. We cannot ignore the fact, either, that the social value system of the Member States regarding their inclination to assume risk or the individual responsibility differs greatly.<sup>74</sup> To give an example, trust in public institutions and a high level of individual responsibility are characteristic of Scandinavian countries, whereas it is less ubiquitous in the post-socialist countries due to historical experiences of state paternalism over its citizens. It is clear that these were all factors that resulted in a significantly different meaning of 'reasonability' during the first wave.

The Member States refrained from introducing more drastic travel restrictions during the second and the third wave in spite of the emergence of the much more contagious British coronavirus variant. Furthermore, it can be generally said that the precautions introduced are less strict (albeit more differentiated) than the ones launched during the first wave. In compliance with the abovementioned Council recommendations, the Member States' authorities still oblige entrants arriving from non-green areas to undergo quarantine or present a negative test before or after the travel, however, as a main rule, travel restrictions do not apply to those who travel on business or for pressing family reasons.<sup>75</sup> It stems from the reasonability principle however, that the restrictions introduced during the second and third wave are significantly more

70 On restrictive measures introduced during the first wave of the pandemic see Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal (Part I.)', *EU Immigration and Asylum Law and Policy Blog*, at <https://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/>.

71 An exception was the Swedish model introduced initially in the Northern states which later proved to be inadequate, thus, these countries later introduced at least as strict measures as countries in other parts of Europe.

72 The stricter measures introduced in reaction to the British variant are exceptions, the proportionality of which is undisputable. The Council recommendation no. 2020/1475 on enhancing coordination, which was accepted in the meantime, must have had a role in this balanced practice.

73 Lang opines that due to scientific uncertainty, the principle of precaution transforms the traditional proportionality test and obviously sets less strict standards regarding national restrictions. Lang 2021, p. 19.

74 The Member States greatly differ not only in their social value systems, but also in their economic plight. The economically less powerful Member States may be pressed to lift restrictions too early to avoid collapse.

75 See Council Recommendation (EU) 2020/1475, para. 19.

differentiated: the Member States did not have to solely rely on their public health experience gained in the first wave. Rather, they could take into account real social habits and the social tolerance levels besides foreseeable proximity to the vaccine. On the other hand, differentiated Member State reactions in the second and third wave have posed new, in the first wave unprecedented problems. These are mostly related to the documentation needed for travel, e.g. a valid employment agreement, a document evidencing family relations, chiefly the marriage certificate.<sup>76</sup> In this respect, it is the CJEU's practice that is authoritative: the mobile citizen is entitled to verify the legitimacy of his/her travel in any unambiguous way.<sup>77</sup>

The same issue arose in connection with the acceptance of tests allowing for entry into a country. It is hardly a coincidence that the Council made a recommendation on a mutual framework for applying antigen quick tests and the mutual recognition of COVID-19 test results all around Europe on 21 January 2021, which remarkably facilitates free movement between the Member States.<sup>78</sup>

However, the difficulties in ensuring mutual recognition have cast light on a much more significant, prospective problem, notably, the issue of recognizing one another's vaccine passports. The European Commission made a recommendation on creating a *digital green certificate* on 17 March 2021, to foster the citizens' safe and free movement during the COVID-19 pandemic within the EU.<sup>79</sup> The recommendation stipulates that every EU citizen (or foreign citizen residing legally in the EU) having a digital green certificate shall be exempt from any restriction on free movement similarly to the citizens of the visited Member States' citizens.<sup>80</sup> It has already been stated several times that the digital green certificate will not be a precondition for free movement, it will only facilitate it. In fact, it cannot even become a precondition as the former is a fundamental right of every EU citizen which can be directly traced back to the provisions of TFEU.

76 In practice, the situation of those living in a *de facto* partnership is even more complicated regarding free movement between the Member States, which is exacerbated by the relevant directive that obliges Member States' authorities only to ease entry for them. In addition, it is still to clarify whether this easement restriction applies to same-sex partners. See Alina Tryfonidou & Robert Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU', European Union, 2021, at [www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL\\_STU\(2021\)671505\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/671505/IPOL_STU(2021)671505_EN.pdf), p. 61.

77 In *Oulane* it has been stated that the Dutch law runs counter to EU law which compels citizens from other Member States to present a valid identity card or passport, whereas the country's citizens are exempt from this obligation and allows them to identify themselves in any other way set forth in their national law. *Case C-215/03, Oulane*, para. 34.

78 See at <https://data.consilium.europa.eu/doc/document/ST-5451-2021-INIT/hu/pdf>.

79 Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate). COM(2021) 130 final.

80 It is necessary to emphasize here that according to the proposal, public health restrictions could be maintained concerning both domestic citizens and EU citizens. The center of gravity is whether equal treatment can be guaranteed within certain personal categories of the green card depending on the fact it is based on vaccination, recovery or test.



However, the question arises if it is in compliance with EU principles that Member States are only obliged to recognize those green cards which certify inoculation with vaccines that have an EU marketing authorization, whereas Member States enjoy discretion concerning all other vaccines. A special weight is given to this issue in connection with Hungary owing to the fact that Hungary was the first EU country to approve the Russian Sputnik-V and the Chinese Sinopharm vaccines.

As a result, other EU Member States are entitled to *not issue travel permits from citizens having been inoculated with these vaccines*, or rather, almost exclusively the Hungarian citizens in the whole EU. Meanwhile, the Sputnik-V vaccine has been undergoing an authorization process at the European Medicines Agency (EMA),<sup>81</sup> whereas the manufacturer of the Chinese vaccine does not even consider filing for an authorization on the European market.<sup>82</sup> Nevertheless, the fact that a pharma manufacturer does not consider applying for an authorization of one of their products (a vaccine, in this particular case) on the European market *does not necessarily prove lack of effectivity*. It is a common practice that business (and sometimes political) reasons drive a pharmaceutical company to determine the region where they would wish to market a product after taken into account supply and demand, and the expected costs and authorization time, too. All this seems to indicate that the Union legislator chose to take a *slightly unorthodox solution, taking a shortcut in the assessment of proportionality by not reviewing the effectiveness of the vaccine* based on available health data, but instead tying the recognition of vaccines to the EMA license. Of course, in such an uncertain situation where most of the EMA licensed vaccines are basically still being tested, this somewhat simplified solution of the legislator may appear to be acceptable.

At the same time we need to see that if the said proposal is accepted, Hungarian citizens will be unambiguously in a disadvantageous situation compared to other EU citizens, in terms of hindering their free movement. This primarily lies in the fact that they could not escape quarantine and test requirement upon entry with a COVID passport, incurring for example extra costs (costs of testing, missed working day due to quarantine, etc.).

Taking a look at the CJEU jurisprudence in cases related to free movement of EU citizens, it is obvious that the CJEU strives to enforce *the principle of mutual recognition* so that free movement rights could be exercised in the most effective way possible. In *Coman*,<sup>83</sup> the issue was whether a Union citizen can require the State of destination to admit within its territory his same-sex spouse, irrespective of whether that State has opened marriage to same-sex couples within its territory. The CJEU gave an expressly affirmative answer and reasoned that the refusal of recognizing a marriage would generate a situation whereby the free movement right would vary from one Member State to another depending on

81 Although Germany ordered vaccines in bulk from Russia, authorization is a precondition.

82 On the contrary, the Chinese vaccine has already been granted WHO approval.

83 Judgment of 5 June 2018 *Case C-673/16, Coman and others*, ECLI:EU:C:2018:385.

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marriage regulations on same-sex couples.<sup>84</sup> Analogously, it can be inferred that *an authorization issued by a Member State, notably by the Hungarian National Institute of Pharmacy and Nutrition, shall be recognized by the authorities of the other Member States to enforce the right of free movement*. I am of the opinion that the only possible exception can be when it is proven that *the vaccine at issue fails to provide as effective protection as other vaccines authorized by EMA*. It does not indicate, however, that free movement cannot be curbed based on objective reasons in the public interest, or, on public health reasons in this particular case.<sup>85</sup>

The issue at hand is compliance with the principle of proportionality, in other words, whether the restriction can be suitable for achieving the previously set objective, mainly with view to the fact that Hungary boasted the highest vaccination rate regarding the adult EU population late April 2021.<sup>86</sup> It is beyond doubt that people having been administered any type of vaccine (either Russian, or Chinese) pose a significantly lesser risk of spreading the virus than those who have not been inoculated. Here, the question arises whether it has any relevance that the EU citizens concerned were deprived of the possibility of choosing between the vaccines. Their only discretion was to decide if they wished to register for the vaccination or not. If the provisions of the EU Charter of Fundamental Rights (especially Article 35) are taken into consideration, the answer is undisputable. As the EU Member States' citizens exercised their right to preserve their health without being granted the right to make a decision between the vaccines, it can be stated that the EU proposal on the legal effect of vaccine certificates having no EU market authorization is able to undermine free movement and questions the EU citizens' right to high level health protection enshrined in the Charter. The question is whether the requirement of proportionality is correctly applied by the Union legislator where recognition is tied exclusively to the EMA license.

#### 4. Conclusion

Whereas the legal literature seems unified in regarding the reintroduction of internal border controls as a reaction of the Member States to the COVID-19 pandemic as one being in compliance with EU legal principles, the standpoints vary when it comes to travel restrictions and bans. This does not mean that the operation of Schengen system is without questions, far from it, the COVID-19 pandemic has pinpointed the system's weak points and the need for an immediate reform.

As for travel restrictions, it is obvious that their long-term 'side effects' will be visible later. In case the issue of the legality of the measures introduced by the

84 Moreover, it can prevent an EU citizen from exercising the right to free movement.

85 In *Coman*, the CJEU stipulated that the said recognition obligation does not undermine the concerned Member State's national identity and does not threaten its public policy.

86 See at <https://ourworldindata.org/covid-vaccinations> and <https://coronavirus.jhu.edu/vaccines/international>.

Member States is raised, either before national or international forums, the assessment will be based upon their necessity and proportionality and on the requirement of non-discrimination. In this respect, the Member States are in a safe position as necessity / proportionality is a vague point due to the unprecedented gravity of the health care crisis and the scientific uncertainties surrounding its treatment. There are only some areas where the infringement of EU legal standards may be contentious. One of them is discriminatory measures based on citizenship if supported by an incoherent Member State policy.

However, it cannot be overstated that the citizens expect concrete measures in crisis situations, predominantly from their own Member State. In turbulent times, such as the last decade of integration, the nation-state's framework has become the fundamental pillar of safety, increasing the importance of national allegiance and identification. This can be substantiated by the fact that masses of citizens residing in another State returned to their countries upon breakout of the pandemic in spite of the travel restrictions. Return can be triggered by the loss of the workplace in the host State in many cases. Still, it can be generally stated that the wish for a safe environment meaning predominantly the country of citizenship seems to be the priority during pandemic times.

The first, exaggerated Member State reactions to COVID-19 and the delayed EU reactions seemed to question the legitimacy of free movement. Moreover, the pandemic worsened the financial and migration-related woes that hurt the EU's integrity.<sup>87</sup> However, it should not be treated as a debacle of Union citizenship or a collective attack on the legal institute of free movement. Rather, it is an adequate Member State reaction to a public health issue arising in a multi-layered governmental system, where the EU must give a wide leeway for Member State activity. In return, Member States have to respect the implementation and enforcement of EU principles, among them, the principle of solidarity. In this respect, it is a sign of hope that the pandemic affects Member States in a more symmetric way than earlier crises. As a result, it is much more realistic that an attitude of common problem-solving and solidarity between the Member States will prevail.

In addition, the experience that we as EU citizens cannot exercise our free movement rights can easily reverse the former trend and inspire us to exploit our possibilities afforded by this freedom,<sup>88</sup> by "improving our life by our own actions".<sup>89</sup>

87 This is evidenced by the debates over bonds issued to mitigate the grave social, economic effects arising from the financial crisis triggered by the corona virus, which highlighted the EU's Northern / Southern division similarly to the former financial crisis. Heinikoski 2020, p. 7.

88 It inevitably requires the reform of the Schengen system which would enable the Member States to implement the provisions of the Code in a more flexible way by avoiding the infringement of EU law.

89 Davies 2019, p. 680.

## 5. Lessons from COVID-19 in Vol. 9 (2021) of the Hungarian Yearbook

The thematic chapter of Vol. 9 (2021) of the Hungarian Yearbook of International Law and European Law tackles different aspects related to dealing with the consequences of COVID-19.

In his piece on the new offence of scaremongering at the time of special legal order, *András Koltay* argues that the novel provision of the Hungarian Criminal Code in combination with the Constitutional Court's decision on the interpretation of the statutory elements of scaremongering guarantees the constitutional right to free speech. It is now up to the ordinary courts to develop their respective jurisprudence and refine the concrete application of this COVID-19 inspired provision. *Lóránt Csink* examines the leeway for restricting fundamental rights in Hungary at the time of the special legal order, putting the issue into the broader context of legal history and comparative law. He argues that while the Hungarian Fundamental Law allows for the restriction of most fundamental rights during the special legal order, this does not mean that such restriction should be exempt from the necessity and proportionality requirement laid down in the jurisprudence of the Constitutional Court. Through an overview of the Commission's Temporary Framework and the CJEU's rulings in the *Ryanair* cases, *Mónika Papp's* piece on state aid granted to airlines at the time of the pandemic highlights that there is no entitlement to state aid, indeed, it is an instrument in the hands of the Member States to pursue industrial policy objectives within a certain margin of discretion subject only to binding secondary law. *Katalin Gombos and Anikó Edit Szűcs* also focus on the Temporary Framework and in particular, present specific examples of state aid that had been approved in order to mitigate the effects of COVID-19. In her contribution on the development of family benefits at the time of the pandemic, *Éva Gellérné Lukács* provides insight into the European legal and policy context of combating social exclusion from the Porto Declaration to the emergency measures introduced, arriving at the conclusion that Hungary largely followed other Member States in its efforts to mitigate crisis effects, introducing the additional element of housing benefit. Finally, *Lilla Nóra Kiss and Orsolya Johanna Sziebig* look into the opportunities for reinforcing European identity in the light of the pandemic, through enhancing the participatory and free movement rights of Union citizens that produce our unique, European way of life.

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On behalf of the entire Editorial Team, I wish you a good read and hope you enjoy the current Volume of our Yearbook. I also hope to welcome you among the authors of Vol. 10 (2022) of the Hungarian Yearbook of International Law and European Law. We plan to dedicate the thematic chapter of the 25th anniversary of the *Gabcikovo-Nagymaros Project Case* judgment of the ICJ. Please feel free to submit your contribution (to be published in any of our chapters) with us no later than 15 April 2022, in accordance with our Style Guide and Call for papers (available at our website, [www.hungarianyearbook.com](http://www.hungarianyearbook.com)).