

Restrictions for frontier workers in the internal market due to COVID-19

Protecting the freedom of movement by coordination between Member States

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The EU Commission is calling on the Member States, in non-binding guidelines, to coordinate with each other on border controls and border closures, to avoid restricting free movement for “critical” occupations and to allow entry to other occupations and seasonal workers. cep gives the following assessment of the guidelines:

- ▶ The Commission's proposals are largely appropriate. Under EU law, however, the toughest measures available for enforcing them are non-binding guidelines.
- ▶ A coordinated approach by the Member States is essential for the functioning of the internal market.
- ▶ Workers should be exempt from national quarantine requirements on entry.

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1 Policy context

On 26 March, in a joint statement¹, the European Council called on the European Commission to coordinate the entry restrictions applicable at internal borders to workers in the EU, due to COVID-19. It demands that workers, who live in one Member State and work in another (hereinafter “affected workers”), be given unhindered access to their place of work. The EU Commission then published Guidelines on 30 March 2020² allowing affected workers to cross internal market borders and aiming to keep the time delay for affected workers when crossing borders as short as possible.³ The Commission is reliant on Member States to collaborate in order to implement the Guidelines.

Currently, all EU Member States have introduced border controls and entry restrictions. The entry restrictions affect inter alia the 1.3 million workers who live in one country, but work in another.⁴ Due to the restrictions, the affected workers are unable to reach unhindered either their place of work or their place of residence.

The following assessment will examine whether the Guidelines are suitable for coordinating entry restrictions at the EU’s internal borders. Section 2 sets out the legal framework for the reintroduction of restrictions for workers. Section 3 briefly describes the content of the Commission Guidelines. Finally, Section 4 provides an assessment of the Guidelines.

2 Legal framework for restricting rights to free movement

Basically, free movement within the EU involves lack of both border controls⁵ and border closures⁶. Exemptions from either are subject to strict conditions under EU law. That is the only way to ensure that the internal market continues to function. The Commission’s call for a coordinated approach between the Member States is to be understood against this background

2.1 Border controls

The EU must ensure “the absence of any controls on persons, whatever their nationality, when crossing internal borders”.⁷ The right is laid down in primary law and defined under secondary law. Member States continue to remain responsible for maintaining public order and for safeguarding internal security.⁸ They may reintroduce border controls temporarily where there is a “serious threat” to public

¹ European Council, “Joint statement of the Members of the European Council” of 26 March 2020, <<https://www.consilium.europa.eu/media/43085/26-vc-euco-statement-de.pdf>>, accessed on 15.04.2020.

² EU Commission, Communication C(2020) 2051 of 30 March 2020, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [hereinafter C(2020) 2051].

³ The guidelines are supplemented by two Communications from the Commission with Guidelines for border management measures to protect health and ensure the availability of goods and essential services of 16 March 2020 [C(2020) 1753] and Guidance on the implementation of the temporary restriction on non-essential travel to the EU of 30 March 2020 [C(2020) 2050]. The urgency of a coordinated opening of internal borders is also highlighted by a Joint European Roadmap towards lifting COVID-19 containment measures from the Commission and the President of the European Council of 15 April 2020 [COM (2020) 2419].

⁴ See Eurostat (2019), People on the move – statistics on mobility, <<https://ec.europa.eu/eurostat/documents/2995521/9969660/1-09072019-AP-EN.pdf/ed628add-4210-4597-8f2d-696f1b099ff9>>, accessed on 20.04.2020.

⁵ Art. 67 (2) TFEU.

⁶ Art. 21 (1) TFEU.

⁷ Art. 67 (2); Art 77 (1) (a) TFEU.

⁸ Art. 72 TFEU.

policy or internal security in the Member State.⁹ For cases requiring immediate action, they may do so with immediate effect.¹⁰ These are both subject to strict conditions, however.

2.1.1 Requirements for the introduction of temporary border controls

Border controls can only be set up under the following conditions: (1) They can only be used as a last resort.¹¹ (2) They must be appropriate for achieving the envisaged objective and also proportionate. This assessment is based on: the likely impact of the threat — in this case the spread of COVID-19 — on public policy or internal security and the likely impact on the free movement of persons. (3) The affected Member States and the EU Commission must be informed of the scope of border controls.

2.1.2 Permitted duration of border controls

In principle, border controls may be set up for the foreseeable duration of the serious threat up to a maximum of 30 days. This may be extended several times by a further 30 days period if the serious threat persists. The total period must not exceed six months.¹² In cases requiring immediate action, border controls may only be set up for a maximum of 10 days. This period may be extended several times by a further 20 days period if the serious threat persists. The total period must not exceed two months.¹³

Twelve Member States have notified the Commission that border controls were necessary immediately.¹⁴ According to the current status, these countries are not planning to exceed the maximum period of two months. The other states are also only planning to maintain border controls due to or in connection with the COVID-19 pandemic until mid-May.¹⁵

2.2 Border closures

Border closures are basically in breach of both the general right to free movement of all EU citizens and the right to free movement of workers. Both are laid down in primary law and defined under secondary law.

2.2.1 Conditions for restricting the general right to free movement

The general right to free movement laid down in primary law, covers the right of every citizen of the Union to move and reside freely within the territory of the Member States.¹⁶ The right was defined by the Free Movement Directive¹⁷ which regulates a right to exit and entry as well as a right to reside.¹⁸ The Member States are permitted to restrict free movement where this is necessary inter alia for reasons of public health.¹⁹ Diseases with epidemic potential — such as COVID-19²⁰ — expressly justify

⁹ Art. 25 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).

¹⁰ Art. 28 Regulation (EU) 2016/399.

¹¹ Art. 25 (2) Regulation (EU) 2016/399.

¹² Art. 25 Regulation (EU) 2016/399.

¹³ Art. 28 Regulation (EU) 2016/399.

¹⁴ European Commission, Temporary Reintroduction of Border Control <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en> accessed on 27.04.2020.

¹⁵ Ibid.

¹⁶ Art. 21 (1) TFEU; Art. 45 (1) of the Charter of Fundamental Rights of the European Union.

¹⁷ Directive 2004/38/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.

¹⁸ Art. 4, 5 and 6 et seq. Directive 2004/38/EC.

¹⁹ Art. 27 (1) Directive 2004/38/EC.

²⁰ World Health Organisation press conference on 11 March 2020, Director Tedros Adhanom Ghebreyesu declares COVID-19 to be a pandemic, <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>>, accessed on 21.04.2020.

restrictions on free movement.²¹ Unlike border controls, in the case of border closures the Free Movement Directive does not provide for any time limits on restrictions for reasons of public health.

2.2.2. Restriction of the right to free movement of workers

Under EU law, the right to free movement is granted to employees under primary law by way of the freedom of movement for workers²² and to posted and self-employed workers by way of the freedom to provide services²³. Discrimination against workers from another Member State based on their nationality is not permitted.²⁴ Exercising these rights may, however, be restricted on grounds of public health.²⁵ Protecting public health is a recognised reason in the public interest where Member States have scope for discretion.²⁶ Nevertheless, the CJEU imposes a strict test of proportionality on restrictions of basic freedoms. Lawful provisions are only those which (1) have a legitimate objective, (2) are appropriate for attaining the envisaged objective²⁷ and (3) do not go beyond what is necessary to attain the objective²⁸. No maximum periods are provided for the restriction of rights to free movement of workers.

3 Guidelines for the exercise of the free movement of workers

In its “Guidelines concerning the exercise of the free movement of workers”, the Commission acknowledged that Member States may restrict the right to free movement on health grounds but calls on them “to take specific measures ensuring a coordinated approach at EU level” (p. 1) This relates to both border controls and border closures. The Commission’s Guidelines are aimed at “workers who exercise critical occupations” (3.1), seasonal workers (3.2) and other workers (3.3) as well as health screening (3.4).

It expressly argues that employees working as frontier workers, posted workers, seasonal workers and the self-employed should at least receive equal treatment and that the Guidelines should also apply to workers who are in transit to their place of work.

3.1 Workers exercising critical occupations

In the guidelines, the Commission calls on the Member States to allow workers exercising critical occupations “to enter” and “to have unhindered access” to their place of work because “[t]he continued free movement” of these workers is “essential”. It is thereby calling for nothing other than for border closures to be lifted and border controls to be proportionate with respect to these persons. The Guidelines designate the following 17 occupations as critical (see Table 1):

Tab. 1: Critical occupations

Occupations
Health professionals including paramedical professionals
Personal care workers in health services, as well as for children, persons with disabilities and the elderly
Experts in health-related industries

²¹ Art. 29 Directive 2004/38/EC.

²² Art. 45 TFEU.

²³ Art. 56 et seq. TFEU and subsequent settled case law since CJEU, Judgement of 27 March 1990, C-113/89, Rush Portuguesa, EU:C:1990:142, para. 15 (15-17).

²⁴ Art. 45 (2) and Art. 57 (3) and TFEU.

²⁵ Art. 45 (3) and Art. 62 in conjunction with Art. 52 (1) TFEU.

²⁶ CJEU, Judgement of 14 November 2018, Moria, C-342/17, EU:C:2018:906, para. 54.

²⁷ CJEU, Moria, EU:C:2018:906, para. 55 (55-56).

²⁸ CJEU, Judgement of 10 July 2019, Aubriet, C-410/18, EU:C:2019:582, para. 29.

Workers in pharmaceutical and medical devices industry
Workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including in their installation and maintenance
Information and communications technology professionals
Information and communications technicians and other technicians for essential maintenance of the equipment
Engineering professionals such as energy technicians, engineers and electrical engineering technicians
Persons working on critical or otherwise essential infrastructures
Science and engineering associate professionals (includes water plant technicians)
Protective services workers
Fire fighters/police officers/prison guards/security guards/ civil protection personnel
Food manufacturing and processing and related trades and maintenance workers
Food and related products machine operators (includes food production operator)
Transport workers: Car, van and motorcycle drivers, heavy truck and bus drivers and ambulance drivers, including those drivers who transport assistance offered under the Union Civil Protection Mechanism and those transporting repatriated EU citizens from another Member State to their place or origin; airline pilots, train drivers, wagon inspectors, maintenance workshops' staff as well as the infrastructure managers' staff involved in traffic management and capacity allocation and maritime and inland navigation workers;
Fishermen
Staff of public institutions, including international organisations, in critical function

In the interests of lifting the entry restrictions for these occupations, the Commission recommends introducing “specific burden-free and fast procedures” as quickly as possible. It specifically suggests the introduction of dedicated lanes or stickers that are recognised in the neighbouring Member States. The Technical Committee on the Free Movement of Workers should investigate other ways of giving critical workers unhindered cross-border access to their place of work.

3.2 Seasonal workers

Member States will exchange information on their different needs regarding seasonal workers. If, for example, seasonal workers “perform critical functions” in the agricultural sector, they are to be treated in the same manner as workers in critical occupations. Other seasonal workers should also be permitted entry if work in the sector concerned is still allowed. Member States are to establish “specific procedures” to ensure a smooth border crossing for seasonal workers.

3.3 Other workers without critical functions

The Commission urges Member States to permit entry if work in the sector concerned is still allowed.

3.4 Health screening

The Commission is urging Member States to carry out the health screening of people from other EU countries in the same manner as for their own nationals exercising the same occupations.

Member States should also coordinate on which side of the border screening is to take place so that the affected workers are only checked once per crossing. In the case of health screening, affected workers should not have to leave their vehicle, and body temperature should be measured

electronically. Temperature checks should not be carried out more than three times a day on the same person. If, due to fever, a person is not to be allowed to continue their journey, the state of departure will be notified.

4 Assessment

4.1 Economic Assessment

The free movement of workers is an essential element of a functioning internal market in the EU. Entry restrictions at internal borders mean high costs for the affected workers and companies: On the one hand, due to the lack of foreign workers, companies have to put up with falls in productivity or higher costs. Thus, for example, German companies are paying Polish frontier workers an allowance for overnight stays in Germany because they would have to go into quarantine if they returned to Poland. On the other hand, border closures can mean workers are faced with pay cuts or even job losses. In addition, the somewhat uncoordinated rules on border restrictions between Member States lead to high information costs and planning uncertainty for companies and workers. The Commission's Guidelines, which call for coordinated entry conditions within the EU's borders, may — even though they are not binding — reduce these costs and are therefore basically appropriate. It is therefore unclear why the Communication was not published until three weeks after the first entry restrictions came in.²⁹ Earlier coordination would have reduced uncertainty and saved costs.

Although coordinating free movement of workers by the Commission is appropriate, the Communication itself is problematic for two reasons:

Firstly, it is unclear how far entry restrictions such as health screening apply to critical occupations and how far they should differ from entry restrictions for other workers. At the same time, all entry restrictions should basically be decided on the basis of the relevant regional health situation. Specifically, they may be appropriate if at least one of the two border regions is particularly severely affected by COVID-19. In this case, workers in critical occupations could be exempted from restrictions or given priority in health screening. Information on how severely a border region is affected by COVID-19 would also have to be provided in a transparent and timely manner by the European Centre for Disease Prevention and Control.

Secondly, the guidelines should indicate that affected workers are to be exempt from national quarantine regulations. Even where borders are open, these regulations could otherwise hinder access to the workplace in another Member State. This is completely overlooked by the Guidelines.

Finally, the Commission's suggestion that the affected workers should have their temperatures measured at the border, is appropriate. Admittedly, this is not a sure-fire method of identifying COVID-19 patients. In Germany, only 42% of those infected with COVID-19 had a fever.³⁰ In addition, a person may be contagious even before showing any symptoms of the virus.³¹ However, the inconvenience for affected workers caused by temperature measurement is small, especially if — as the Commission recommends — measurements only take place on one side of the border. Temperature measurement cannot however replace social distancing and responsible conduct on the part of the affected workers.

²⁹ EU-Commission, "Temporary Reintroduction of Border Control", <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en>, accessed on 23.04.2020.

³⁰ RKI (2020), SARS-CoV-2 Steckbrief zur Coronavirus-Krankheit-2019 (COVID-19), <https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Steckbrief.html#doc13776792bodyText2>, accessed on 23.04.2020.

³¹ BMG (2020), Recognizing symptoms and taking correct action, <<https://www.zusammengegen corona.de/en/inform/recognize-symptoms/>>, accessed on 23.04.2020.

4.2 Legal Assessment

The Union's competence to submit Communications is based on Art. 17 TEU: The Commission promotes the general interest of the Union and takes appropriate initiatives to that end. No stricter measures – such as the power to issue delegated acts or implementing acts – are available to coordinate restrictions on free movement as a result of the COVID-19 pandemic. Implementing acts are only allowed in the specific case of exceptional circumstances where serious deficiencies relating to external border control put the functioning of the area without internal border control at risk (Art. 21, Art. 29 (4) Schengen Borders Code). This is not the case in the current COVID-19 pandemic.

Border controls and entry restrictions violate the right to the free movement of workers or the freedom to provide services. The protection of public health is an overriding reason in the public interest which may justify interference with fundamental freedoms. The EU is also obliged to ensure a high level of human health protection when it defines and implements Union policies and activities.³² The Commission's call for the Member States to coordinate with each other on their approach is correct and essential for the functioning of the internal market.

³² Art. 168 (1) TFEU.

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