



INSIGHT

FREE MOVEMENT OF WORKERS IN THE LIGHT OF THE COVID-19 SANITARY CRISIS: FROM RESTRICTIVE SELECTION TO SELECTIVE MOBILITY

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ABSTRACT: In a context of widespread border checks and border closures, the circulation of workers was not totally abolished: some workers, whose mobility was considered necessary, continued to benefit from free movement. The selection of the types of work mobility to be preserved, in the crisis, is the starting point of this contribution. After considering the most obvious, a “restrictive selection”, the *Insight* suggests that selection can also constitute a way to encourage mobility, in the Union interest, and examines why “selective mobility” can strengthen free movement.

KEYWORDS: COVID-19 and the EU – free movement of workers – restrictions – selection – preferential treatment – European common good.

I. INTRODUCTION

Within the EU, freedoms, in general, and the free movement of persons, in particular, were not left untouched by the sanitary crisis. Unusually, restrictions to free movement of workers resulted, to a large extent, from measures of containment, forcing workers to stay at home. From the perspective of EU free movement law, massive restrictions to mobility resulting from the impossibility to leave the place of residence are unheard-of. Comparatively, most obstacles to free movement that the European Court of Justice dealt with, in the past, had their source in restrictive measures adopted by host states. In addition, it is not only the “territory of the Union”¹ that has become inaccessible: the territory of most Member states also ceased to be an area of free movement. Labour mobility was affected both nationally and internationally, and the deprivation of free movement within Member states was so extensive that it overshadowed restrictions to

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¹ A notion introduced by the Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC].



international mobility. There is absolutely no doubt that the current crisis differs in many regards from what we have previously experienced.

For all that, the sanitary crisis also led to developments that were far from unexpected. Generalisation of border checks and border closures, which constitutes a more classical and radical form of restriction to free movement within the EU, is among them. To be sure, border checks only incidentally affect free movement rights granted to the beneficiaries of free movement of workers: these rights do not preclude border controls, governed by the Schengen Borders code.² But the closure of borders or restrictions on travels restricted workers' right to enter, reside and work in another Member state: it became impossible for some workers to reach their place of work, or find employment in another country. However, since restrictions are not necessarily prohibited when public order, public security or public health are at stake, the temporary limitations introduced by Member states do not necessarily violate free movement of workers, provided certain conditions are fulfilled.³

In this context of rampant, if not illegal, restrictions, it has also appeared that the circulation of workers was not totally abolished: some workers continued to benefit from free movement, as their mobility from State to State was considered just as necessary as the mobility of some workers within Member states. But what remained, in terms of mobility, was the result of a selection: only the most needed, the most necessary, continued to have a right (or sometimes an obligation) to move. This selection of the types of work mobility to be preserved, in the crisis, can be regarded as an indication of what the future looks like: a dramatic regression. But if reversed, selection also contains a positive side: instead of a selection to avoid total eradication of free movement, it can be an instrument to boost the circulation of workers in the EU interest. Selection, a restrictive solution for the time of the sanitary crisis (II), can be turned around to encourage mobility, in the Union interest, and free movement can be strengthened by selective mobility (III).

II. RESTRICTIVE SELECTION

As the European Commission recognized, the COVID-19 crisis has led to the introduction of unprecedented restrictive measures across EU Member States, including rein-

² Regulation 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. See also S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu, on the reintroduction of internal border controls in the Schengen area, and S. COUTTS, *Citizenship, Coronavirus and Questions of Competence*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu, on the impact of border controls on the free movements of EU citizens.

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, Arts 27-33.

troduced checks at their internal borders.⁴ There is indeed a number of striking illustrations of this general observation.

In Hungary, for instance, border controls were restored at Austrian-Hungarian and Slovenian-Hungarian borders on 12 March 2020.⁵ Trains, buses, coaches and aircrafts coming, namely, from Italy could no longer enter the Hungarian territory, and persons other than Hungarian nationals coming from this state were not granted access to Hungary. After March 17, persons other than Hungarian nationals arriving from abroad could no longer enter in Hungary, until the legislation was modified to allow entry of nationals from the European Economic Area with their family member.⁶ In Poland, severe restrictions to free movement included discriminations between nationals and foreigners, including EU nationals: restrictions started on 15 March 2020⁷ and, since then, border controls applied⁸ and the possibility for foreigners to enter in Poland was suspended. Restrictions were not always so rigorous (and not always in breach of EU law),⁹ but, all in all, border checks became a widely spread phenomenon.

The disintegration of free movement was particularly well illustrated in the case of Romanian seasonal workers, around 250 000 of whom in March 2020 had to return from EU Member States (Italy, France, Spain, Austria, and Germany, namely) to Romania after their employment ended. In this case, the termination of employment contracts, whose legality remains uncertain, affected workers' right to reside on the territory.

In most cases, however, restrictions to free movement were not without exceptions. In Poland, exceptions namely concerned truck drivers ensuring transportation of goods, who were not submitted to quarantine. In Italy, frontier workers, health care workers, freight transport staff were excluded from the limitations. In Spain, entry on the territory was allowed not only for Spanish citizens, residents in Spain and residents of other Member States, but also for cross-border workers, health or elderly care professionals, and workers employed in the transport of goods. Germany continued to allow entry of workers and service providers (except for seasonal workers). In Slovakia, drivers of trucks carrying goods, permanent or temporary residence and frontier workers were still allowed to enter on the territory and quarantine was not imposed to workers in a number of sectors (transport of goods, trains and planes, medical and funeral ser-

⁴ Communication 2020/C 102 I/03 of 30 March 2020 from the Commission, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*.

⁵ Governmental Decree no. 41/2020 (III.11.), based on Art. 28, para. 1, Regulation (EU) 2016/399, cit.

⁶ Governmental Decree no. 46/2020 (III.16.) modifying Governmental Decree no. 41/2020.

⁷ Regulation of 13 March 2020 of the Minister of Health announcing the state of epidemic threat.

⁸ Regulation of 13 March 2020 of the Minister of the Interior and Administration on the temporary reintroduction of border control of persons crossing the state border constituting an internal border.

⁹ On border control, which started, in Portugal on March 16, see Resolução do Conselho de Ministros no. 10-B/2020 of 16 March 2020, dre.pt. In Spain, entry on the territory was controlled and limited since 27 March 2020, see OM INT/283/2020 of 25 March 2020, www.boe.es. For France, see Circulaire of the Prime Minister 6149/SG of 18 March 2020.

vices...). Concerning, in particular, frontier workers, the decision of the Hungarian authorities to ban the entry into Hungary of all foreign citizens, which affected particularly Romanian frontier workers, was eventually revoked: Romanian and Hungarian border authorities decided to allow the movement of cross-border workers having Romanian or Hungarian nationality, through specific border crossings.

The sanitary crisis called in question many aspects of free movement, but it did not result in an absolute ban on EU workers' mobility: controls and restrictions introduced by Member States were associated with exceptions, for economic and social reasons. That transportation of goods had to continue in order to avoid shortages, and frontier workers should benefit from a preferential treatment, was a much-shared view. In some Member States, exceptions were conceived more extensively, to include seasonal work in agriculture, health or elderly care professionals, for instance.

All in all, complete elimination of free movement was avoided. However, the national selection of workers whose free movement rights were maintained is incompatible with the idea of an open area, within which all EU workers can choose their place of work and residence. It is also conflicting with the idea that free movement of workers is derived from EU law, not national law. However, as long as these temporary restrictions are proportionate and non-discriminatory, they can be considered acceptable exceptions justified by the protection of public order, public security, and, of course, public health.¹⁰ This explains why the recent documents published by the European Commission concerning "free movement of workers during COVID-19 outbreak"¹¹ do not insist on Member States' infringements upon free movement of workers, but rather on the need for a common approach to the categories of workers who should continue to circulate.

In the Guidelines for border management measures to protect health and ensure the availability of goods and essential services,¹² the European Commission intended to set up the principles for an integrated conception of what the Commission calls "effective border management": the aim was to protect public health, while preserving the integrity of the internal market, at the same time. To integrate Member States' policies concerning exceptions to the ban on mobility the Commission suggests a model of free movement, for the time of the sanitary crisis, based on a selection of workers whose free movement rights are maintained.

Under this crisis model, workers benefiting from free movement are categorized along two lines, depending on the modalities of the work performed, and the economic sector. A first group includes workers who are mobile by definition (frontier, posted and seasonal workers). A second group encompasses workers, who work in "essential" sectors (among

¹⁰ Cf. Directive 2004/38, cit.

¹¹ Communication C/2020/2051, cit., p. 12, and Communication C(2020) 1753 final of 16 March 2020 from the Commission, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*.

¹² Communication C(2020) 1753 final, cit.

which, health and health-related industries, care, the supply of goods, information and communications technology, engineering, essential infrastructures, civil protection, food, transportation). When the two lines cross, it becomes all the more important that free movement is preserved. Thus, frontier workers working in the health care or food sectors, or in other essential services (child care, elderly care, critical staff for utilities) should continue to benefit from free movement, to continue their professional activity and the essential service they provide to the community.¹³ Their unhindered movement across borders is considered necessary. The same is true, according to the Commission, for posted workers, seasonal workers, or frontier workers, who share their lives between Member States: their activity is often crucial, in particular when they work in the health care system, or provide other essential services including the setting up and maintenance of medical equipment and infrastructure, or the supply of goods. Free movement should continue to be guaranteed to workers who need to cross borders in order to reach their place of work, especially when they perform activities related to essential services.

III. SELECTIVE MOBILITY

“Border management measures”, the Commission mentioned, should be governed by the principle of solidarity between the Member States.¹⁴ And as the documents recently published suggest, the integrative approach relies on a European definition of the categories of workers whose freedom of movement must be preserved. To be sure, in a period when restrictions are rampant, this is a very timid way (not only because of the use of soft law instruments) to protect one of the four fundamental freedoms. The preservation of free movement only for a limited group of workers constitutes an enormous setback: nothing to be content with.

But selection can be reversed to become a direction to explore, for the future of free movement of workers. The new paradigm involves a deviation from freedom as *laissez-faire* and individualism: instead of relying on what can be called “neutral freedom”, circulation of workers within the EU is oriented to achieve a certain conception of the common good, and this implies a specific (preferential) treatment of some mobile workers, considered essential to the achievement of EU priorities. If we accept the idea that neutral equality is not sufficient, we can probably do the same for freedom, and admit that it needs to become more concrete by the recognition of specific rights to specific groups of workers. Along this path, free movement is no longer only a purely individual choice. It diversifies into specific rights for the achievement of purposes explicitly defined at the European level, which cannot only consist in freedom for free-

¹³ *Ibid.*, para. 23.

¹⁴ *Ibid.*

dom's sake. The pursuit of a European common good can be embedded into this renewed conception of free movement.

This approach is a far cry from the proposal to substitute "fair movement" to free movement, also called "managed migration",¹⁵ although it also consists in a transformation of the current conception of free movement of workers. The proposal to shift from free movement to "fair movement" does not intend to foster European solidarity, on the contrary. It aims at giving States the possibility to control migration of EU citizens to avoid sudden influx of immigrants. It relies on the recognition of the limits of solidarity, on the "political reality" of people's resistance to it, illustrated namely by the British vote on Brexit. Pragmatism, it contends, dictates a more narrow conception of free movement, in line with current aspirations of some European governments. This is not at all the purpose of "selective mobility".

However, selective mobility, as "fair mobility", favours a less extensive conception of the notion of obstacles to free movement, in order to reallocate Member states' resources devoted to mobility. Instead of compelling Member states to complicated and uncertain assessments in order to eliminate regulatory barriers to market access for all EU workers,¹⁶ which the prohibition of non-discriminatory restrictions requires, free movement would imply concrete support for selected groups of workers, whose mobility is considered essential. This seems all the more justified as it is highly uncertain that waiving the prohibition of non-discriminatory obstacles would strike a severe blow to mobility: there is no evidence that such an extensive conception of free movement contributed to mobility, as much as it was supposed to. Furthermore, the prohibition of all obstacles to free movement of workers is not, as equal treatment, a fundamental right for EU citizens. Thus, targeted positive action does not seem to be a risky option.

A more concrete and targeted approach to the circulation of workers focuses less on the barriers created by specific regimes of work resulting from national choices, as long as equal treatment is ensured, but insists on the highly needed forms of mobility to be buttressed, in the European interest. The reaction of the European Commission to unilateral measures affecting free movement adopted by Member States, at the onset of the sanitary crisis, suggests that the identification of groups of workers needing specific support is not impossible to achieve at a European level. Even if it takes place in the specific context of the crisis, and proposes nothing more than "green lanes" to facilitate border crossing, it is worth noting that it pointed at some important categories of workers, not always highly considered, which proved to be particularly necessary for the survival of an economic and social life: posted, frontier and seasonal workers, in particular, truck drivers and other

¹⁵ On this concept: C. BARNARD, S. FRASER BUTLIN, *Free Movement vs. Fair Movement: Brexit and Managed Migration*, in *Common Market Law Review*, 2018, p. 203 *et seq.*

¹⁶ For a recent example, see Court of Justice, judgment of 10 October 2019, case C-703/17, *Krah*.

workers in the transport sector, health staff, workers employed in the food industry... This should be kept in mind for future developments of free movement of workers.

The objective of “selective mobility” is to inject European resources to develop mobility, where it is a priority for the EU. To be sure, distinguishing, and granting specific rights or advantages, to workers exercising their mobility in the framework of European programs or policies is not entirely new. A number of past achievements are paving the way: Erasmus programs are an example, and so is the recognition of professional qualifications, for instance. But the enterprise can, no doubt, reach much further. Shifting free movement of workers in a new direction requires reflection on a number of yet unsolved questions. Whether the initiatives should emanate from EU institutions, the European Commission, in particular, or from more decentralized actors, at national or infra-national level, is one of them. It would certainly be a good thing to limit distant decision-making that feeds the democratic deficit argument, as long as EU institutions are supportive. On the forms that the proposals and projects could take, there is, indeed, space for research.

