



# REPLIES OF THE EUROPEAN COMMISSION

TO THE EUROPEAN COURT OF  
AUDITORS' SPECIAL REPORT

**Free movement in the EU during the COVID-19 pandemic:** Limited scrutiny of internal border controls, and uncoordinated Member States' actions

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This document presents the replies of the European Commission to observations of a Special Report of the European Court of Auditors, in line with Article 259 of the [Financial Regulation](#) and to be published together with the Special Report.

# I. THE COMMISSION REPLIES IN BRIEF

## a) General introduction

The area without controls at internal borders ('the Schengen area') is the largest free travel area in the world and home to more than 420 million people across 26 countries. For the last two years, the COVID-19 pandemic placed a major strain on the Schengen area, leading several Member States to reintroduce internal border controls.

The COVID-19 pandemic is a public health crisis of unprecedented proportions. It is the first time that the Commission has been confronted with a pandemic affecting every single Member State, necessitating significant efforts to respond to this challenge as a matter of priority.

To address the situation at internal borders, the Commission developed a series of guidelines and recommendations. In addition, experience showed that the current tools in the Schengen system are insufficient to address a crisis like the current one effectively. Therefore, the Schengen Strategy of 2 June 2021 announced a number of measures to remedy this, including a Commission proposal to amend the Schengen Borders Code<sup>1</sup> and an update of the Practical Handbook for Border Guards. That proposal to amend the Schengen Borders Code was presented on 14 December 2021<sup>2</sup>, based on a comprehensive impact assessment that looked closely in particular at the issues caused by the COVID-19 crisis.

The area without controls at internal borders underpins the right to free movement of EU citizens and their family members within the EU, one of the EU's most cherished achievements and an important driver of its economy. However, the two concepts are governed by different legal regimes and apply to different groups of countries. Free movement, while a fundamental right, may nevertheless be subject to limitations, which must comply with the general principles of EU law, in particular the principles of non-discrimination and proportionality.

In the context of the extraordinary threat posed by the COVID-19 pandemic, Member States have introduced some public health measures that have affected the right of free movement in the European Union. Since the beginning of the pandemic the Commission has coordinated with Member States regarding their travel restrictions linked to COVID-19<sup>3</sup>, developing tools such as the traffic light map published weekly by the European Centre for Disease Prevention and Control<sup>4</sup> and the EU Digital COVID Certificate<sup>5</sup>. Throughout this process, the Commission always emphasised the need for Member States to provide clear, comprehensive and timely information on any applicable travel restrictions.

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<sup>1</sup> 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) OJ L 77, 23.3.2016, p. 1–52

<sup>2</sup> COM(2021)891 final.

<sup>3</sup> Commission Guidelines for border management measures to protect health and ensure the availability of goods and essential services, available here: [EUR-Lex - 52020XC0316\(03\) - EN - EUR-Lex \(europa.eu\)](#)

<sup>4</sup> <https://www.ecdc.europa.eu/en/covid-19/situation-updates/weekly-maps-coordinated-restriction-free-movement>

<sup>5</sup> [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en)

When monitoring the compliance of Member States' travel restrictions with EU law, the Commission had to take account of Member States' competence in the field of public health. The Commission had to constantly strike a balance between restrictions necessary to protect people's lives, and limiting restrictions to the freedom of movement in accordance with the general principles of EU law, such as proportionality and non-discrimination.

The audit took place at the height of the COVID-19 pandemic at a time that all resources possible were mobilised to be able to respond to the unprecedented crisis. As a result of the timing of the audit, valuable Commission resources were deployed from dealing with the crisis to addressing the audit. An undoubtedly unintended, nonetheless undesirable, consequence that the Commission would like to bring to the attention of ECA.

## **b) The Commission's position on the key ECA observations and recommendations**

The Commission takes note of the ECA report regarding Commission's action to protect the right of free movement of persons during the COVID-19 pandemic, with a focus on internal Schengen border controls and travel restrictions.

With reference to Commission's oversight of the reintroduction of internal border controls, the Commission did not consider written requests for additional information in the fast-moving context of the COVID-19 pandemic. Instead, the Commission proceeded to discuss in a pro-active way the issue of internal border controls, reintroduced by Member States in response to COVID-19, in the regular meetings of the 'COVID-19 Information group – Home affairs', where press reports and individual complaints have been followed up with the relevant national authorities. Furthermore, the Commission proposed to amend the Schengen Borders Code, with the view to inter alia strengthen Commission's oversight possibilities.

The Commission's monitoring and coordination of Member States' travel-related restrictions on free movement, in particular its assessment of proportionality and non-discrimination, was subject to constraints and challenges arising from the COVID-19 pandemic, including the rapidly changing nature of the measures. In this context, the detailed guidance on travel restrictions put forward by the Commission, and adopted by the Council in the form of Recommendations<sup>6</sup>, became gradually more detailed and tailored to epidemiological developments. The Recommendation provides the Commission with an important baseline for the assessment of Member States' measures. Based on the improvements to the legal framework introduced by the EU Digital COVID Certificate Regulation<sup>7</sup>, the Commission has also taken steps to streamline the collection of information on Member States' travel restrictions.

With reference to recommendations, the Commission accepts recommendations 1a, 1b, 1c and 1d. It does not accept recommendation 1e. The Commission accepts recommendations 2 and 3.

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<sup>6</sup> Council Recommendation of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (consolidated version available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020H1475-20210202>). Such recommendation was replaced by Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (available at: <http://data.europa.eu/eli/reco/2022/107/oj>)

<sup>7</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic. It is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0953>

The Commission's detailed position is explained in sections II and III.

## **c) Relevant latest developments and next steps**

To facilitate free movement during the COVID-19 pandemic, the European Parliament and the Council adopted, based on a proposal of the Commission, the EU Digital COVID Certificate Regulation. It applies since 1 July 2021. The EU Digital COVID Certificate is a free –of-charge, simple and secure way to demonstrate a person's COVID-19 status, and has been a crucial element in Europe's response to the COVID-19 pandemic..

In addition, on 25 January 2022, the Council adopted, based on a proposal from the Commission, a Recommendation on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic, replacing the previous recommendation on the subject.

With regard to the proposal for amendment of the Schengen Borders Code of 14 December 2021 (COM(2021) 891 final), negotiations have started in the Council, where the first reading was concluded at the end of January 2022.

Two experts meetings with Member States have taken place so far, in October and December 2021, to discuss the update to the Practical Handbook for Border Guards, which should be issued by the end of the year.

## **II. COMMISSION REPLIES TO MAIN OBSERVATIONS OF THE ECA**

### **1. The Commission's oversight of the reintroduction of internal border controls**

With reference to the Commission's oversight on the reintroduction of internal border controls, in the fast-moving context of the COVID-19 pandemic, written requests for additional information were considered to be not the most efficient way to exercise this oversight; the Commission nevertheless proceeded to discuss in a pro-active way the issue of internal border controls, reintroduced by Member States in response to COVID-19, in the regular meetings of the 'COVID-19 Information group – Home affairs', where press reports and individual complaints have been followed up with the relevant national authorities.

The information provided by Member States – notifications and ex post reports - has been insufficient. When the Commission tried to address this issue with the Member States who have had internal border controls in place for several years in the course of 2017, the replies it obtained were insufficient to allow a robust assessment.

This was not only due however to insufficient Commission action, but also to a legal framework not fit for purpose. This was part of the findings of the impact assessment in May 2021<sup>8</sup> and has been addressed through the Commission proposal to amend the Schengen Borders Code of 14 December 2021.

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<sup>8</sup> See p. 21 of the Impact Assessment and its Annex XII.

The Schengen Strategy announced already in June 2021, that *“It is important that political discussion comprehensively covers all elements of the complex architecture supporting the proper functioning of Schengen. To this end, the Commission will relaunch the adoption of the ‘State of Schengen Report’ to serve as a basis for discussions at the annual Forum. The report will summarise the situation as regards the absence of internal border controls, the results of Schengen evaluations, and the state of implementation of recommendations. The Commission will integrate into these reports a ‘State of Schengen Scoreboard’ to assess in an interconnected manner the implementation of the Schengen acquis in the different policy fields and better support Member States in addressing any challenges.”* This requirement is also included in the proposal for amendment of the Schengen Borders Code. In addition, the proposal provides for an obligation on Member States to report at least annually on the necessity and proportionality of the internal border controls, in cases where such controls are in place for more than 12 months.

## **2. Commission efforts to facilitate coordination and cooperation regarding the reintroduction of border controls**

As the protection of public health is primarily a national competence, any decision to implement travel restrictions linked to the COVID-19 pandemic, and enforce them through border controls, rests with national governments. The Commission cannot object to these travel restrictions as long as they comply with the principles of proportionality and non-discrimination. In the absence of a binding legal framework for the Commission to act, Member States remain competent to take measures at national level, and efforts by the Commission to coordinate such actions depend on the good will of the Member States.

With respect to internal border controls, this issue was one of the key findings of the impact assessment<sup>9</sup> for the proposal for the amendment of the Schengen Borders Code, and is reflected also in Article 28 of the adopted Commission proposal.

Despite the limitations of the legal framework, the Commission did the utmost to coordinate the response by Member States regarding internal border controls and travel restrictions. The COVID-19 Information Group – Borders (later ‘Home Affairs’) met (by videoconference) 33 times between end of February and September 2020. Meetings were attended by all Member States and Schengen Associated Countries, different services from the Commission (usually DG HOME, SANTE, ECHO, JUST, MOVE, SG, but occasionally others as well, depending on the topics discussed, such as EMPL, AGRI, TAXUD, etc.) as well as agencies (European Border and Coast guard Agency, European Asylum Support Office, European Centre for Disease Control and Prevention) and the Council Secretariat. The mission of the Group was to provide an ad-hoc forum for Member States, Schengen Associated Countries, Commission Services and Agencies to tackle all border- and Home Affairs-related issues linked to the COVID crisis. It is important to bear in mind that these actions were implemented in the context of the biggest global challenge the world has faced in modern times.

The Commission also pro-actively issued extensive guidance documents for the Member States in the form of communications, guidelines and proposals for Council recommendations, as well as legislative proposals in specific sectors.’ This guidance was issued following the evolution and the different stages of the pandemic.

The Schengen Strategy of June 2021 also underlined that reintroduced internal border controls, particularly those reintroduced in response to COVID-19, had a big impact on citizens and the economy due to the lack of coordination between Member States, especially in cross-border areas. The Strategy also referred to the wide range of guidelines and recommendations adopted for the

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<sup>9</sup> See section 4.2.1 of the Impact Assessment.

COVID-19 pandemic, in particular the 'Green Lanes' system, in response to the freight traffic halted at internal borders. In order to be better prepared for future crises and for the case that border control at internal borders should again become unavoidable, the Strategy committed to codify the pertinent mitigating measures from the guidelines and recommendations developed in relation to COVID-19 in the Practical Handbook for Border Guards, which should become a first point of reference for border guards in a crisis situation. This process of updating the Handbook is under way, as explained under point I c) above.

### **3. The Commission monitoring and coordination of Member States' travel restrictions**

The monitoring of Member States' travel-related restrictions on free movement, put in place in response to the COVID-19 pandemic, is subject to various constraints and challenges.

When assessing their proportionality, the Commission is required to carry out a case-by-case analysis of Member States' measures, taking into account factors such as the epidemiological situation, Member States' geographical situation, domestic measures adopted to fight the pandemic, exemptions provided for essential travellers, and other considerations (for instance, the different healthcare capacities of Member States). The difficulty of this analysis is exacerbated by the rapidly changing nature of the measures.

At the same time, the guidance on travel restrictions put forward by the Commission and adopted by the Council became more detailed over time and tailored to the epidemiological developments, such as newly emerging SARS-CoV-2 variants of concern, increasing vaccination uptake, or the rollout of the EU Digital COVID Certificate.

Not only did the Recommendation, first adopted in October 2021, include general principles, but it also provided Member States with a common framework intended to facilitate the practical application of these principles, in a coordinated manner, to the exceptional situation caused by the COVID-19 pandemic. As the Recommendation was adopted by the Council and thus endorsed by the Member States, it provided the Commission with a useful benchmark in its regular contacts with Member States as to which measures could be seen as complying with the principle of proportionality and non-discrimination.

In addition, the adoption of the EU Digital COVID Certificate Regulation in June 2021 brought important improvements to the applicable legal framework. Its Article 11(2) introduces a requirement for Member States to inform each other and the Commission of restrictions imposed on holders of an EU Digital COVID Certificate, if possible 48 hours in advance. In this context, the Member States need to provide the reasons for such restrictions, their scope and duration. This new legal requirement facilitates the Commission's analysis of Member States' measures and allowed it to streamline the collection of information on Member States' travel restrictions.



## III. COMMISSION REPLIES TO THE CONCLUSIONS AND RECOMMENDATIONS OF THE ECA

### **Recommendation 1: Exercise close scrutiny of internal border controls**

The Commission has already taken steps to improve the current legislation, in proposing wide-ranging amendments to the Schengen Borders Code. These include amongst others an increasing threshold for Member States to prove the proportionality and necessity of internal border controls, the longer they are reintroduced, as well as templates for the notifications and ex-post report, which should improve their quality.

However, the Commission would like to point out that while it has the right of legislative initiative and has adopted the proposal, the final text of the legislation will be a result of the negotiations between the co-legislators – the European Parliament and the Council.

The Commission accepts recommendation 1a), 1b), 1c) and 1d). and considers that they have been partially addressed with the proposal for the amendment of the Schengen Borders Code adopted on 14 December 2021 and the related impact assessment. The capacity of the Commission to comply with the deadlines set for the recommendations will depend on the adoption of the proposal.

Recommendation 1e) is not accepted, as it recommends that the Commission should launch enforcement actions. This interferes with the discretion of the Commission as regards its enforcement policy and whether or not, and when, to start infringement procedures or to refer a case to the Court of Justice, as also more detailed explained in the Communication “EU law: Better results through better application”<sup>10</sup>.

### **Recommendation 2: Streamline data collection about travel restrictions**

The Commission accepts recommendation 2. The Commission has already proposed what ultimately became Article 11 of the EU Digital COVID Certificate Regulation, which establishes a requirement for Member States to inform each other and the Commission of restrictions imposed on holders of an EU Digital COVID Certificate.

To that end, Member States are required to provide information on the reasons for such restrictions, the scope of such restrictions, specifying which certificate holders are subject to or exempt from such restrictions, and the date and duration of such restrictions. The Commission continues to gather information from Member States on their implementation of the relevant Council Recommendations and the EU Digital COVID Certificate Regulation and follows up with Member States wherever necessary.

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<sup>10</sup> Communication from the Commission — EU law: Better results through better application, C(2016)8600, OJ C 18, 19.1.2017, p. 10–20



Should this prove insufficient, the Commission will assess whether additional guidance should be provided to Member States. In any case, the Commission intends to address the lessons learned in the context of the Commission's planned update of the 2009 EU guidelines on free movement<sup>11</sup>.

### **Recommendation 3: Provide more actionable guidance on the implementation of internal border controls**

The Commission accepts Recommendations 3a) and 3b). They will be addressed through the upcoming revision of the Practical Handbook for Borders Guards, as announced in the Impact Assessment Report, accompanying the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (SWD/2021/462 final). This process of updating the Handbook is already under way.

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<sup>11</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2009) 313 final).