



The free movement of persons (tourists and workers) in the European Union and COVID-19 :

WHERE ARE THE BOUNDARIES OF COMPATIBILITY OF NATIONAL RESTRICTIONS WITH EUROPEAN UNION LAW?

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Limiting the free movement of persons in the current context is a matter of balancing family, personal, economic and public health protection considerations. Measures taken by Member States to restrict the free movement of persons must be clear, consistent, non-discriminatory and proportionate to the objective of protecting public health so that the European Union remains a united area, even in adversity.

Restrictions must be strictly necessary and may not go beyond the objective of health protection. They may therefore not be used for economic protectionism.

A major but often controversial achievement European project, the free movement of persons is today confronted with the objective of protecting public health in the context of the Covid-19 pandemic. Indeed, 25 years after the entry into force of the Schengen agreements, many Member States are reintroducing controls at the Union's internal borders in order to prevent the spread of the virus. Restrictions on a fundamental freedom, such as the free movement of persons, nevertheless remain within the framework of European Union law and must respect certain principles.

Indeed, the free movement of persons within the European Union is one of the four pillars of the internal market and probably one of the most distinctive features of European integration. While originally this freedom to cross borders between Member States was intended as an economic objective to promote the free movement of workers, it has gradually been extended to become one of the attributes of European citizenship. **What restrictions can then be placed on it in the name of protecting public health?**

- **With regard to workers**, Article 45 §3 TFEU expressly provides that their freedom of movement may be restricted "on grounds of public policy, public security or public health". The European Commission nevertheless recalls in its [guidelines](#) on the exercise of the free movement of workers during the COVID epidemic-19 that, "if restrictions on the right to free movement of workers can be justified on grounds of public policy, public security or public health, they must be necessary, proportionate and based on objective and non-discriminatory criteria".

In order to reconcile the proper functioning of the internal market with the imperatives of public health protection, these guidelines set out a non-exhaustive list of workers in professions which the Commission describes as "critical" and for which it is essential to be able to continue to move freely. They specify that medical screening of frontier and posted workers must be carried out under the same conditions as for national workers exercising the same professions. With regard to seasonal workers, the Commission also invites Member States to exchange information on their different needs in order to address labour shortages, particularly in the agricultural sector.

- **With regard to citizens**, Articles 3(2) TEU, 20 and 21 TFEU and Article 45 of the Charter of Fundamental Rights of the European Union 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.

Thus, as a result of the pandemic, many Member States have introduced restrictions on borders and on travel within the European Union itself. This is accompanied by the announcement by some Member States of various forthcoming restrictions, such as the closure of beaches to foreign tourists for the summer period.

To what extent are these restrictions compatible with the principle of non-discrimination?

Secondary legislation allows the free movement of EU citizens to be restricted under certain conditions on public health grounds, but does not allow disproportionate restrictions to be maintained in order to protect the local economy.

Explicitly pursuant to the provisions of Directive 2004/38/EC

Article 27 of Directive 2004/38/EC provides that Member States may restrict the freedom of movement and residence of a citizen of the European Union or a member of his or her family on grounds of public policy, public security or public health. However, the Directive expressly states that these reasons may not be invoked for economic reasons.

Article 29 provides that the only diseases justifying measures restricting freedom of movement are potentially epidemic diseases as defined in the relevant World Health Organisation instruments and other contagious infectious or parasitic diseases provided that they are the subject of protective provisions in the host country in respect of nationals of the host Member State.

Indeed, the Court of Justice of the European Union has already had occasion to state that the status of citizen of the Union is intended to be the fundamental status of nationals of the Member States enabling those who are in the same situation to obtain, irrespective of their nationality and without prejudice to the exceptions expressly provided for in this respect, the same legal treatment.

Indirectly pursuant to the provisions of Regulation (EU) 2016/339, better known as the "Schengen Borders Code".

Article 25 of the Schengen Borders Code exceptionally allows a Member State to reintroduce checks on all or specific sections of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if it exceeds 30 days. These measures must be notified in advance to the European Commission and the other Member States.

Where a serious threat to public policy or the internal security of a Member State requires immediate action, Article 28 of the Schengen Borders Code allows a Member State to reintroduce checks at internal borders immediately for a limited period not exceeding ten days.

Already used in the context of the terrorist threat, this is the first use of these provisions by Member States for health reasons. These various measures are published on the Commission's website.

However, as the Commission points out, the reintroduction of internal border controls must remain an exception, be used only as a last resort and, in any event, respect the principle of proportionality. The scope and duration of the temporary reintroduction of internal border control must not exceed what is strictly necessary to respond to the serious threat.

Other measures have, as the Commission points out, a lesser impact on the functioning of the internal market, which is at the heart of the European project. For example, in order to limit the global spread of the virus, the members of the European Council approved the strengthening of the Union's external borders by applying a coordinated temporary restriction on non-essential movements for a period of 30 days, on the basis of the approach proposed by the Commission in its communication of 16 March 2020. On 8 April, the Commission invited the Member States and the countries forming part of the Schengen area to extend this temporary restriction on non-essential travel to the European Union until 15 May.

Furthermore, on 15 April, the Commission presented, in cooperation with the President of the European Council, a **European roadmap for the lifting of the containment measures related to the coronavirus pandemic**. The Commission calls on the Member States to coordinate the lifting of the measures, bearing in mind the integrated nature of the single market. It therefore recommends that travel restrictions should first be relaxed between identified low risk areas and that neighbouring Member States remain in close contact to facilitate this process. In addition to coordination, the Commission recalls 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.

In this common roadmap, the **Commission recommends that existing general prohibition measures should be replaced by safe alternatives and that generalised states of emergency with special powers for national authorities should be replaced by more targeted interventions by public authorities, in accordance with national constitutional provisions, in order to ensure democratic accountability and transparency of the measures taken and their wide acceptance by the general public, as well as respect for fundamental rights and the rule of law.** The Commission states that it will propose more detailed guidance on how to gradually restore transport services, connectivity and free movement as soon as the health situation allows, also in view of travel planning for the summer holidays.

Conclusion

Framing the free movement of persons in the current context is a matter of striking **the right balance** between family, personal and economic considerations and the protection of public health. The measures taken by Member States to restrict the free movement of persons must be **clear, consistent, non-discriminatory and proportionate** to the objective of protecting public health so that the European Union remains a united area, even in adversity. **At the end of the period of confinement, these restrictions may not be used for protectionist purposes by encouraging exclusively national or even local tourism and/or consumption to the detriment of the exercise of freedom of movement.**