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**Free Movement of Persons versus COVID-19:
National Restrictions and EU Law**

Friedery, Réka

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Abstract

Albeit, in recent years, the EU has faced several health issues such as the pandemic influenza (H1N1), or E. Coli outbreak in Germany, this time the domino effect of Covid-19¹, a worldwide epidemic with serious effects on societies and economics of everyday life, has resulted in never-before-seen protection measures across the world. Its challenges forced countries to take steps with negative outcomes to liberties as free movement. Nevertheless, free movement of persons between Member States and the limitations have multiple layers which need to be analysed separately.

Free movement: right and freedom

“We must look out for each other, we must pull each other through this. Because if there is one thing that is more contagious than this virus, it is love and compassion. And in the face of adversity, the people of Europe are showing how strong that can be” said Ursula von der Leyen, President of the European Commission at the plenary session of the European Parliament in 26 March 2020 when the EU has been confronted with the epidemic. However encouraging these words were, the perils to free movement are clearly visible, and containing the spread of COVID-19 is an exercise of emergency risk regulation on an unprecedented scale².

Originally, freedom to cross borders between Member States was intended as an economic objective to promote the free movement of workers, and the 1957 Treaty establishing the European Economic Community covered the free movement of workers and freedom of establishment, and thus individuals as employees or service providers. Free movement of persons is one of the four pillars of the internal market sans internal borders. Free movement was furthermore strengthened when the 1992 Treaty of Maastricht introduced the notion of EU citizenship to be enjoyed automatically by every national of a Member State, including a right to move and reside freely within the territory of the Member States. Moreover, freedom

* Research fellow, Institute for Legal Studies, Centre for Social Sciences (Centre for Excellence of the Hungarian Academy of Sciences), friedery.reka@tk.mta.hu.

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¹ COVID-19 is the infectious disease caused by the most recently discovered coronavirus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019. COVID-19 is now a pandemic affecting many countries globally. See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> accessed on 10.10.2020 accessed on 10.08.2020.

² Alessio M. Paces – Maria Weimer, From Diversity to Coordination: A European Approach to COVID-19, *European Journal of Risk Regulation*, 11(2) (2020), 283-296.

of movement is also a fundamental right enshrined in Article 45 of the Charter of Fundamental Rights. Hence, Articles 3(2) TEU, 20 and 21 TFEU and Article 45 of the Charter establish the principle that every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaties and by the provisions adopted for their application.

Public health

According to Art. 168 TFEU public health is a competence shared between the European Union and the Member States.³ That is to say Union actions complement national policies and the EU is primarily intended to support actions taken by Member States, as for example to cover monitoring, early warning of, and combating serious cross-border threats to health. Member States coordinate among themselves their policies and programs in the areas covered by Union action in the field of public health. In connection with the recent pandemic this was emphasized by the Commission stating that short-term and strongly coordinated action to strengthen key areas of preparedness and response will require strong coordination and exchange of information in and between Member States and communities as well as commitment to implement these measures, which are a national competence⁴

Also, the EU can adopt health legislation on the ground of protection of public health e.g. serious cross-border threats to health and in this regard an important step was Decision 1082/2013⁵ on serious cross-border threats to health⁶ which applies among others on communicable disease⁷ too. This decision lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies. Also Member States are obliged to coordinate their COVID-19 measures in the so-called EU Health Security Committee, composed of national health ministers and chaired by the Commission.⁸

The EU Commission may take any useful initiative to promote the coordination of member States's policies and programs, in particular initiatives aiming at the establishment of guidelines and indicators, the organization of exchange of best practice, and the preparation of

³ Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE XIV: PUBLIC HEALTH - Article 168 (ex Article 152 TEC) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E168> accessed on 10.07.2020.

⁴ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Short-term EU health preparedness for COVID-19 outbreaks https://ec.europa.eu/info/sites/info/files/communication_-_short-term_eu_health_preparedness.pdf accessed on 10.07.2020.

⁵ Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health. accessed on 10.07.2020.

⁶ According to Art. 3 of the Decision a 'serious cross-border threat to health' means a life threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection,

⁷ According to Art. 3 of the Decision a 'communicable disease' means an infectious disease caused by a contagious agent which is transmitted from person to person by direct contact with an infected individual or by indirect means such as exposure to a vector, animal, fomite, product or environment, or exchange of fluid, which is contaminated with the contagious agent

⁸ Art. 11 of the Decision.

the necessary elements for periodic monitoring and evaluation and the Council may also adopt recommendations.⁹

Restrictions in primary law and secondary law

Although the right to free movement can be subject to limitations and conditions, there is no other provision in primary law regarding the restrictions. Only Article 45 TFEU details the grounds for restrictions on the right of free movement and residence, namely public policy, public security or public health. Indeed, secondary legislation addresses the issue of restrictions but with certain requirements to be met. In this regard while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the Community context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions¹⁰.

Indeed, secondary legislation addresses the issue of restrictions but with certain requirements to be met. Directive 2004/38/EC concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Directive 2004/38/EC concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This also governs free movement of persons who are engaged in economic activities and contains limitations and conditions. According to this, EU citizens or members of their family may be expelled from the host Member State on grounds of public policy, public security or public health. However, the Directive expressly states that these cannot derive from economic reasons, namely, because of the internal economy. The Directive specifies the kind of disease that can justify restrictions. The only diseases justifying measures restricting freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation or other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

Border control

The politics that produce border security as a proper response to external threats have guided the COVID-19 response in many states as well. In this respect, pandemics—no less than migration waves or terrorist attacks—involve border politics.¹¹

Regulation (EU) 2016/399¹², also known as the Schengen Borders Code (SBC) contains the rules that govern checks on persons on external borders, entry conditions and the conditions

⁹ See Art. 168 TFEU.

¹⁰ See Case C-33/07 Jipa [2008] ECR I-5157, para. 23

¹¹ Michael R. Kenwick – Beth A. Simmons, Pandemic Response as Border Politics, *International Organization* 74 (2020), 2

<https://www.cambridge.org/core/journals/international-organization/article/pandemic-response-as-border-politics/0A9FC8629BF379D0CFFAADD0661547DA3/core-reader> accessed on 10.10.2020.

¹² 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)

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399> accessed on 10.07.2020.

of temporary reintroduction of border controls at internal borders in the Schengen Area. According to the SBC, internal borders are the common land borders, including river and lake borders, of the Member States; the airports of the Member States for internal flights and sea, river and lake ports of the Member States for regular internal ferry connections.

Articles 25, 28 and 29 of the Regulation provides Member States with the capability of temporarily reintroducing border control at the internal borders in the event of a serious threat to public policy or internal security.¹³ Although public health is clearly not included, public policy is broadly interpreted in our case. Thus, in the present pandemic, the reason to reinstate border controls between Member States is that the border controls should help combat threats, immediate or future, to public health. But there are several requirements to meet. This measure must remain an exception and be used as last resort, taking into consideration the principle of proportionality and necessity. The Commission may issue an opinion with regard to the necessity of the measure and its proportionality but cannot veto such a decision if it is taken by a Member State.

Interestingly, Member States have taken different approaches regarding the use of border control, turning to either Article 25 or Article 28 of the SBC.¹⁴ The two provisions differ regarding the entry into force, the time period and the obligation of notification. On one hand, Article 25 can be used for foreseeable events that pose serious threats to public policy or internal security. This measure can be used to reintroduce border control (an activity carried out at the border and consisting of border checks and border surveillance) at all or specific parts of its internal borders. The time frame is for a limited period of up to 30 days or for the foreseeable duration of the serious threat if it exceeds 30 days. It can be prolonged for renewable periods of up to 30 days but the total period shall not exceed six months.

Art. 25

1. Where, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days and if it persists beyond the period t may prolong border control at its internal borders for renewable periods of up to 30 days.

4. The total period shall not exceed six months. Where there are exceptional circumstances as referred to in Article 29, that total period may be extended to a maximum length of two years.

On the other hand, Article 28 is for cases requiring immediate action because of a serious threat to public policy or internal security. Here, the measure immediately reintroduces border control at internal borders, for a limited period of up to ten days, with the possibility to

¹³ Art. 29 can be used for exceptional circumstances, where the overall functioning of the Schengen area is put at risk as a result of persistent serious deficiencies relating to external border control, and insofar as those circumstances constitute a serious threat to public policy or internal security, the Council may, based on a proposal from the Commission, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders.

¹⁴ Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code.
https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf
accessed on 10.07.2020.

prolong the border control at internal borders for renewable periods of up to 20 days. However, the overall period shall not exceed two months.

Art. 28

Specific procedure for cases requiring immediate action

1. Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days.

3. If the serious threat to public policy or internal security persists beyond the period provided for to prolong the border control at internal borders for renewable periods of up to 20 days.

Another difference between the measures is that according to Article 25 (and also Article 26), Member States have the obligation to notify the Commission and other Member States at least four weeks before the planned reintroduction. But there is still an exception if the circumstances giving rise to reintroduced border control become known less than four weeks before the planned reintroduction. Contrary to this, because the immediate nature of the measure, Article 28 imposes no obligation for prior notification, rather the Commission and Member States shall be informed immediately, parallel to implementing the immediate measure.

Soft-law instruments

According to Article 288 TFEU, to exercise the Union's competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions, where recommendations and opinions have no binding force.

While Member States (hastily) imposed restrictions on free movement, the European Commission used soft-law instruments, thus published several guidelines in the form of recommendation to coordinate those actions. The restrictions introduced by Member States were associated with exemptions for certain categories of workers on the ground of economic and social reasons, e.g. seasonal workers in Germany.

The European Commission, acknowledging the importance of the exemptions, published Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak¹⁵. In this the EU Commission emphasized the integrity of the internal market and the criteria that must be met for justified restrictions on the right to free movement of workers on the ground of public health, namely the criteria of necessity, proportionality, objectivity and non-discrimination. Although there is a list of workers included whose occupations are of a critical nature and whose free movement is considered to be essential, the list is not exhaustive. Among others, the document clarified that Member States should allow frontier workers in general to continue crossing borders if work in the sector concerned is still allowed in the host Member State and should treat cross border workers and national workers in the same manner. The Commission underlined the critical and essential nature of seasonal work, too.

¹⁵ Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03) accessed on 30.07.2020.

The guideline complemented another one, the Guidelines for border management measures to protect health and ensure the availability of goods and essential services¹⁶ that intended to set up principles for an integrated approach of the exemptions used by the Member States to an effective border management to protect health while preserving the integrity of the Single Market. Member States were requested to designate for transport workers “green lane” border crossings for land (road and rail), sea and air transport and urged Member States to allow and facilitate the crossing of frontier workers and not only of those working in the health care and food sector, and other essential sectors.

The non-discrimination principle and the principle of proportionality was emphasized by the Commission during the restrictions thus meaning that measures must not discriminate between Member States’ own nationals and resident EU-citizens and Member State must not deny entry to EU citizens or third-country nationals residing on its territory and must facilitate transit of other EU citizens and residents that are returning home. Furthermore, the proportionality of a measure means consulting with the health authorities and having them approve the measure as suitable and necessary to achieve the public health objective. In reality this was not met by several states, e.g. Hungary, as of 17 March 2020, only Hungarian citizens and EEA nationals holding a permanent residence card, were allowed to enter the territory.¹⁷ ¹⁸ Also, there was a clear discrimination between EU citizens when the Hungarian government granted exemption to Czech, Slovak and Polish citizens in case they present a negative coronavirus test but other EU nationals were not allowed to enter even with a negative test.

The importance of seasonal workers was highlighted again in the Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak ¹⁹. That is to say, that in certain circumstances seasonal workers in agriculture perform critical harvesting, planting or tending functions and Member States should treat those workers in the same manner as the workers that exercise critical occupations referred to above. We shall point out, that the restrictions on free movement of workers shifting towards the free movement of certain workers imposed by Member States were not regarded as Member States’ infringement and the Commission only called for a common approach regarding the categorization of these workers.

The priority of the EU was underlined in the Joint European Roadmap towards lifting COVID-19 containment measures ²⁰ published by the Commission. It called on the Member States to coordinate the lifting of the measures, but noted that the protection of public health in the short and long term should remain the primary objective of decisions taken by Member States and that respect and solidarity between Member States remains essential.

¹⁶ COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (2020/C 86 I/01) accessed on 30.07.2020.

¹⁷ Exceptions were granted in case the person concerned undergoes a medical examination that does not result in the suspicion of COVID-19 infection and that the person is listed in the registry of the epidemiological authority. See more Hungary, Governmental Decree no. 81/2020 on extraordinary measures relating to the state of danger declared for the protection of health and lives and for the restoration of national economy (81/2020. (IV. 1.) Korm. rendelet az egészség és élet megóvása, valamint a nemzetgazdaság helyreállítása érdekében elrendelt veszélyhelyzettel kapcsolatos rendkívüli intézkedésekről), 1 April 2020, Section 2, available at: https://njt.hu/translated/doc/J2020R0081K_20200514_FIN.pdf. accessed on 10.09.2020.

¹⁸ European Union Agency for Fundamental Rights (FRA), Coronavirus pandemic in the EU – Fundamental Rights Implications accessed on 25.10.2020

https://fra.europa.eu/sites/default/files/fra_uploads/hu_report_on_coronavirus_pandemic_june_2020.pdf

¹⁹ Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (2020/C 235 I/01).

²⁰ Joint European Roadmap towards lifting COVID-19 containment measures

[https://ec.europa.eu/info/sites/info/files/communication_-_](https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf)

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Furthermore, on 13 October the Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic was adopted and it declared again, that any measures restricting free movement to protect public health must be proportionate and non-discriminatory, must be lifted as soon as the epidemiological situation allows. The Recommendation sets out four key areas where Member States will coordinate their efforts:

- a common mapping system based on a color code (green, orange, red, grey)
- common criteria for Member States when deciding whether to introduce travel restrictions
- more clarity on the measures applied to travelers from higher-risk areas (testing and self-quarantine)
- providing clear and timely information to the public.

Among others it called on the Member States that they should not restrict the free movement of persons travelling to or from green areas and should respect the differences in the epidemiological situation between orange and red areas and act in a proportionate manner and in principle they shall not refuse entry to persons travelling from other member states. Those member states that consider it necessary to introduce restrictions could require persons travelling from non-green areas to undergo quarantine or undergo a test after arrival.²¹

Conclusion

Until recently only some Member States have reintroduced controls on their internal borders, mainly in response to the influx of migrants in 2015. As we can see, Member States have autonomy to restrict free movement of persons between Member States, and protecting public health is a legitimate object. Public health is a competence shared between the European Union and the Member States, and EU action in this area is primarily intended to support and complement actions taken by individual Member States, e.g. national policies battling cross-border threats to health. The recent pandemic situation allows to diverge from the regular rules. But the protection of economies (e.g. internal tourism sector) cannot generate any restrictions to free movement. Protection of public health can lead to different measures but reinstating border control – whether considering the threat as foreseeable or as requiring immediate action – has to meet the criteria of necessity, last resort, proportionality and non-discrimination. It is also important to recognize that administrative obstacles (e.g. lacking trustworthy data to understand the scale of the disease) might lead to late classification of a disease as a pandemic (remember that WHO declaration is needed as a grounds for justifying the restriction of free movement between Member States) and can cause missed opportunities to combat threats. We could observe that the soft-law instruments adopted by the EU to coordinate the necessary pandemic measures were late as Member States have already introduced their (restrictive) measures.

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Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Kecskés Gábor

Szerkesztőség: Hoffmann Tamás, Mezei Kitti, Szilágyi Emese

Honlap: <http://jog.tk.mta.hu/mtalwp>

E-mail: mta.law-wp@tk.mta.hu

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