



INSIGHT

CITIZENSHIP, CORONAVIRUS AND QUESTIONS OF COMPETENCE

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ABSTRACT: Restrictions on movement imposed in all Member States have necessarily resulted in a restriction of free movement rights of Union citizens, albeit in an incidental manner. These restrictions are nonetheless facilitated by the relevant provisions of primary and secondary law. This is appropriate in light of the multi-level system of competences of the Union and represents a strength of Union law.

KEYWORDS: COVID-19 and the EU – coronavirus – Union citizenship – free movement – public health restrictions – competences.

I. INTRODUCTION

The current crisis has transformed the European political and legal space in a radical and astonishingly swift manner. A space of free movement has been rapidly segmented as travel and other restrictions are imposed and border controls are reinstated. And yet European Union law appears capable of adapting and facilitating this rapid response to the coronavirus. Rights have certainly been restricted as a necessary consequence of public health measures but this is nonetheless contained within a legal framework facilitating such a response. This is not a failure of Union citizenship or an assault on free movement but rather an appropriate response to a public health crisis in a multi-level system of overlapping and complementary competences; sometimes Union law must stand aside to allow national governments to perform the fundamental functions of the state, namely protecting the health of the population. It is a strength of Union law that it permits this within its broader normative framework.

The remainder of this short *Insight* will be structured as follows. The next section will detail the necessary restrictions on citizenship rights in the current crisis. Section II will describe how Union law facilitates these restrictions. Section III will then outline how this is appropriate within the broader legal system of the Union. Section IV will locate

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this within a broader discussion on the interaction between the competences of the Union and of the Member States.

II. RESTRICTIONS OF RIGHTS IN THE FACE OF CRISIS

The European Union as a legal space is founded on open borders and free movement. These are facilitated by the Schengen system of border management (both internal and external) on the one hand and Union citizenship and other free movement rights on the other. Both aspects are impacted by the crisis in radical ways. This current contribution will address the question of citizenship rights and free movement.

The focus of much legal and public attention has been focused on the closure of borders in the face of the crisis.¹ Free movement rights while closely connected to this issue are not frequently addressed and if they are it is in passing. The reason for this is surely that in the face of mass restrictions on movement *within* Member States, the restriction of movement *between* Member States are so incidental they are perhaps not worth mentioning. Restrictions on free movement are occurring but as a necessary side-effect of broader restrictions on liberty across all aspects of social and economic life. Unlike for example the re-imposition of border controls, they are not the direct object of restriction but rather are affected in an incidental manner. What are those restrictions? As a rule all Member States have imposed some restrictions on non-essential travel which necessarily extends to travel to other Member States.² As a consequence there is a clear restriction on free movement rights contained in Art. 21 TFEU and Directive 2004/38/EC. The question is the extent to which EU law can accommodate this restriction flowing from the exercise of core state competences in the face of a pandemic.

III. COMPATIBILITY WITH EU LAW

Free movement rights are contained in Art. 21 TFEU on Union Citizenship and in Title IV on the free movement of persons, services and capital. Art. 45, para. 3, TFEU and Art. 52, para. 1, TFEU permit the restrictions on the free movement of workers and on those providing services or exercising their freedom of establishment in the interests of public health. While the provisions dealing directly with citizenship do not have a primary law provision dealing with possible restrictions on rights, those rights are to be “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect” in accordance with Art. 21 TFEU. Those limitations and conditions

¹ For a discussion of the management of borders see the *Insight* by S. Montaldo in this *Special Focus*, forthcoming.

² For some examples of the restrictions imposed see Fundamental Rights Agency, Coronavirus Pandemic in the EU – Fundamental Rights Implications, Bulletin 1/2020, fra.europa.eu.

are contained in Directive 2004/38/EC (the so-called Free Movement Directive),³ which also governs the free movement of persons who are engaged in economic activities. Art. 29 of that Directive deals with restrictions based on public health. These are restricted to diseases “with epidemic potential as defined (...) by the WHO” and “other infection diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State”.⁴ Coronavirus clearly falls within the scope of this provision.

The Commission has noted that “[f]or EU citizens, the safeguards laid down in the Free Movement Directive must be guaranteed. In particular, non-discrimination between Member States’ own nationals and resident EU-citizens must be ensured”.⁵ Beyond, the requirement of non-discrimination (which, as far as can be determined, is being respected by Member States) it is not entirely clear what those safeguards are. Restrictions on the basis of public health are not subject to the same range of ‘counter-limits’ as applied to restrictions based on public security and public policy. In particular, requirements relating to individual assessments and personal conduct have no analogy in the public health category. It would appear that mass restrictions, such as those we are currently witnessing, are permissible. It can be assumed that these restrictions would be subject to proportionality and non-discrimination requirements and indeed this is what the Commission has noted in its guidelines on the matter.⁶ This would require that any measures be necessary, not go beyond what is necessary and show an appropriate balance between the rights of individuals and the public health interest. Current restrictions it can be assumed meet those requirements in light of the overwhelming public health interest. Furthermore, Member States are requested to allow residents (including Union citizen residents) return and to facilitate onward travel by Union citizens and their family members, an approach which would appear to contribute to the proportionality of the responses.⁷

³ 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.

⁴ *Ibid.*, Art. 29, para. 1.

⁵ Communication COM(2020) 1753 final from the European Commission, *Guidelines for border management to protect health and ensure the availability of goods and essential services*, para. 21.

⁶ *Ibid.*, para. 4.

⁷ For a discussion of the repatriation of EU citizens through the EU Civil Protection Mechanism, see C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity is Not Dead and What We Need to Make it both Happen and Last*, in *European Papers – European Forum*, *Insight* of 25 April 2020, www.europeanpapers.eu.

IV. FREE MOVEMENT, RESTRICTIONS AND COMPETENCES IN THE UNION IN THE FACE OF CRISIS

As noted in the introduction, the promise of Union citizenship relates to a space of free movement and residence, a space which has been radically restricted in the context of the current crisis, restrictions which appear to be facilitated by Union law itself. Does this indicate somehow a failure of the principle of Union citizenship and free movement?

This would not only be melodramatic but false. It is simply the appropriate response of the federal system of competences of the Union to an emergency situation. The Union is a multi-level system of competences which must interact. They should operate in such a way that conflict is avoided and complementarity is enhanced. Member States remain competent for public health measures including public health emergencies. This is entirely appropriate; protection of the security and health of the population is a core state function and Union law should and does respect this. If anything, the current crisis reveals a curious reversal in the normal relationship of competence between the Member States and the Union. As is well known, ordinarily Member States much exercise their competence in compliance with Union law. This applies even in areas of exclusive national competence⁸ with the effect that the exercise of national competences must bend and adapt to Union law.⁹ In the current situation, it is an area of Union law and the rights which flow from it which must adapt to the exercise of Member State competence in public health. Emergency appears to warrant this reversal in the relationship between Union law and Member State competence; Union law must bend to Member State need. However, at all times this is managed within the broader normative framework of Union law through its provision of exceptions, safeguards and Commission surveillance. Union law facilitates and manages its own limitation in the face of imperative need and the necessary exercise of Member State core state functions. This managed flexibility is entirely appropriate and a strength of the system. It balances the need to respond to a crisis within a system of multi-level and complementary competences, respecting the core state functions of Member States while ensuring the broader integrity of Union law in its application – and disapplication. And yet questions remain as to the operation of this managed flexibility in practice including the extent of effective Commission surveillance and the application of proportionality principle. Moreover, hanging over all these questions is the context of emergency within which they are being applied. Further research, including systematic analysis of national measures in practice and broader questions on the capacity of Union law in face of emergency remains to be completed.

⁸ See the famous statement by Koen Lenaerts that there “is simply no nucleus of sovereignty that the Member States can invoke, as such, against the (Union).” See K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *The American Journal of Comparative Law*, 1990, p. 220.

⁹ See for example nationality law in the field of Union citizenship. See Court of Justice: judgment of 2 March 2010, case C-135/08, *Rottmann*; judgment of 12 March 2019, case C-221/17, *Tjebbes and Others*.