

Pandemic, Free Movement Restrictions and EU Soft Law

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Abstract: Covid-19 pandemic generated such a threat that Member States of the European Union restricted free movement between Member States on the ground of public health as part of their crises management. Nevertheless, free movement of persons between Member States and the limitation of this freedom have multiple layers. The paper aims to analyse the complementing nature of EU soft law and Member States' free movement restrictions during the present pandemic, with a special focus on the EU Commission's key role. The paper presents the multiple layers of free movement and its restrictions: public health, border policy and soft law form the frame of free movement restrictions. The main aim of the article is to define the scope of role soft law can play in the integrated approach during time of crises in the EU; the article helps to understand the EU's use of soft law in crises management.

Key words: soft law, free movement, public health, CJEU, EU, Member States

1 INTRODUCTION

Soft law appeared first in international law, we can observe soft law examples e.g. in certain types of resolutions of international organizations. A general approach of the meaning of soft law is that these are rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.¹ On the supranational EU level we can notice that soft law instruments are increasingly used by the EU institutions in forms of action programmes, communications, code of conduct, guidelines, notices, recommendations etc. that contain policy goals in various areas with the common feature that they do not have legally binding effects.

The Court has developed extensive case law regarding soft law instruments such as the use of soft law by the European Commission. The institution uses many soft law instruments as guidance for the member states and the Court stated that recommendations are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules² and that Article 155 of the Treaty gives the Commission the right to formulate recommendations or deliver opinions which, according to Article 189 of the Treaty, are not binding³. The competence of the Commission to adopt soft law has been already established by Article 211 of Treaty establishing the European Community, whereby Article 292 of Treaty on the Functioning of the European Union (TFEU) contains the provision that the Commission shall adopt recommendations.

We shall mention that the European Parliament also stressed that 'soft law' constitutes a widely accepted interactive form of EU regulatory policy along with coordination, cooperation, negotiation and hierarchy. It also stressed that each EU institution, including the European Council, must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take.⁴

1. FREE MOVEMENT AND ITS RESTRICTIONS

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

¹ SENDEN, L. Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet? p. 23.

² See C-322/88 Salvatore Grimaldi v Fonds des maladies professionnelles, para. 13.

³ See C-303/90 French Republic v Commission of the European Communities, para. 30.

⁴European Parliament: Report on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)), 28 June 2007, PE 386.366v02-00 https://www.europarl.europa.eu/sides/getDoc.do?reference=A6-2007-0259&type=REPORT&language=EN&redirect#_part1_ref1

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 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.

Next to Article 45 of the TFEU, free movement of workers is enshrined in EU secondary legislation and developed by the case-law. There were several legislative and broad case-law regarding free movement of persons, when a comprehensive directive was adopted in 2004. Directive 2004/38/EC was meant to create a coherent legal system and unite the disparate pieces of legislation that dealt with workers and economically inactive EU migrants⁵. Directive 2004/38/EC had the view to encourage Union citizens to exercise their right to move and reside freely within the Member States, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence. Moreover, according to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, EU citizens are entitled to look for a job in another EU country, work without needing a work permit, reside for that purpose to stay there even after the employment has finished. They enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages.

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. According to the above-mentioned Directive 2004/38/EC, 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 but the Directive expressly states that these cannot derive from economic reasons, namely, because of the internal economy. Thus, 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. However, the Court persistently tries to balance this in its case law stating that for 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 institutions⁶.

As for public policy, the Court pointed out that the concepts of 'public policy' and 'public security' must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions,⁷ and they are Community concepts, which cannot be defined solely by the various national systems.⁸ Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another but interpret those requirements strictly.⁹ They are not at liberty to give their own interpretation, based solely on national law, to the concept of 'risk to public policy' in Article 7(4) of Directive 2008/115.¹⁰ The concept of 'risk to public policy' is neither included in the concepts defined in Art. 3 of Directive 2008/115 nor defined by other provisions of that directive.¹¹

Regarding restricting free movement, Directive 2004/38/EC also specifies the kind of disease that can justify restrictions: the only diseases justifying measures restricting freedom of movement

⁵ MANTU, S. Concepts of time and European citizenship, p.454.

⁶ See C-33/07 Jipa, para. 23.

⁷ See e.g. C-41/74 van Duyn, 30/77 Bouchereau, C-482/01, C-493/01 Orfanopoulos and Oliveri, C-441/02 Commission v Germany, C-50/06 Commission v Netherlands.

⁸ C-554/13, ZH. and O., paras 48 and 54.

⁹ Cases 36/75 Rutili para. 27, 30/77 Bouchereau para. 33 and C-33/07 Jipa para. 23.

¹⁰ C-554/13, ZH. and O., para. 30.

¹¹ C-554/13, ZH. and O., para. 41.

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.

3 PUBLIC HEALTH AND BORDER POLICY

According to Art. 168 TFEU public health is a competence shared between the European Union and the Member States. 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 competence.

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 1082/2013 on serious cross-border threats to health¹² which applies among others on communicable disease¹³ too. This decision lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health (Early Warning and Response System), including preparedness and response planning related to those activities, in order to coordinate and complement national policies. Moreover, the European Centre for Disease Prevention and Control (ECDC), an EU agency was set up to strengthen Europe's response capability and to provide technical support to Member States.

Moreover, 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.¹⁴ Moreover, the EU Commission may take any useful initiative to promote the coordination of member States' 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 the necessary elements for periodic monitoring and evaluation and the Council may also adopt recommendations.¹⁵ However, in spite of having the above-mentioned legally binding instrument and a dedicated agency, the EU governance framework remains a work in progress.¹⁶

In the EU, the base for border policy rests in Regulation (EU) 2016/399 (European Parliament and Council, 2016), known as the Schengen Borders Code (SBC) and contains the rules that govern checks on persons on external borders, entry conditions and the conditions of temporary reintroduction of border controls at internal borders (SBC, art. 2).¹⁷ Thus, in the Schengen Area there is the possibility for a travel ban temporarily prohibiting or banning entry of nationals and residents of

¹² 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.

¹³ 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. Decision 1082/2013/EU on serious cross-border threats to health [2013] OJ L 293/1, repealing Decision 2119/98/EC.

¹⁴ Art. 11 of the Decision.

¹⁵ See Art. 168 TFEU.

¹⁶ RENDA, A. and CASTRO, R. (2020). Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic, p. 273-282.

¹⁷ The Schengen Agreement was signed in 1985 by France, Germany, Belgium, Luxembourg, and the Netherlands with the aim of the gradual abolishment of the internal borders between countries and extended control of the external borders. In 1990, a Convention was signed for the concrete implementation of the Schengen Agreement. The Schengen Area started to be alive in 1995, when seven Schengen member countries, France, Germany, Belgium, Luxembourg, Netherland, Portugal, and Spain decided to abolish their internal border checks. In 1999, the Treaty of Amsterdam incorporated the agreement into the EU's legal framework.

another Schengen country: Articles 25, 28 and 29 provides Member States with the capability of temporarily reintroducing border control at the internal borders¹⁸ in the event of a serious threat to public policy or internal security.¹⁹

As for the pandemic, Member States turned to the SBC in the “fight” against an invisible enemy, and in this context there are several elements that shall be discussed. First of all, as mentioned before, according to the Code, border control can be reintroduced on the ground of public policy or internal security whereby public health is clearly not included. Although public health is clearly not included, public policy is broadly interpreted in our case. We shall emphasize that according to the Court, the concepts of public policy and public security must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions. It furthermore stated that while public policy presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, public security covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.²⁰

4 THE EU’S APPROACH TO FREE MOVEMENT RESTRICTIONS

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.²¹ 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. All this being in line with Article 288 TFEU, namely, to exercise the Union’s competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions, where recommendations and opinions have no binding force. Based upon a complex institutional and judiciary practice, recommendations, communications, guidelines, codes of conduct and so forth, have formed a composite legal framework producing a set of practical effects, even beyond the Grimaldi ruling.²² But the aim of the Commission’s soft law instruments adopted during the COVID-19 crisis has been among others to set a satisfactory tier of legal certainty in terms of EU law compliance, namely by public authorities.²³

When we analyse the restrictions introduced by Member States at the beginning of the pandemic, they 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 acknowledged the importance of the exemptions, however, it recognised that it is of utmost importance to direct the separate and different actions into an integrated approach. Because of this, it turned to soft law and published a Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak²⁴, thus stressing 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. In connection with this, we shall point out that the Court reinforced in its case law that the rights enjoyed by citizens can be restricted for reasons of public interest, and if the rights of workers have to be curtailed then the court must consider whether such obstruction would likely impact the freedom of movement of

¹⁸ According to the SBC, internal borders means the common land borders of Member States, including river and lake borders, the airports of the Member States for internal flights, and sea, river and lake ports of the Member States for regular connections.

¹⁹ Article 29 has been introduced since 2013, after the revision of the SBC, enabling the possible temporary introduction internal borders for up for two years where there are ‘serious deficiencies’ at external borders.

²⁰ See C-304/14 Secretary of State for the Home Department v CS.

²¹ KENWICK, M. R. and SIMMONS, B. A. Pandemic Response as Border Politics, p. 2.

²² SNYDER, F. Soft law and institutional practice in the European Community, p. 1.

²³ KORKEA-AHO, E. EU soft law in domestic legal systems: flexibility and diversity guaranteed? p. 271.

²⁴ European Commission. Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03) C/2020/2051, OJ C 102I, 30.3.2020, p. 12–14.

workers.²⁵ It was established that workers are favoured citizens because their rights cannot be restricted even under public interest unless such measure is proportionate to the aim pursued, and compatible with the fundamental rights enjoyed by the workers²⁶.

In our case, in the above-mentioned guideline there was a not exhaustive list of workers included whose occupations are of a critical nature and whose free movement is considered to be essential. 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.

This guideline complemented another one, the Guidelines for border management measures to protect health and ensure the availability of goods and essential services²⁷, 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: 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. It stressed that 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. We can see, that in reality this was not met by several states, for example Hungary. According to a governmental decree in March 2020, only Hungarian citizens and EEA nationals holding a permanent residence card were allowed to enter the territory.²⁸ Here, there was a clear discrimination between EU citizens and the breach of EU law 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 Commission started to take matters into its hand, and the importance of seasonal workers was highlighted again in the Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak²⁹. 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. Also, the Commission underlined the priority of the EU, namely coordination in the Joint European Roadmap towards lifting COVID-19 containment measures³⁰: Member States shall coordinate the lifting of the measures, though 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.

Also, the Council Recommendation put emphasis on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, and declared 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. It took the step to set out four key areas where Member States will coordinate their efforts like a common mapping system based on a colour code

²⁵ See C-482/01 *Orfanopoulos and Others v Land Baden Württemberg*.

²⁶ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification.

²⁷ European Commission. COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (2020/C 86 I/01) OJ C 86I, 16.3.2020, p. 1–4.

²⁸ 81/2020. (IV. 1.) Korm. rendelet az egészség és élet megóvása, valamint a nemzetgazdaság helyreállítása érdekében elrendelt veszélyhelyzettel kapcsolatos rendkívüli intézkedésekről/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, 1 April 2020, Section 2.

²⁹ European Commission. Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (2020/C 235 I/01).

³⁰ European Commission. Joint European Roadmap towards lifting COVID-19 containment measures (2020/C 126/01).

(green, orange, red, grey), common criteria for Member States when deciding whether to introduce travel restrictions, more clarity on the measures applied to travellers from higher-risk areas (testing and self-quarantine), providing clear and timely information to the public. It took into consideration Member States' different approach: the differences in the epidemiological situation between areas but pointed out to act in a proportionate manner and in principle they shall not refuse entry to persons travelling from other member states. Even suggesting, that 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.³¹

All this show that after the sudden chain of events, the EU first tried to follow and then tried to lead and coordinate the separate actions of Member States into a more integrated reaction³² and the newest approach, the EU Digital COVID Certificate³³ shows that the EU can integrate the different approach.³⁴ Also, we shall stress, that the restrictions on free movement of workers shifting towards the free movement of certain workers imposed by Member States were not regarded as infringement of EU law by the Member States and the Commission only called for a common approach regarding the categorization of these workers.

5 CONCLUSION

European institutions use soft law instruments in various policy areas, this has for long developed but the Treaty has not been adapted to their practice. The Treaty only refers to regulations, directives, decisions, recommendations and opinions, but does not explain the function and position of other soft law instruments that often take place in practice, and there is no exhaustive list of soft law instruments used by the EU institutions. However, the Court recognised the importance of the clarification of soft law and has developed a case law on the nature and legal status of some of its instruments that offers a part-solution for this problem. In crises, like the pandemic generated one, the importance of soft law becomes clear in areas of shared competence: the countries are mainly unprepared in crises like the present pandemic, and the current coordination mechanisms does not offer to prevent the late and divided actions to disintegrate.

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³¹ European Commission. Draft Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic

³² See more https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/timeline-eu-action_en

³³ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (Text with EEA relevance) PE/25/2021/REV/1, OJ L 211, 15.6.2021

³⁴ The card holder should in principle be exempt from free movement restrictions: Member States should refrain from imposing additional travel restrictions on the holders of an EU Digital COVID Certificate, unless they are necessary and proportionate to safeguard public health.

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