



Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union

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When Covid-19 was acknowledged to have arrived in Europe in February-March 2020, politicians and public health authorities scabbled to find appropriate and effective responses to the challenges. The EU obligation contained in Article 9 Treaty on the Functioning of the European Union (TFEU) requiring the EU (including the Member States to achieve a common protection on human health, however, seems to have been missing from the responses.) Instead, borders and their control became a site of substantial political debate across Europe as a possible venue for effective measures to limit the spread of the pandemic. While the most invasive Covid-19 measures have been within EU states, lockdown, closure of businesses etc., the cross-border aspects (limitations on cross border movement) have been important. In the European Union this had important consequences for EU law on border controls, in particular free movement of persons and the absence of controls among Schengen states. It also implicated border controls with third countries, including European Free Trade Area (EFTA and Switzerland) all states neighboring the EU, the UK (having left the EU on 1 January 2020) the Western Balkans and Turkey. While EU law distinguishes between Schengen borders where no control takes place on persons, non-Schengen EU borders, where controls take place but are limited to identity checks and border controls with third countries and external borders with third countries (non-EFTA or Swiss) the responses of many Member States and the EU institutions abandoned many aspects of these distinctions. Indeed, the difference between border controls between states (inside Schengen, the EU, EFTA, or outside) and internal restrictions on movement became increasingly blurred. Two approaches—public health and public policy—were applied simultaneously and not always in ways which were mutually coherent, or in any way consistent with the Article 9 TFEU commitment. While the public health approach to movement of persons is based on ensuring identification of those in need of treatment or possibly carrying the disease, providing treatment as quickly as possible or quarantine, the public policy approach is based on refusing entry to persons who are a risk irrespective of what that may mean in terms of propagating the pandemic in neighboring states or states of origin. I will examine here the ways in which the two approaches were applied in the EU from the perspective of EU law on border controls.

Keywords: European Union, free movement of persons, border controls, Schengen area, COVID-19

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THE EU LEGAL FRAMEWORK ON MOVEMENT OF PERSONS

The overarching framework of EU and Member States includes an obligation to coordinate action (the mainstreaming duty in Article 9 TFEU) which includes cooperation to promote the protection of public health. In the first phase of the Covid-19 pandemic, there has been little evidence of Member State coordination let alone promotion of this EU duty. Taking the perspective of movement of persons, it is apparent that the border control reflex took priority over the EU cooperation on public health leading to incoherence and inconsistency in the field. This article examines the consequences of this incoherence.

There are two complementary legal regimes on movement of persons in the EU both are embedded in the Treaty on the Functioning of the EU—the EU’s “constitution-lite” (Spaventa, 2007). The first, and oldest representing one of the four fundamental freedoms of the EU, is free movement of persons. It dates from the establishment of the European Economic Community in 1957. The detail of how this freedom is exercised is set out in Directive 2004/38 (Guild et al., 2019). Basically, every EU national and his/her family members of any nationality have the right to move and reside in another Member State without formalities for 3 months. Thereafter if they wish to stay longer they must fulfill fairly light criteria in one of the following categories: workers (including part-time and very low paid), self-employed persons, service providers or recipients, students, pensioners, or economically inactive but self-sufficient persons (self-sufficiency only requires resources at the level of national social benefits). EU nationals and their family members have a right to leave any Member State and enter any other Member State without being required to give reasons. States can only interfere with this right on the basis of public policy, public security or public health (Stehlik, 2017). All three grounds for exclusion have been carefully limited by the legislator and faithfully interpreted as exceptions by the Court of Justice of the EU. EU nationals and their family members are also entitled to enter the EU from any third state on the basis of the same rules—they have a right of entry in EU law completely unrelated to their right to enter their country of underlying nationality.

The second EU legal framework on movement of persons is the Schengen regime within which there are common rules on entry of third country nationals at the common external borders and no border controls on persons of any nationality moving within the Schengen participating states (De Somer, 2020). The Schengen regime commenced as an intergovernmental treaty among five Member States in 1985 expressing an ambition for the EU which had not yet been realized. It was incorporated into EU law in 1999. This regime includes 22 of the 27 EU Member States (excluded are Bulgaria, Cyprus, Ireland and Romania, with Croatia approved for participation but not yet incorporated). But it also includes four non-EU states (Iceland, Liechtenstein, Norway and Switzerland) and de facto three microstates: Monaco, San Marino, and the Vatican City. The implementing legislation of this regime is Regulation 2016/339. It provides that third country nationals entering at the external

border can be refused entry if they are a threat to public policy, internal security, public health, or the international relations of any of the Member States (article 6). But re-introduction of intra-Schengen state border controls on persons (EU nationals or third country nationals) can only be justified where there is a serious threat to public policy or internal security (article 25).

The dual form of the EU law on free movement of persons across external borders, as well as internal, is far from tidy but according to the EU’s public opinion agency, Eurobarometer, it is the most popular of EU policies among EU nationals (Guild, 2020).

THE COVID-19 CHALLENGE

The WHO declared Covid-19 a global pandemic on 11 March 2020. However, from February 2020 some EU states, in particular Italy, was already experiencing a spectacular rise in the number of Covid-19 cases. Lombardy (among the richest parts of the country), was most affected and had substantial difficulties in providing medical care to sufferers (Remuzzi and Remuzzi, 2020). Among the first measures which EU states began to take in February and March 2020 as Covid-19 took hold, was to close their international borders. There was a dramatic slowdown in air-traffic (according to the European Commission, by 31 March 2020 the overall reduction was 86.1% compared to a year earlier [COM(2020)148]). Ferry, coach and rail transport followed suit. These international border measures started in a rather uncoordinated manner, notwithstanding the 10 March statement of the EU Heads of State or Government of the need for a joint EU approach (Zemskova, 2020). The Commission was quick to remind Member States that any action at the external border must be applied to all parts of the EU’s external border to be effective [COM(2020)115]. People who continued to travel were frequently directed by the destination state authorities to place themselves in quarantine for 14 days (with variations). But not all EU and Schengen states followed this approach (Renda and Castro, 2020). Very few states closed all their international (or intra-EU) borders. But the permitted reasons for international travel varied substantially. Among the challenges was reaching agreement on essential and non-essential but permitted travel (Paterlini, 2020). The European Commission was particularly active in seeking agreement among the Member States that all EU (and Schengen Associated states) citizens and their family members must be exempt from temporary travel restrictions for the purposes of returning to their homes [COM(2020)115]. Schengen Member States also began to apply border controls on intra-Schengen free movement. Here the Schengen Regulation and the Free Movement Directive were both engaged (Davies, 2020). While the Free Movement Directive permits Member States to refuse entry to EU nationals on the basis of public health risks, the Schengen Borders Code does not (Eckardt et al., 2020).

Among the most common (though not universal) measures adopted by EU states was confinement or lockdown. People were required to stay at home with limited periods of time when they could go out and for specific purposes. In much

of Europe these lockdown measures, adopted under emergency legislation, took effect in mid-March and were not lifted until mid-May at the earliest. The objective from a public health perspective was similar to the closure of borders—preventing people from passing on the virus from one to another by preventing them from coming in contact with one another. The measures included the mandatory closure of restaurants, bars and cafes across much of Europe. The result, however, was an exponential rise in home cooking and consequentially an increased demand for food in the shops (and to be delivered). Food supply chains in the EU are complex and cross many states. The increased demand in cities meant that special regimes had to be established for lorry drivers to cross borders to bring produce from countries which produced it to states where supermarket shelves needed to be filled to meet increased demand. The European Commission engaged in negotiating special corridors for this purpose and allowed temporary relaxation of strict EU rules on working time for the transport sector to meet the need (Akter, 2020; Loske, 2020).

The timing of the pandemic's rise in Europe also corresponded with the beginning of the Spring harvests (early vegetables like asparagus and fruit such as strawberries) which require seasonal workers, normally EU nationals who move annually across the EU carrying out harvesting work. Arrangements had to be found to permit these workers, categorized as “essential” in some Member States, to move. But there were concerns not only that seasonal workers must be able to move to bring in the harvests but also that their health and safety should be protected when moving across borders (Rasnaca, 2020).

The integration of the EU's markets and supply chains were laid bare by the Covid-19 measures—while on the one hand public health ministry's sought solutions on the basis of reducing drastically contact among people, on the other hand, to prevent food shortages (and storages of other essential items) increased movement of persons across the EU was essential.

What is particularly evident from the responses to the pandemic is that EU states engaged in very little coordination even when pushed by the EU institutions to adopt more coherent approaches. This failure of the Member States to take into account their mainstreaming duty undoubtedly caused much waste or duplication of efforts across the region.

THE LEGAL CHALLENGE

What happened over this period as regards borders and their control on persons moving can only be explained on the basis of the institutional framework within which measures were adopted. National responses to the pandemic were driven by public health ministries and authorities, not interior ministries. Public health authorities faced an enormous challenge—how to provide medical treatment for people suffering from a disease about which little was known at the time and within public health systems which in many cases had been underfunded after the banking crisis of 2008 (Anderson et al., 2020).

Institutionally, this meant that the logic of the measures was primarily based on the objectives of public health authorities which sought to diminish contact among people to prevent spread of the disease and to secure the integrity of their health systems and their capacity to cope (World Health Organization, 2020). The complex EU legal regime around border controls was an issue for interior ministries but they were not in the driving seat as measures were being adopted. Yet, what unfolded was a profound challenge to the EU legal regime and one in respect of which there is still no clear solution.

EU states' right to prohibit entry (or intra-EU border crossing) to EU citizens and their family members on the ground of public health is limited in the legislation. It can be invoked solely for infectious diseases listed by the World Health Organization (WHO). According to the WHO fact sheet on infectious diseases (46 in total), Avian flu is one but Covid-19 has not (yet) been added. It may well be that greater flexibility will be allowed as regards the public health proviso in light of the pandemic. However, there is also the EU principle of non-discrimination on the basis of nationality at issue. Where states place a limitation of, for instance, quarantine on both their own nationals and third country nationals entering their state, the limitation of entry of other EU (Schengen) state nationals to transit raises questions of compatibility (Barnard, 2020). This issue was partially resolved, or at least addressed, by the Commission's Communication (2020/C 102 1/03) guidelines concerning the exercise of free movement of workers.

A number of third country nationals were expressly included in the Commission's communications and guidelines to Member States on measures at the external borders. These include long term resident third country nationals under Directive 2003/109. For the purposes of repatriation/return to a home country, the position of nationals of Serbia, North Macedonia and Turkey was assimilated to those of Member States [Com(2020)2050]. The UK was also included. The inclusion of long term resident third country nationals seeking to transit to the EU state of residence supports the UN Human Rights Committee's interpretation of the human right contained in Article 12(4) UN International Covenant on Civil and Political Rights (to enter one's country) as extending also to resident aliens (General Comment 27; Nowak, 1993; Conte and Burchill, 2016). But it is neither fundamental right under Article 45 of the EU Charter of Fundamental Rights which is reserved for EU citizens nor is it a human right under Article 4(2) Protocol 4 European Convention of Human Rights (ECHR) which is limited to nationals (Peers et al., 2014; Schabas, 2015). There is no obvious fundamental right source for this inclusion of some candidate states but not others (e.g., Albania, Bosnia Herzegovina, Montenegro etc.).

To protect free movement of workers, the Commission issued a Communication at the end of March providing guidelines (2020/C 102 1/03). It is linked to the Guidelines for border management referred to above. The free movement guidelines require all restrictions to be necessary, proportionate and based on objective and non-discriminatory criteria. Frontier

workers, posted workers and seasonal workers were singled out for particular attention and protection. However, the Commission linked the free movement rights of those workers to their existing cross-border economic activities and to critical occupations. This leaves open the question of new entrants to the labor market across borders (Peers, 2013). The Commission listed 17 occupations as belonging to the “critical” category including health professionals, but perhaps less foreseeable, fishermen, staff of public institutions in a critical function and firefighters, police officers, prison guards, security guards, and civil protection personnel. The guidelines also stated that health screening must be carried out in a non-discriminatory manner. Limits on screening at intra-EU borders are specified. Seasonal workers merit a special section where the Commission insists on their health and safety rights when working in another Member State.

From the perspective of European human rights, the EU Charter requires full compliance with the ECHR (Peers et al., 2014). European human rights law does not recognize a human right to free movement across international borders. This is an EU right (Guild et al., 2019). But coupled with the right to non-discrimination on the basis of nationality, EU nationals must be treated similarly to nationals of the state of entry, but also in accordance with EU law (Barnard, 2019). If citizens of the Union are entitled to access to the whole of the EU territory then do they enjoy rights equivalent to access to their home state? This argument is countered by the continuing right of Member States to refuse admission and expel nationals of another Member State but only on the specified grounds (which do not include Covid-19, see above). The Schengen area entails even more complex questions as border control free travel across these states includes everyone (Jeandesboz, 2020). It is not limited to EU citizens and their family members. But this is not a fundamental right. It is part of a fundamental freedom—free movement of persons which is realized through the Schengen system.

Even more contentious is the application of confinement or lockdown regimes within states. There is a general principle of EU law that to enjoy its protection, an EU national must have crossed an EU border to exercise an EU right in another Member State (Sánchez, 2018). So, EU nationals caught by the lockdown regimes in a host Member State are entitled to the protection of EU law as regards their free movement (Tryfonidou, 2017). While the Commission sought to find ways to allow such persons to return to their home Member State that did not resolve the question of the compatibility of lockdown regimes with EU law. As lockdown regimes in those Member States which used them were as varied as the states with no coherence of consistency regarding the nature of the confinement, the questions of non-discrimination, proportionality and necessity as EU law principles must be considered (Koutrakos et al., 2016). A simple example is that of rules on physical distancing to avoid transmission of the disease. In France, the rule is that the distance between people must be one meter. Across the (Schengen) border in Belgium the rule is one and a half meters. Similarly, while in Belgium shops not selling essential materials were required to

close across the border in the Netherlands they were permitted to stay open. The incoherence reveals the differences in opinion among EU public health ministries, less accustomed to EU coordination (and law) than their interior counterparts. The lack of coherence also indicates a failure by Member States to mainstream cooperation as an EU duty in their policies.

THE WAY FORWARD?

On 15 May 2020 the European Commission issued a Communication entitled: *Toward a phased and coordinated approach for restoring freedom of movement and lifting internal border controls* (2020/C 169/03). The objective is to gradually reduce the exceptional and emergency measures adopted to fight the pandemic and re-establish the free movement regimes in the EU. The Commission candidly states that there are three issues: (1) epidemiological criteria; (2) health system capacity and (3) monitoring capacity. But the Communication is startling in so far as it makes virtually no reference to EU law. There is only one reference to the Schengen regime, return to which is expressed as an objective (not a legally binding obligation). All of the measures are proposed as options for Member States not obligations under EU law. This is surprising from the perspective of the objective of EU integration which is achieved first and foremost through law.

As the EU has now not only agreed a new multiannual budget but also negotiated an immense economic recovery package to counter the negative impacts of Covid-19 measures on national economies, closer attention may be warranted to binding EU law and the need to achieve coherence in all EU policy areas. It is time for the EU institutions and the Member States to recognize the relevance of their Article 9 TFEU obligation to guarantee adequate protection of human health through coordination of pandemic responses. On 10 July 2020, the European Parliament called for a European Health Union which would entail a coherence and consistent public health policy applicable across the EU (<https://www.europarl.europa.eu/news/en/press-room/20200710IPR83101/parliament-wants-a-european-health-union>). This proposal may be considered bold by EU constitutionalists but it may be the best way forward to achieve the Article 9 TFEU objective.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary materials, further inquiries can be directed to the corresponding author/s.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

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