

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Maija Kervinen

**The Role of the European Union in the Face of COVID-19
Pandemic from the Perspective of Free Movement of People:
Reintroduction of Internal Border Control and the Principle of
Proportionality**


Bachelor's thesis

Programme HAJB08/17, Bachelor of Arts in Social Sciences, EU and International Law

Supervisor: Ondrej Hamulak, Ph.D.

Tallinn 2021

I declare that I have compiled the paper independently
and all works, important standpoints and data by other authors
have been properly referenced and the same paper
has not been previously been presented for grading.
The document length is 11731 words from the introduction to the end of summary.

Maija Kervinen 

(signature, date)

Student code: 183938HAJB

Student e-mail address: maijaemilia.kervinen@gmail.com

Supervisor: Ondrej Hamulak, Ph.D.:

The paper conforms to requirements in force

.....
(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

.....
(name, signature, date)

TABLE OF CONTENTS

ABBSERVATIONS	5
INTRODUCTION	6
1. EUROPEAN UNION COMPETENCES, COMPETENCE IN PUBLIC HEALTH AND INTERNAL MARKET	8
1.1. Competence in Public Health	10
1.2 Internal market and its main principles	11
2. COVID-19 VIRUS AND BORDERS	14
2.1 Origin of Covid-19 virus	14
2.2 Borders.....	16
2.2.1 Problems caused by Covid-19	17
3. EUROPEAN UNION’S RESPONSE, SCHENGEN BORDERS CODE AND PROPORTIONALITY PRINCIPLE	19
3.1 European Union Response to Border Policies and Travel Restrictions	19
3.2 The Schengen Borders Code and Member States’ right to restrict entry	21
3.2.1. Member States’ right to restrict entry.....	22
3.2.1 Internal Border Control During Covid-19.....	23
3.3. Assesment from the point of view of proportionality principle	25
4. A SURVEY OF THE OPINIONS OF MEPs	29
4.1 Evaluation and summary of responses	30
5. CONCLUSIONS	32
LIST OF REFERENCES	35
Scientific books	35
Scientific articles	35
European Union and International legislation	36
Court Decisions	36
Other Sources	37

ABSTRACT

This paper examines whether the reintroduction of internal border controls has been contrary to the principle of proportionality from the perspective of free movement of persons during the Covid-19 pandemic. In addition, research clarifies whether European Union legislation should be amended to avoid the problems that arose at the beginning of the Covid-19 pandemic in the future. This paper also examines the above issues in the light of the relevant aspects set out in the Treaties of the European Union, the importance and significance of the functioning of the internal market in the European Union, the relevance of fundamental freedoms and the symbolic importance of the EU's internal borders. The answers to the research questions have been obtained by examining the activities of the Member States and the European Union since the beginning of the pandemic. A small part of the research also presents the survey which was conducted for MEPs. Its purpose was to find out general opinion about the EU's activities and if the free movement of persons has been jeopardized too much. In particular, cooperation between Member States has proved problematic during the Covid-19 pandemic. As there are many arguments on the Covid-19 pandemic and the measures taken to prevent it, this paper has been written solely on the basis of European Union law, secondary legislation and other guidelines and recommendations issued by the European Parliament, the Council and the Commission.

Keywords: Covid-19 pandemic, Internal border control, free movement of people, principle of proportionality

ABBSEVATIONS

TEU	Treaty on the European Union
TFEU	Treaty Functioning of the European Union
WHO	World Health Organization
ECB	European Central Bank
ICPR	The political crisis response mechanism
COREPER	Permanent Representatives Committee
ECDC	The European Center for Disease Control
SBC	The Schengen Border Code

INTRODUCTION

According to the Treaty on the Functioning of the European Union, the Union shares competence with the Member States in the field of public health. The Member States have felt that there is no need to give the European Union more competence in this area. In the field of public health, the European Union is taking action to unite and support the Member States. During the Covid-19 pandemic, the fundamental freedoms of the European Union have had to be assessed in the light of the threat to public policy, internal security and public health in a Member State. The interpretation of these criteria is subject to national discretion and may therefore vary widely between Member States. For example, in Case 116/81 *Adoui and Cornuaille*, the Court of Justice left a discretion to a Member State as to whether an offense or infringement by an EU citizen or a member of her/his family constitutes a threat to public policy.¹ This was also clearly evident in the prevention of the spread of the Covid-19 pandemic, especially in the introduction of internal border controls. Different and uncoordinated action by Member States to reintroduce internal border controls jeopardized the free movement of persons. The European Union as a Crisis Organization has also been criticized. The European Union was unable to respond to the pandemic quickly enough by creating clear guidelines that would have enabled Member States to achieve more uniform practices.

This study examines the effects of the reintroduction of internal border controls on the free movement of persons. The study is based on the competences of the European Union and the Member States, the importance of the internal market and internal borders for functioning of European Union, and fundamental freedoms, in particular the free movement of persons. The reintroduction of internal border controls during the Covid-19 pandemic will be examined in the light of the above-mentioned fundamental issues of the Union, in particular from the point of view of the principle of proportionality. The purpose of the study is to answer the following key research questions:

- 1) Were the rapid decisions of the Member States to reintroduce internal border controls and jeopardize the free movement of persons in accordance with the principle of proportionality?

¹ Kuusela S., EU-kansalaisten Vapaan Liikkuvuuden Rajoittaminen, Tampereen Yliopisto, Tampere 2008.

- 2) Should the European Union's powers be increased in any way in order to coordinate this kind of crisis in the future more quickly and more coherently among the EU Member States?

The research has been carried out using a qualitative research method. In addition, an empirical perspective on the research is provided by a survey of MEPs which aim was finding out the views of MEPs on the subject of my research. The research has been carried out using European Union legislation, decisions published by the European Commission, the Parliament or the Council, scientific articles, studies and books, and other relevant sources.

The first part of the study gives the reader an overview of the competences of the European Union. It also provides a clear picture of the division of competences in the field of public health between the Union and the Member States. In addition, the section provides an overview of the functioning of the internal market and its principles, in particular the importance of the principle of proportionality. Part two continues to address the Covid-19 virus, the importance of the European Union's borders, especially internal borders, and the problem caused by the Covid-19 virus at the EU's internal borders. Part three deals with the European Union's response to the Covid-19 virus, the Schengen Borders Code and the right of Member States to reintroduce internal border controls and restrict the free movement of persons. The section also provides an overview of how internal border controls were carried out during the pandemic. Finally, internal border controls and the free movement of persons are assessed from the point of view of the principle of proportionality. Part four presents the survey of MEPs and the evaluation of the responses to the survey. The last part brings together the conclusions and answers the research questions.

1. EUROPEAN UNION COMPETENCES, COMPETENCE IN PUBLIC HEALTH AND INTERNAL MARKET

The activities of the European Union are based on the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These were widely amended when Treaty of Lisbon entered into force on 1st December 2009.² These agreements have the same legal value in relation to each other. The European Union's action is guided by the provision in Article 2 of the TEU on the EU's value base. The values that underpin the European Union's values are respect, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to all Member States and are characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.³ With the Treaty of Lisbon, the European Union aims to create an ever-closer union among the peoples of Europe. Article 3 of the Treaty on European Union defines the Union's objectives as promoting peace, its own values and the well-being of its peoples. In addition, the Union offers its citizens an area of freedom, security and justice, completing the internal market and exercising control at the external borders. The Union aims to promote sustainable development and environmental protection. The promotion of equality for all citizens, the protection of the rights of the child and social justice are also objectives of the Union. The Union shall pursue its objectives in accordance with the competences conferred upon it in the Treaties.⁴

The competence between the European Union and the Member States are defined in Articles 3 to 6 of TFEU. The Union's competences are divided into exclusive competences, competences shared with the Member States, competences to take various measures to support and coordinate the Member States and specific competences. According to Article 3 of TFEU, the Union's exclusive competences include the customs union, the establishment of competition rules necessary for the functioning of the internal market, monetary policy for Member States whose currency is the euro, conservation of marine living resources as part of fisheries policy, trade policy and competence to conclude an international agreement under the conditions provided by the Treaties.⁵ The exclusive competence of the European Union therefore means that only the EU has the right to act as legislator. Member States can only act as legislators if the EU has

² Raitio J., Euroopan Unionin oikeuden periaatteet ja perusvapaudet, Helsingin yliopiston oikeustieteellinen tiedekunta, Helsinki, 2017

³ Consolidated version of the Treaty on European Union, Official Journal c 326, 26.10.2012, p. 0001 – 0390,

⁴ *Ipid.*

⁵ Consolidated version of the Treaty Functioning of the European Union, Official Journal C 326, 26.10.2012, p. 0001 – 0390

mandated them to pass some legislation. Article 4 of TFEU defines the areas in which competence is shared between the EU and the Member States. This means that Member States as well as the EU can adopt binding legislation. If the EU has already enacted legislation on a particular issue, Member States cannot act as legislators in that regard. The European Union and the Member States share competences in the areas of internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common security issues, research and development and humanitarian aid. The third issue that determines competence is the EU's competence to take various coordination, support and complementary measures. The European Union has the opportunity to complement the actions of the Member States.⁶ The Court of Justice of the European Union assesses jurisdiction in two stages. First, the court assesses whether the jurisdiction is explicit or implicit. Secondly, whether competence is exclusive to the EU or shared with the Member States.⁷

Competence between the European Union and the Member States is determined by two important principles, the principle of subsidiarity and the principle of proportionality.⁸ These principles are enshrined in Article 5 of the Treaty on the Functioning of the European Union and can also be found in the Protocol annexed to the Treaty of Lisbon. In accordance with the principle of subsidiarity, the Union must act only to the extent that the achievement of a specific goal would be achieved better at Union level than at the level of the Member States. Closely linked to the principle of subsidiarity is another principle which reflects the competences between the Union and the Member States. In accordance with the principle of conferral, the Union shall act only within the limits of, and in accordance with the competences conferred upon it by the Member States in the Treaties. The principle of proportionality, in turn, determines how powers should be exercised. In other words, what kind of action must be taken to achieve a certain goal. In the light of these principles, before taking another new legislative action, the Commission must consider it from three perspectives: whether the Union can act, whether it should act and how it should act.⁹

⁶ Division of competences within the European Union, Eur-Lex, 26.1.2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0020&from=fi>

⁷ Raitio J., *Supra nota* 1, p. 23.

⁸ TFEU, *Supra nota* 4.

⁹ Raitio J., *Supra nota* 1, p. 24.

1.1. Competence in Public Health

Common public health issues as defined in the Treaties fall within the shared competence of the Member States and the Union in so far as it is conferred on it and which do not concern the areas covered by Articles 3 and 6. The European Union seeks to protect health in accordance with Article 168 of the Treaty on the Functioning of the European Union. The European Union seeks to support the public health policies of the Member States and to promote cooperation on public health, ensuring a high level of protection of citizens' health. In accordance with Article 168 of TFEU, the Union shall aim to prevent and combat diseases which are harmful to public health. The Union's activities also include research and information on various diseases. According to paragraph 2 of the Article, one of the Union's main tasks is to support and promote cooperation between the Member States. Member States may coordinate their health policies with a view to improving public health, preventing illness and diseases, and obviating sources of danger to physical and mental health. The European Commission may take any appropriate initiative to promote such cooperation. In addition, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also address common security issues. Such measures may be subject to high standards of quality and safety in relation to organs and substances of human origin, blood and blood products, and medicinal products and medical devices. These measures can also be applied to the veterinary and phytosanitary sector. As mentioned above, the European Parliament and the Council may also decide on promotion measures, in particular for the control, monitoring and alert of widespread cross-border serious diseases. Through its promotion activities, the Union seeks to protect and improve human health. However, these measures must not oblige Member States to consolidate their laws or regulations.¹⁰

The European Union's competence in the field of public health therefore lies in supporting the policies and activities of the Member States and promoting coherence. This role of the Union is further strengthened in Article 114 TFEU. According to this, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may take measures to harmonize the laws, regulations and administrative provisions of the Member States. Harmonization measures may be used to ensure

¹⁰ TFEU, *Supra nota* 4.

the objectives set out in Article 26 TFEU, namely the functioning of the internal market. It states that the Union has competence to harmonize national laws in order to support and implement a functioning internal market, including in the field of health.¹¹

1.2. Internal market and its main principles

One of the tasks of the European Union is to complete the internal market and the four fundamental freedoms that are essential to it. Article 3 of the Treaty on European Union states that in completing the internal market the Union shall take account of sustainable development, balanced economic growth and price stability, a competitive market economy based on employment and social progress, improvement and protection of the environment and scientific and artistic development.¹² The European Union's obligation to complete the internal market is also enshrined in Article 26 of TFEU. According to that article, the Union has to take measures resulting from the Treaties to ensure the functioning of the internal market. According to the second paragraph, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Treaties. The Council, together with the Commission, will define measures to ensure balanced progress in these areas.¹³

There are three general principles of law for the internal market. These principles are the principle of proportionality, the principle of non-discrimination and the principle of legal certainty. The principle of non-discrimination simply means that legislation must not treat similar situations differently or different situations in the same way. According to the principle of non-discrimination, which is also enshrined in Article 18 of the TFEU, all discrimination on grounds of nationality is prohibited. Article 19 states that the general prohibition of discrimination prohibits discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The principle of non-discrimination also raises issues of equality, such as equality between men and women, in employment, between the sexes, etc.¹⁴ Another of the fundamental principles of law for the internal market, namely the principle of

¹¹ Brehon Nicolas-Jean, *The European Union and the Coronavirus*, Foundation Robert Schuman, European Issues, No. 553, 7.4.2020, p. 1-10, <https://www.robert-schuman.eu/en/european-issues/0553-the-european-union-and-the-coronavirus>.

¹² TEU, *Supra nota 2*.

¹³ TFEU, *Supra nota 4*.

¹⁴ Raitio J, *Supra nota 1*, p. 57–67.

legal certainty, relates to decisions having legal effect. This means that these decisions must be predictable and acceptable. The predictability of decisions is linked to the fact that the authorities must apply the law in the same way in the future as in the past. The admissibility of decisions means that they must be correct and therefore acceptable in the future. According to substantive legal certainty, decisions are substantively correct solutions. According to formal legal certainty, the form of the law is followed, i.e., for example, according to its wording. *Schermers* and *Waelbroeck* have divided the principle of legal certainty into the following factors: protection of legitimate expectations, non-retroactivity, protection of acquired rights, calculation of time-limits and the requirement of comprehensible language.¹⁵

As the paper focuses on the problems caused by Covid-19 pandemic and the competences of the European Union from the point of view of the principle of proportionality, it is worth looking at this principle a little more than the previous two. The principle of proportionality is a legal principle common to all Member States, which is also to be found in the Treaties, as stated earlier in the text. In accordance with the principle of proportionality, the reaction of the Union institutions must be proportionate to the effects of the act contrary to European law.¹⁶ In addition, one of the most important tasks of the principle of proportionality is the protection of fundamental rights.¹⁷ The principle of proportionality is characterized by its discretionary element. This element is linked to the fact that a principle does not have direct effect but can be relied on by an individual as a remedy. The principle of proportionality has been interpreted relatively extensively in the case-law since it was first interpreted in the *Fédéchar* case (8/55), Judgement of the Court of 29 November 1956 (Eur-lex, Case 8-55). In this case, it was stated that the sanctions must be proportionate to the erroneous nature of the act, i.e., the seriousness of the act contrary to European law. Article 49 of the Charter also states that the penalty must not be disproportionate to the seriousness of the offense. In addition to the EU institutions and private parties, the principle of proportionality also has an impact on the Member States, especially in terms of evaluating the measures they take. In other words, the principle of proportionality defines the limits of the competence of the Member States. When assessing a concrete action by the European Union in the light of the principle of proportionality, three criteria must be met in order for a given action to comply with the principle. In assessing a

¹⁵ Raitio J, *Supra nota* 1, p. 72–75.

¹⁶ Raitio J, *Supra nota* 1, p. 53–55.

¹⁷ Cottier T., Enchandi R., Leal-Arcas R., Liechti R., The Principle of Proportionality in International Law, SSRN Electronic Journal, December 2012.

particular action, one may ask whether it is appropriate, effective and proportionate to the aim and objective pursued. Secondly, is the action necessary in relation to the rights and interests of its target? Thirdly, is the measure proportionate, that is to say, does it restrict the rights of the individual more than is necessary?¹⁸

The principle of proportionality also has a significant impact on the internal market. Especially from the point of view of control by the Member States. The internal market is subject to exceptions to the obligation to safeguard the four fundamental freedoms if justified on grounds of public policy, public security or other grounds referred to in Articles 36, 45 (3), 52 (1), 62 and 65 (1b) of the TFEU. According to the case law (*C-390/12 Pflieger*), the court must satisfy itself that a restrictive measure satisfies the requirements of the principle of proportionality. Therefore, it is for the Member States to determine the objectives which a particular restriction seeks to achieve. The free movement of persons is strongly associated to interpretation of the principle of proportionality. That is because, it is possible to restrict freedom of movement only if it is within the limits set by the principle of proportionality.¹⁹

¹⁸ Raitio J, *Supra nota 1*, p. 53–55.

¹⁹ Raitio J, *Supra nota 1*, p. 56–57.

2. COVID-19 VIRUS AND BORDERS

2.1. Origin of Covid-19 virus

A virus like Covid-19 may have been feared and expected that one day the world will face such a pandemic. To date, the coronavirus has infected millions of people and caused the deaths of many people around the world.²⁰ Currently, the World Health Organization has already reported more than 110 million cases of coronavirus and more than 2.4 million deaths.²¹ The first infections of Covid-19 virus, caused by a new type of coronavirus (SARS-CoV-2), were diagnosed in city of Wuhan, Hubei Province in China on 31st of December 2019. Even then, the disease was of pneumonia of unknown etiology, characterized by dry cough, dyspnea, fever and clinical signs of bilateral pulmonary infiltrates on imaging.²² Shortly thereafter, the first infections were already detected in Europe and around the world. The first case of infection was detected in France on 24th January 2020. Immediately thereafter, the first infections were also detected in Germany and Sweden. Those infections had come to those who had just traveled in China. During February, large clusters of infection had been identified in northern Italy, which had led Italy to report a public health concern of international concern. Soon, infections had been detected in more and more countries worldwide. On 11th March 2020, the World Health Organization declared the coronavirus a global pandemic.²³

Covid-19 belongs to the group of CoV viruses that can infect humans and animals. There are four forms of coronavirus, alpha-, beta-, gamma-, and delta-coronavirus. Coronaviruses are often derived from animals such as bats, birds and pigs. Different forms of coronavirus are characterized by the fact that they seriously infect humans and can lead to death or can be completely asymptomatic or mild infections. Coronavirus is a generic term for a large number of other viruses. The virus that spread early in the year is SARS-CoV-2, which causes Covid-19 disease. SARS-CoV-2 belongs to a group of beta-coronaviruses that can cause serious illness and death. The symptoms of a person with Covid-19 disease often begin in less than a week and

²⁰ Sanjay K. M, Timir T., One year update on the COVID-19 pandemic: where are we now?, *Acta Tropica*, 214, 2021, 105778.

²¹ World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard, 20.2.202, <https://covid19.who.int/>

²² Sohrabi C., Alsafi Z., O'Neill N., Khan M., Kerwan A., Al-Jabir A., Iosifidis C., Agha R., World Health Organization declares global emergency: A review of the 2019 novel coronavirus (COVID-19), *International Journal of Surgery*, 76, 2020, p. 71-76.

²³ Goniewicz K., Khorram-Manesh A., Hertelendy A. J., Goniewicz M., Naylor K., and Frederick M. Burkle Jr., Current Response and Management Decisions of the European Union to the Covid-19 Outbreak: A review, *Sustainability*, MDPI, 12(9), 3838, 8.5.2020.

often include fever, cough, headache, muscle aches, shortness of breath, loss of sense of smell or taste, etc.²⁴

The Covid-19 virus has affected and continues to affect the economies, cultures, education, social and health care systems, employment, etc. of different countries worldwide.²⁵ According to Eurostat, Europe's gross domestic product shrunk by 6.6 % last year. In Finland and Sweden, for example, GDP also shrunk by 2.8 %.²⁶ As a result, states needed to be able to quickly develop a strategy to prevent the spread of a pandemic. In addition, at the beginning of the pandemic, problems of security of supply in particular emerged among the Member States of the European Union. The coronavirus has also highlighted the need to develop international cooperation and strengthen the roles of international organizations. The importance of transparent, real-time and fact-based information has also emerged. With a lot of uncertainty associated with a pandemic, it is important that decisions are as public as possible. In order to be able to make the most equitable decisions possible, it has been clear how important research and education resources have been. The effects of the coronavirus have also been seen in human relationships between families, loved ones, and other people as a source of power. The effects of the pandemic, especially on the economy and employment, are brutal. The coronavirus has highlighted the need to learn new patterns of work and study. Of these, telework in particular has been highlighted. On the other hand, teleworking and distance learning have also enabled more time for the family.²⁷ The pandemic has been fatal to the economy of an individual state as well as the entire world. Especially companies have had hard times which has resulted in bankruptcies and terminations of employees. Economic recovery measures have had to be coordinated at European Union level.²⁸

²⁴ World Health Organization, Origin of SARS-CoV-2, 26.3.2020.

²⁵ Tulevaisuusvaliokunta, Koronapandemian hyvät ja huonot seuraukset lyhyellä ja pitkällä aikavälillä, Eduskunta, 1/2020, Helsinki 2020.

²⁶ Kuusisto T., Liukkonen S., Talouden Tilannekuva, Tilastokeskus, 15.3.2021.

²⁷ Tulevaisuusvaliokunta, *Supra nota* 24.

²⁸ *Ipid.*

Situation by WHO Region

Americas	49,465,467 confirmed
Europe	37,559,336 confirmed
South-East Asia	13,368,276 confirmed
Eastern Mediterranean	6,208,063 confirmed
Africa	2,789,884 confirmed
Western Pacific	1,583,091 confirmed

Source: World Health Organization

Data may be incomplete for the current day or week.

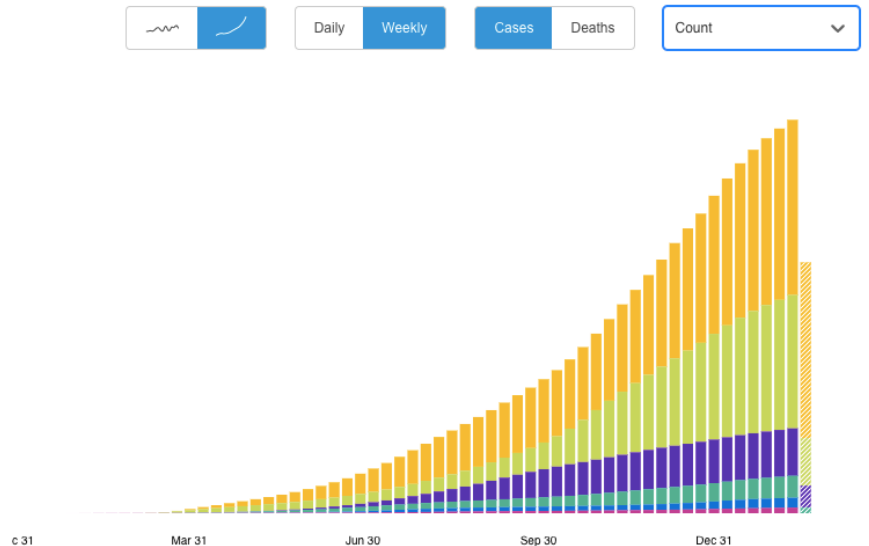


Figure 1 World Health Organization, WHO Coronavirus (COVID-19) Dashboard, 22.2.2021.

2.2. Borders

In the fight against the coronavirus, borders of the Member States and the European Union have played a significant role. The symbolic significance of borders is also important in assessing the importance of borders in preventing the spread of the virus. The symbolic value of borders can be exploited as an instrument of political power towards other states, or they can be relevant from the point of view of Member States' internal order and security. The goal of the European Union has been an increasingly united union of peoples and a united Europe. Borders plays a major role for the completion of the internal market, which is why the Commission has historically said that borders must be abolished, because they show the people the division of the Community. In May 1984, at the French-German Summit, Helmut Kohl and François Mitterrand launched the Schengen area, which still represents the unity of the EU. From the point of view of the coronavirus, the symbolic value of borders is worth knowing, because reintroduction of internal border control has affected the unity of the European Union.²⁹

²⁹ Thym D., Bornemann J., Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics, European Papers, Vol 5, 2020, p. 1143-1170.

2.2.1. Problems caused by Covid-19

Because of a spread of Covid-19 disease, some of the European Union's Member States reintroduced the internal border control in an uncoordinated manner and imposed various restrictions on cross-border mobility. Some countries acted very quickly on borders, while some did not introduce border controls at all, but relied solely on internal restrictions to combat the spread of the Covid-19 virus. Also, reasons for the use of internal border control varied between Member States. For instance, the Nordic countries justified border control by the prevailing pandemic, while France and Austria justified border control by the situation at the external border.³⁰

The coronavirus brought problems to the European Union's internal market. The reintroduction of internal border control has restricted the free movement of people and goods.³¹ In March 2020, the EU's external borders with third countries were closed and Member States began to adopt different practices with regard to internal borders. What comes to the closure of EU's external borders, the decision was very unanimous, but with regard to internal borders, following a coherent line has been more challenging. Member States have hampered the free movement of people and goods, depending on the situation of the virus.³² Restrictions on free movement have particularly affected cross-border and seasonal workers, for whom the coronavirus has increased existing uncertainty.³³ The lack of a coherent line has had a wide range of effects and has caused many problems from the point of view of free movement. In the spring of 2020, Poland introduced border controls, resulting in tens of kilometers of truck queues behind the borders. The fact that different countries had different practices also caused confusion for flights and train connections between the countries. The problems caused by the closure of internal borders have been reflected, especially in the economy. There was a great deal of uncertainty among EU citizens about what you are allowed to do and where you are allowed to travel.³⁴

In addition to practical problems, the unclear border policy also created problems for the symbolic significance of borders. According to the social psychological perception, during a

³⁰ *Ipid.*

³¹ European Parliament, Parliament calls for better protection of cross-border and seasonal workers, European Parliament News, 23.6.2020.

³² Turunen S., Toimittajalta: Kun ihmisten perusoikeuksia rajoitetaan, menee kaikki sekaisin, YLE, 18.3.2020.

³³ European Parliament, Bold measures needed to protect cross-border and seasonal workers in EU, MEPs say, European Parliament News, 19.6.2020.

³⁴ YLE, *Supra nota 27.*

crisis, the perception of the prevailing threat seeks to protect one's own group by distinguishing between "we" and "they". This distinction is related to idea of who protects us. During the Covid-19 virus, thinking like the one described above has led to the idea of who will protect us from the pandemic and its effects. The fact that the Member States quickly began to take independent decisions on their internal borders undermined the importance of the European Union's institutions, rules and policies. Such a situation does not serve the fact that the symbolic function of borders is to strengthen our understanding of the Schengen area, the four fundamental freedoms and a united Europe.³⁵

³⁵ Thym D., Bornemann J., *Supra nota* 24.

3. EUROPEAN UNION'S RESPONSE, SCHENGEN BORDERS CODE AND PROPORTIONALITY PRINCIPLE

The European Union's response to the Covid-19 pandemic could be described as rather slow.³⁶ The Union's role as a Crisis Organization has given rise to much debate and doubt, particularly as regards its role and its functioning. Criticism has also been leveled at the threat to the fundamental principles of the Union, such as the free movement of people and goods. As a result of the Union's slow response to the coronavirus, each Member State took the lead.³⁷ After March and April 2020, the European Union took the first effective actions to prevent the spread of the coronavirus. The Union woke up to this when it became clear how uncoordinated and hectic the decision each Member State made in terms of internal border control and travel restrictions.³⁸ The European Union's response to the spread of the coronavirus was agreed at a videoconference meeting on 17th and 26th March 2020. The issues decided in the videoconferences are based on discussions held on 10th March 2020 together with the President of the European Central Bank (ECB), the President of the Eurogroup and the High Representative. From the discussions, it was clear that in a crisis situation, joint coordinated action at EU level is needed. As a result, on the basis of these meetings and discussions, the EU identified six issues to focus on. One of these was the prevention of the spread of the virus, which also involved border coordination.³⁹

3.1. European Union Response to Border Policies and Travel Restrictions

The European Union has sought to improve cooperation and communication between the Member States and the Union during a pandemic crisis. For this reason, the EU activated the political crisis response mechanism (IPCR) on 28th January. This will allow the Presidency to coordinate policy responses to the crisis. During the coronavirus pandemic, the Permanent Representatives Committee (COREPER) cooperated with the IPCR, as representative of the Member States and the Council. In times of crisis, this will allow the smooth exchange of up-to-date information between the European Union, in particular the Commission, and the Member States. In addition, The European Center for Disease Control (ECDC) has been a major player in

³⁶ Alcaro R., Tocci N., *The European Union in a COVID World*, Istituto Affari Internazionali, 2020, <https://www.jstor.org/stable/resrep27576>.

³⁷ Ojanen H., *Koronapandemia, EU:n rooli ja tehtävät: Tutkimuksen empiirisiä ja teoreettisia lähtökohtia*, Kosmopolis, 2020.

³⁸ Alcaro R., Tocci N., *Supra nota* 31.

³⁹ MDPI, *Supra nota* 20.

population risk assessment to prevent the spread of coronavirus. Risk assessments have enabled the European Union and its Member States to prepare timely and correct responses to the current situation. These various actors have also played a major role in the evaluation of border policy by the European Union and the Member States.⁴⁰

Member States' own and divergent measures in relation to internal border controls or travel restrictions have significantly hampered the free movement of people within the EU. As the European Union shares competences with the Member States through public health, it can only take action to support the Member States and increase cooperation. Restricting free movement with regard to the threat to public health is on the responsibility of the Member States. Such measures, which only support and promote cooperation between Member States, have been used by the EU in connection with border control or travel between the Member States. On its proposal to the Council of 4th September 2020, the European Commission recommended a coordinated approach to restricting free movement. The proposal, adopted by the Council on 13th October 2020, decided on common criteria, color codes and a common framework. These recommendations have been constantly updated to reflect the pandemic situation. For example, on February 1st, 2021, the recommendations were updated due to new more susceptible virus variants.⁴¹

Member States have agreed on certain criteria for commonly agreed color codes on the basis of which The European Center for Disease Control (ECDC) publishes a weekly area map. The purpose of this map and color codes is to inform Member States of the risk area classification. There are 5 risk categories, of which dark red means very high risk, red means high risk, orange means medium risk, green means low risk and gray means situation where no exact risk classification is available, or coronavirus tests have been performed for less than 250 per 100 000 persons. Risk classifications are assessed on the basis of color codes which are based to three criteria. First, the number of positive cases per 100 000 people in the last 14 days. Second, the number of tests performed per 100 000 people during the previous week. The third evaluation criteria is the percentage of positive test results during the previous week. Based on these criteria, ECDC generates a weekly area map. Through color coding, the EU wants Member States to implement common practices regarding travel restrictions and internal border control.

⁴⁰ MDPI, *Supra nota* 20.

⁴¹ European Council, Council of the European Union, Covid-19: travel and transport, 12.2.2021, <https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-travel-and-transport/>.

In addition, Member States should have common criteria for restricting free movement for persons traveling from high-risk areas, i.e., when a person travels from a red or gray area, even an orange area. In addition to the common criteria to be established through the color map, the EU has proposed that Member States provide timely and clear information to the EU on future travel or movement restrictions at least one week before the restriction enters into force. In terms of the social and economic challenges posed by a pandemic, citizens and businesses need predictability.⁴²

3.2. The Schengen Borders Code and Member States' right to restrict entry

Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union provision on the movement of persons across borders is also known as the Schengen Borders Code (SBC). According to it, internal border control as well as external border control must take into account what is regulated by the Schengen Border Code. Measures taken by the Member States and the Union on cross-border movement shall not call into question the rules on freedom of movement or other rights which are the same for Union citizens, their family members and third-country nationals and their family members who have the same rights as Union citizens. The purpose of border control is to combat illegal immigration and trafficking in human beings and to prevent threats to the internal security, public policy, public health and international relations of the Member States.⁴³

As internal border control is a very exceptional measure for the fundamental freedom of the Union, the free movement of persons, SBC argues that internal borders without border control must have a coherent approach in the event of a threat to the Member States or some Member States. This should be possible without compromising the free movement of persons. In addition, exceptional measures to reintroduce internal border controls must ensure that the principle of proportionality is respected. The SBC also emphasizes that, since the reintroduction of internal border control is so exceptional, the reintroduction of control must take place on a common basis and must be used as an exceptional and very last resort. The duration and scope of internal

⁴² European Commission, Press release, Coronavirus: Commission proposes more clarity and predictability of any measures restricting free movement in the European Union, Brussels, 4 September 2020.

⁴³ Official Journal of the European Union, 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), EUR-lex.

border control should be very clearly defined and should be based on objective criteria and an assessment of necessity.⁴⁴

As a matter of priority, before reintroducing border control, alternative measures should be considered to address a threat to public policy, internal security or public health in a Member State. Alternative measures should be considered at both national and Union level. The reintroduction of internal border control should always be weighed against the threat to the Member State and the right of free movement of persons. According to the interpretation derived from the case law of the European Union, a threat to public policy, internal security or public health means a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. For this reason, the principle of free movement of persons is interpreted strictly.

Article 2 of the Schengen Borders Code defines the most important definitions for the *acquis*. For the purposes of this research, the most important of these is the threat to public health, which means: “any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States”.⁴⁵

3.2.1. Member States’ right to restrict entry

Under the Schengen Borders Code, Member States may reintroduce temporary internal border control on certain grounds. Article 25 defines the general conditions for the reintroduction of border control. According to them, a Member State may reintroduce internal border control in the event of a serious threat to public policy or public security for a maximum of 30 days or for a longer period, as long as the threat is considered to last.⁴⁶ Article 45 (3) of the Treaty on the Functioning of the European Union also lists the grounds on which a Member State may restrict freedom of movement for workers and entry. In certain situations, these restriction criteria also apply to persons other than just employees. The grounds for restriction are public policy, public security and public health.⁴⁷ When a Member State decides to reintroduce temporary internal

⁴⁴ *Ipid.*

⁴⁵ *Ipid.*

⁴⁶ *Ipid.*

⁴⁷ Barnard C., *The Substantive Law of the EU, The Four Freedoms*, Sixth Edition, 2019, Oxford University Press.

border control, it shall assess the proportionality of the control in relation to the threat to public policy and internal security. The Member State must assess the extent to which the reintroduction of internal border control is likely to mitigate this threat and the impact it will have on the free movement of persons in an area where internal border control is not otherwise exercised.⁴⁸ In addition, restriction criteria have certain definitions that they must follow. Firstly, the criteria for restriction must respect the principle of proportionality and human rights. Secondly, the criteria for restriction cannot be complied with where the Union has exhaustively harmonized a certain area. Third, the grounds for restriction cannot be used as a reason for the State's financial interests.⁴⁹ With regard to public health, Article 29 of Directive 2004/38/EC provides an exhaustive list of diseases which the World Health Organization has classified as posing a risk to the health of the citizens of a Member State.⁵⁰ However, in these diseases, the WHO has referred to those that could potentially lead to an epidemic.⁵¹

If a threat to public policy or internal security requires the necessary measures, a Member State may, pursuant to Article 28 of the SBC, reintroduce internal border control immediately for a maximum period of 10 days. If the threat persists, this period may be extended by a maximum of 20 days at a time, but the period during which internal border control is exercised may not exceed two months. In total, in accordance with the general conditions laid down in Article 25, the total period during which internal border control has been reintroduced may not exceed six months. Member States shall have the option of extending the period up to a maximum of two years on the grounds set out in Article 29 concerning serious deficiencies in external border control referred to in Article 21.⁵²

3.2.1. Internal Border Control During Covid-19

The Covid-19 pandemic showed that there is a great deal of national discretion in defining public order and internal security. For this reason, interpretations have varied widely between Member States.⁵³ At the beginning of the pandemic, several Member States relied on Article 28 of the Schengen Borders Code, a threat that requires immediate action. However, the purpose of the

⁴⁸ Schengen Border Code, *Supra nota* 38.

⁴⁹ Barnard C., *Supra nota* 42, p. 476–477.

⁵⁰ Raitio J., *Supra nota* 1, p. 165.

⁵¹ Barnard C., *Supra nota* 42, p. 491.

⁵² Schengen Border Code, *Supra nota* 38.

⁵³ Raitio J., *Supra nota* 1, p. 164.

Schengen Borders Code is to reintroduce border control in accordance with the procedure laid down in Article 27 of the SBC. This means that the provisions distinguish foreseeable threat, in which case the Commission may propose alternative methods on the basis of the Member State's notification and the reasons for reintroducing border control. In the event of a foreseeable threat, notification of a possible reintroduction of border control should be made no later than four weeks in advance. As some Member States did not follow this procedure, after two months of border control, different legal bases and stricter procedures had to be used. The Covid-19 pandemic shows that secondary legislation provisions such as the SBC have no practical relevance to Member States' practice. For some Member States, this is reflected, for example, in the fact that the substantive and procedural requirements of the Schengen Borders Code have not actually been complied with.⁵⁴

It is very clear that Covid-19 fulfills the significance of the existence of a real and sufficiently serious threat affecting public policy, internal security and public health. Reintroducing internal border controls is a very easy solution for Member States to combat the spread of a pandemic. However, it raises the question of whether it has in fact been the primary means, and thus in accordance with the principle of proportionality, that a fundamental freedom has been restricted. During the Covid-19 pandemic, the European Commission repeatedly emphasized that there are also alternative ways than reintroduce internal border controls. Alternative means were, for example, the use of police powers or various public health measures.⁵⁵ According to Article 23 of the Schengen Borders Code, the absence of internal border control does not preclude the exercise of police powers at borders, as long as they do not have the same effect as border control.⁵⁶ It seemed that only the European Union's guidelines on quarantine practice were more widely followed and on the same grounds among the Member States.⁵⁷

As the sudden and uncoordinated reintroduction of internal border controls caused a great deal of criticism from the point of view of the realization of the fundamental rights of EU citizens, the Member States responded to the second wave of the pandemic in Europe with different types of restrictions. In the autumn of 2020, quarantines and negative Covid-19 virus test results were introduced more widely in place of internal border control. Of course, the quarantine

⁵⁴ Thym D., Bornemann J., *Supra nota* 24, p. 1143-1170.

⁵⁵ Thym D., Bornemann J., *Supra nota* 24, p. 1143-1170.

⁵⁶ Schengen Border Code, *Supra nota* 38.

⁵⁷ Thym D., Bornemann J., *Supra nota* 24, p. 1143-1170.

requirement also involves restrictions on free movement, but it still does not mean what is meant by border control under the Schengen Borders Code. The quarantine requirement must also be justified in accordance with the fundamental rights of citizens. Quarantine and a negative Covid-19 virus test result were examples of pursuing a public health goal.⁵⁸

During the second wave of the Covid-19 virus from late 2020 to spring 2021, several countries reintroduced temporary internal border controls. This was due, in particular, to the rapid spread of new Covid-19 virus variants and the easy infectivity of the virus. Five Member States, Denmark, Sweden, Germany, Austria and Norway, have notified the Commission and Member States of temporary border control from November 2020. These restrictions should be scheduled to end on 11 May 2021. Thereafter, border controls are scheduled to continue from 12 May onwards, until 11 November 2021. During the second wave of the pandemic in the spring, Hungary, Austria, France, Iceland and Finland have introduced temporary internal border controls, which means closing all internal borders. For these countries, temporary internal border controls have been introduced in April-May 2021.⁵⁹

3.3. Assessment from the point of view of proportionality principle

The different practices of the Member States with regard to the reintroduction of internal border control and its impact on the free movement of persons also raise the question of whether the measures have complied with the principle of proportionality, i.e., proportionate to the objective pursued? The aim has been to prevent the spread of the Covid-19 pandemic as well as to protect the free movement of persons. When a Member State proposes a restriction, it is assessed on the basis of whether the measure in question is appropriate, respects human rights and complies with the principle of proportionality.⁶⁰ In the case of measures taken by Member States and restrictions on fundamental freedoms, the principle of proportionality has been particularly important. In principle, it should be assumed that the restriction criteria in Article 45 (3) of the TFEU on the free movement of persons should not be complied with if the objective pursued can be achieved by less severe measures.⁶¹ Also, in accordance with the principles of good administration, a restrictive measure complies with the principle of proportionality where it is

⁵⁸ Thym D., Bornemann J., *Supra nota* 24, p. 1143-1170.

⁵⁹ European Commission, Temporary Reintroduction of Border Control, europa.eu, 9.5.2021

⁶⁰ Barnard C., *Supra nota* 42, p. 510.

⁶¹ Raitio J., *Supra nota* 1.

proportionate to the objective pursued, transparent and where the laws are clear and their effects foreseeable.⁶²

Member States have the right to restrict the free movement of persons on the grounds of a threat to public health. This is also reflected in Directive 2004/58 / EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside within the Union. Article 29 of the Directive states that, according to WHO instruments, an epidemic or other communicable disease which constitutes a threat to public health is a ground on which a Member State may restrict the free movement of persons.⁶³ Unlike public policy and public security as a ground for limitation, public health as a ground for limitation must be assessed more in the light of the principle of proportionality. Although, in principle, a restriction on free movement should be assessed individually, Due to the general wording of Article 29 it is not necessarily necessary in such a potential epidemic situation. It may therefore be reasonable to assume that the legislature intended to give Member States greater scope to impose restrictions on the basis of a threat to public health and thus not to require a similar individual examination or proportionality assessment as with regarding of public policy or public security.⁶⁴

Reasonability test has been used to assess the restrictive measures, at least in the case of restrictions on the free movement of goods. Before restricting free movement, it would be important to ensure that the restrictive measure has a real impact on what it seeks to achieve. Reasonability test means that the restriction criteria is justified by its certainty of possible effects. Even during the Covid-19 pandemic, such a justification for a restrictive measure, given its certain effects, has given Member States a wider margin of discretion in assessing the public health restriction criteria. For example, the German Constitutional Court approved restrictions on the movement of persons by assessing abstract suitability. BSE (mad cow) disease and the deadly Creutzfeldt-Jakob disease were also considered, on a case-by-case basis, to be a "likely linked together", leading the Court to accept emergency measures to prevent a threat to public health. It is clear from the case law of the Court that, in assessing whether a restriction on the free movement of persons is justified by a threat to public health, account must also be taken of

⁶² Barnard C., *Supra nota* 42, p. 513.

⁶³ Directive 2004/58/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, The European Parliament and the Council on the European Union.

⁶⁴ Thym D., Bornemann J., *Supra nota* 24.

the precautionary principle. In other words, it is also necessary to consider whether there is uncertainty as to the existence or extent of the risks to human health. Nor can it necessarily be assumed that one should wait until the risk is completely obvious or serious. An assessment such as that mentioned above requires Member States to assess the proportionality of the restriction in the light of changes in the situation.⁶⁵

From the point of view of the principle of proportionality, it could be said that the first and second waves of the Covid-19 pandemic can be assessed differently. During the first wave, Member States introduced internal border controls very quickly. This was despite the fact that the Commission's alternative proposals were not taken into account. In addition, Member States did not follow all the procedures under the Schengen Borders Code. Although Member States have had the right to restrict the free movement of persons due to the Covid-19 pandemic, restrictive measures threatened to hinder the exercise of fundamental freedoms. It seems that at the outbreak of the first wave, it was not possible to think of alternative ways to prevent the spread of the pandemic, but internal border control was seen as the most effective and fastest way. The sudden reintroduction of internal border controls has not been proportionate, regard on how it was implemented and how the Union's fundamental freedom, the free movement of persons, was hindered. It also seems that supranational institutions are not in a position to carry out effective supervision in order for Member States to comply with the provisions created and to comply with legal restrictions. This is best illustrated by the lack of relevance of the provisions of the Schengen Borders Code, although internal border controls have not been illegal.⁶⁶ Furthermore, the conclusion that the reintroduction of internal border controls in the first wave was not fully in line with the principle of proportionality is also supported by the symbolic value of the European Union's borders. The fact that the existence of fundamental freedoms is relevant to the functioning of the internal market and, in fact, the whole basis of the European Union, reintroduction of internal border control had been disproportionate from the point of view of the principle of proportionality and to radical restrictions on the free movement of persons. The reintroduction of internal border controls should, moreover, be a last way in terms of restricting the free movement of persons.

During the second wave of the pandemic, internal border controls have been carried out in accordance with certain common rules. The common guidelines published by the Commission in

⁶⁵ Thym D., Bornemann J., *Supra nota* 24.

⁶⁶ Thym D., Bornemann J., *Supra nota* 24.

September 2020 to provide clarity on restrictions on free movement have helped to assess the compliance of internal border controls with the principle of proportionality. Thanks to the common color codes, the restriction on freedom of movement met the criteria of proportionality as well as of the principle of non-discrimination. After all, the Covid-19 pandemic has also raised questions about the implementation of the principle of non-discrimination. During the second wave, a much smaller proportion of Member States reintroduced internal border controls. Instead, to prevent the spread of a pandemic, quarantines and a negative test result, for instance, were introduced. It could therefore be said that, in terms of free movement, internal border controls have been proportionate since the second wave of the pandemic broke out.

4. A SURVEY OF THE OPINIONS OF MEPs

To support an assessment of the problem which this paper has described, it has been carried out a survey of current MEPs. The survey was conducted from 22 March to 26 March 2021 and was answered by a total of 38 MEPs. The purpose of the survey was to find out what views the European Parliament has on the free movement of persons during the Covid-19 pandemic and on the restriction of this freedom by uncoordinated border policies and travel restrictions between Member States. This question was also asked in the survey from the point of view of the principle of proportionality. The survey was conducted with three background questions concerning the person's nationality, political group, and committee. Of these, responding to citizenship and political group was mandatory. Elsewhere, i.e., in relation to the research problem, 5 different statements were made, which were as follows:

- 1) The EU actions against the spread of the coronavirus has been very successful in achieving the free movement of people.
- 2) The free movement of persons has been jeopardized too much as a result of inconsistent border controls and travel restrictions in the Member States.
- 3) The EU would need more power to coordinate a more coherent border policy.
- 4) EU legislation should be amended to give the EU greater competence in the field of public health, with the ability to take more coherent action between Member States.
- 5) From the point of view of the principle of proportionality, the actions of some Member States with regard to borders or travel restrictions have been disproportionate.

Each MEP was allowed to respond to statements about how much they agreed or disagreed with that statement. In addition to the statements, there was also an open section in the survey where the MEP was free to write ideas about the topic or statements. When looking at the results, it should be noted that only a small number of all MEPs responded to the survey. For this reason, the survey does not provide a complete picture of the views of the European Parliament. In addition, the questions are very general. It was interesting to see if there were differences of opinion in the MEPs of different Member States, as well as the answers to the open text field of the survey.

4.1. Evaluation and summary of responses

The responses to the survey show that almost all respondents felt that the free movement of persons was too much jeopardized during the Covid-19 pandemic. Furthermore, none of the respondents fully agreed that the European Union's efforts to prevent the spread of the Covid-19 pandemic, while maintaining the free movement of persons, have been good. This perhaps means that since the European Union or neither Member States had not even been able to prepare for a pandemic, they cannot assume that everything would have gone as it is ideal to think. However, it is interesting to note from the responses how many fully agreed that the EU would need more power to regulate border policy and public health issues, so that in such situations there would be much more uniform practices in all Member States in the future. However, it should also be borne in mind that the role of the EU is to act as a Crisis Organization and to help Member States cope with crises such as Covid-19.⁶⁷ Changing the legislation itself is not the solution, to the problems raised by the research. Rather, there is a need for ways to promote better communication and cooperation between Member States. The majority of respondents also considered that Member States' actions to reintroduce internal border controls were in breach of the principle of proportionality. For example, respondents from Bulgaria, the Czech Republic, Denmark, Estonia, France, Greece and Hungary all fully agreed with the above statement. Only the Netherland respondents completely disagreed with the statement.

The answers to the survey are MEP's own opinions, which should be taken into account. For example, in the responses to the text field of the survey, it was apparent that some felt that internal border controls had been in line with the principle of proportionality and necessary to prevent the spread of the virus. Others argued that the actions of Member States in the early stages of the Covid-19 pandemic were rather a crime. These differences also support the conclusions that can be drawn from the research. Taken into account the limits of competence between the European Union and the Member States and what the European Union symbolizes and how it works, Member States may not have taken sufficiently account of these fundamental issues and the need for a more coherent response. In addition, if this had happened, the EU, as a Crisis Organization, should have reacted more quickly to the spread of Covid-19.

⁶⁷ Ojanen H., *Supra nota* 32, p. 134.

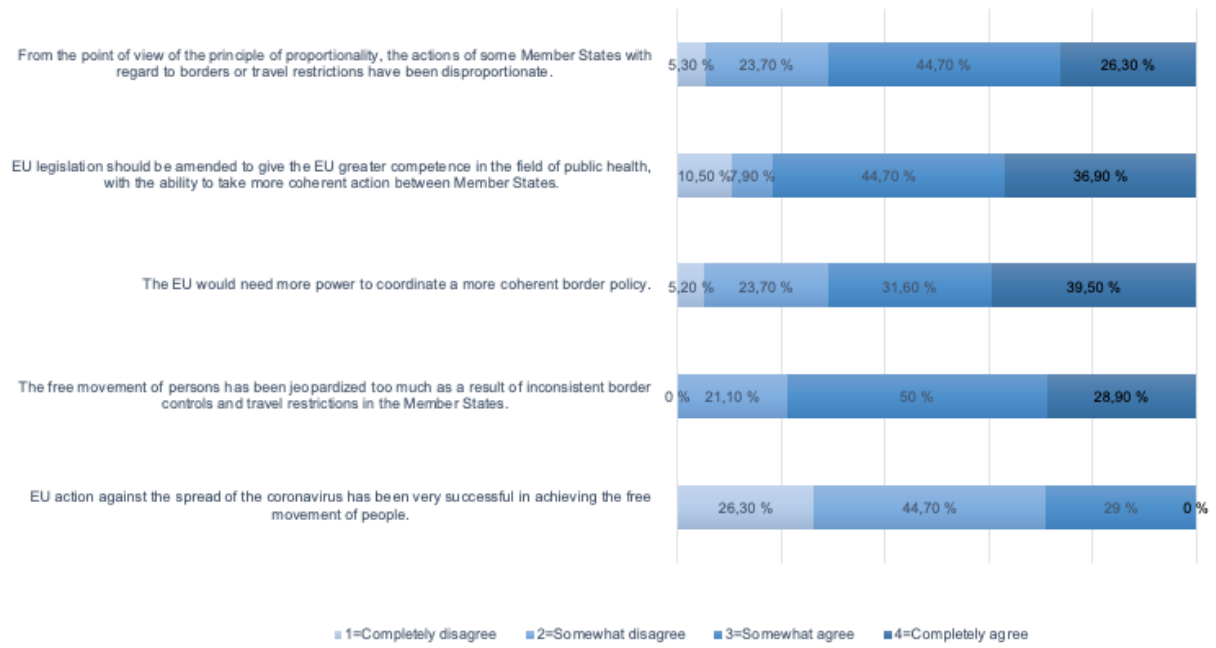


Figure 2 Summary of the responses.

5. CONCLUSIONS

The aim of this paper was to examine whether some EU Member States violated the principle of proportionality, at some point during the Covid-19 pandemic, by introducing internal border controls. Furthermore, referring to the above, the paper also considered whether the competence or power of the European Union should be increased in any way in order to avoid problems similar to those that arose during the Covid-19 pandemic in the future, especially from the point of view of free movement of persons.

The Covid-19 pandemic has raised doubts about the European Union's ability to act as a Crisis Organization. It is clear that the European Union was not able to respond to the pandemic quickly and effectively enough. It is also clear that neither the European Union nor the Member States were able to prepare for or anticipate the future of the Covid-19 virus and its spread. This resulted in an uncoordinated prevention of the spread of the virus, which led to a situation where the fundamental freedoms of the European Union were jeopardized and the internal market suffered. In particular, the pandemic has shown that coordination between Member States has been weak and how important and crucial it is in preventing the spread of the virus. It also seems that, in a crisis situation, the Member States did not sufficiently respect the solidarity and legal restrictions of the European Union.

With regard to internal border control in particular, the Covid-19 pandemic showed that the provisions of the Schengen Borders Code have not always been fully taken into account and that similar provisions of secondary legislation have no practical relevance to Member States' practice. From the point of view of the principle of proportionality, internal border control can be partially criticized during the first wave of a pandemic. This conclusion is also supported by the comparison of the action of some Member State with the symbolic significance of the European Union, in which the functioning of the internal market and fundamental freedoms play a key role. The European Union is a single entity made up of its Member States. This should have been taken into account much better. In addition, the EU should have reacted and coordinated integrated policies more quickly and promoted cooperation between Member States. Although Member States have the right to decide on public health issues and their own border policy, the reintroduction of internal border controls did not fully comply with the Schengen Borders Code. The obligation on the Member States to take the above into account would have been more in

line with the principle of proportionality. During the second wave of the pandemic, internal border controls have been more in accordance with the principle of proportionality. In September 2020, the European Union was able to establish a uniform, coordinated approach to the Member States to prevent the spread of the virus and to establish common criteria for travel restrictions or internal border controls.

There is no need to change European Union legislation or give it more power in order for the EU to be able to better coordinate situations such as the Covid-19 pandemic in the future. This conclusion is supported by the following issues relating to the competences of the Union. The European Union has the power to regulate matters relating to trade policy and the customs union. Legally binding provisions already in force would also have been sufficient in themselves, such as the Schengen Borders Code, which lays down the conditions for the reintroduction of internal border control. The European Union's competence makes it possible to deviate from the EU's own rules in the event of a crisis. For example, with regard to trade policy, the EU changed the rule on customs duties for, for instance, medical supplies and protective clothing from third countries.⁶⁸ The action taken by the Member States and the European Union during the pandemic has shown that coordination between Member States has been weak. Although the Union's aim has long been to promote cooperation between Member States, the pandemic has shown that it needs to be further promoted. In addition, the European Union should strengthen its role as a Crisis Organization, i.e., be able to react and coordinate cooperation between Member States more quickly. The Union's role is to help the Member States overcome the crisis, and without coordination at Union level, as the Covid-19 pandemic has shown, we will find ourselves in a situation where different policies are jeopardizing the functioning of the internal market and fundamental freedoms.

Improving communication and cooperation between Member States has not, as has already been shown, been at a good enough level to better understand the impact of the outbreak of the Covid-19 pandemic. The first and second waves of the Covid-19 pandemic have occurred in all Member States almost simultaneously. As a supranational body supporting the Member States, the European Union could have based its action on Article 114 of the Treaty on the Functioning of the European Union at the beginning of the Covid-19 pandemic. According to this Article, the EU can take measures to complete the internal market (Article 26 TFEU) in order to

⁶⁸ Ojanen H., *Supra nota* 32, p. 137

approximate the laws, regulations and administrative provisions of the Member States. It would have enabled the European Parliament and the Council, in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, to take harmonization measures to approximate the administrative provisions of the Member States on border control and travel restrictions, using Article 114 as the legal basis. When the Member States notified the Commission and the other Member States of the reintroduction of temporary internal border controls, the Commission put forward alternative measures to prevent the spread of the pandemic. The use of these means and the application of Article 114 could have prevented such a radical, as has now been seen, jeopardizing the internal market and the free movement of persons.

LIST OF REFERENCES

Scientific books

1. Barnard Catherine, *The Substantive Law of the EU, The Four Freedoms, Sixth Edition*, 2019, Oxford University Press

2. Raitio Juha, *Euroopan Unionin oikeuden periaatteet ja perusvapaudet*, Helsingin yliopiston oikeustieteellinen tiedekunta, Helsinki, 2017

Scientific articles

3. Alcaro Riccardo and Tocci Nathalie, *The European Union in a COVID World*, Istituto Affari Internazionali, 2020

4. Brehon Nicolas-Jean, *The European Union and the Coronavirus*, Foundation Robert Schuman, *European Issues*, No. 553, 7.4.2020, p. 1-10

5. Catrin Sohrabi, Zaid Alsafi, Niamh O'Neill, Mehdi Khan, Ahmed Kerwan, Ahmed Al-Jabir, Christos Iosifidis, Riazz Agha, *World Health Organization declares global emergency: A review of the 2019 novel coronavirus (COVID-19)*, *International Journal of Surgery*, 76, 2020, p. 71-76

6. Cottier T., Enchandi R., Leal-Arcas R., Liechti R., *The Principle of Proportionality in International Law*, SSRN Electronic Journal, December 2012.

7. Krzysztof Goniewicz, Amir Khorram-Manesh, Attila J. Hertelendy, Mariusz Goniewicz, Katarzyna Naylor, and Frederick M. Burkley Jr., *Current Response and Management Decisions of the European Union to the Covid-19 Outbreak: A review*, *Sustainability*, MDPI, 12(9), 3838, 8.5.2020

8. Ojanen Hanna, *Koronapandemia, EU:n rooli ja tehtävät: Tutkimuksen empiirisiä ja teoreettisia lähtökohtia*, *Kosmopolis*, 2020

9. Kuusela S., EU-kansalaisten Vapaan Liikkuvuuden Rajoittaminen, Tampereen Yliopisto, Tampere 2008

10. Sanjay Kumar Mishra, Timir Tripathi, One year update on the COVID-19 pandemic: where are we now?, *Acta Tropica*, 214, 2021, 105778

Thym Daniel, Bornemann Jonas, Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics, *European Papers*, Vol 5, 2020, p. 1143-1170

European Union and International legislation

11. Consolidated version of the Treaty Functioning of the European Union, Official Journal C 326, 26.10.2012, p. 0001 – 0390

12. Consolidated version of the Treaty on European Union, Official Journal c 326, 26.10.2012, p. 0001 – 0390

13. Directive 2004/58/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, The European Parliament and the Council on the European Union

14. Official Journal of the European Union, 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)

Court Decisions

15. Judgment of the Court of 29 November 1956. - Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community, Case 8-55, EUR-lex

Other Sources

16. Eur-lex, Division of competences within the European Union, Eur-Lex, 26.1.2016
17. European Commission, Press release, Coronavirus: Commission proposes more clarity and predictability of any measures restricting free movement in the European Union, Brussels, 4 September 2020
18. European Commission, Temporary Reintroduction of Border Control, europa.eu, 9.5.2021
19. European Council, Council of the European Union, Covid-19: travel and transport, 12.2.2021
20. European Parliament, Bold measures needed to protect cross-border and seasonal workers in EU, MEPs say, European Parliament News, 19.6.2020
21. European Parliament, Parliament calls for better protection of cross-border and seasonal workers, European Parliament News, 23.6.2020
22. Kuusisto T., Liukkonen S., Talouden Tilannekuva, Tilastokeskus, 15.3.2021
23. Tulevaisuusvaliokunta, Koronapandemian hyvät ja huonot seuraukset lyhyellä ja pitkällä aikavälillä, Eduskunta, 1/2020, Helsinki 2020
24. Turunen Susanna, Toimittajalta: Kun ihmisten perusoikeuksia rajoitetaan, menee kaikki sekaisin, YLE, 18.3.2020
25. World Health Organization, Origin of SARS-CoV-2, 26.3.2020
26. World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard, 20.2.2020

Appendix 1. Non-exclusive licence

Non-exclusive licence for reproduction and for granting public access to the graduation thesis¹

I _____ Maija Kervinen _____ (author's name)

1. Give Tallinn University of Technology a permission (non-exclusive licence) to use free of charge my creation

The Implementation and Effects of the Insurance Distribution Directive in Regards to Consumer Protection in the European Union _____, (title of the graduation thesis)

supervised by _____ Ondrej Hamulak _____, (supervisor's name)

1.1. to reproduce with the purpose of keeping and publishing electronically, including for the purpose of supplementing the digital collection of TalTech library until the copyright expires;

1.2. to make available to the public through the web environment of Tallinn University of Technology, including through the digital collection of TalTech library until the copyright expires.

2. I am aware that the author also retains the rights provided in Section 1.

3. I confirm that by granting the non-exclusive licence no infringement is committed to the third persons' intellectual property rights or to the rights arising from the personal data protection act and other legislation.

1 The non-exclusive licence is not valid during the access restriction period with the exception of the right of the university to reproduce the graduation thesis only for the purposes of preservation.