



EU-CITIZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

Cross-Border Mobility in Times of COVID-19

Assessing COVID-19 Measures and their Effects on Cross-border Regions within the EU

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1. Introduction

For over a year, the COVID-19 pandemic has impacted every aspect of life. When considering EU policy areas, EU citizenship and in particular the freedom of movement connected to the EU internal market and borderless movement ensured in the Schengen Area, these have been severely affected, and at times even disrupted. Within the EU, the disruption of cross-border movements has been particularly problematic for cross-border regions (i.e. the territories at the borders of two or more Member States). These areas often have strongly intertwined societies where work, study, leisure and living take place relying on cross-border movement.

Since the beginning of the pandemic, the Commission has taken an active role in seeking to balance the public health protection and the continuity of freedom of movement. Between March - June 2020, for example, it issued several sets of guidelines and recommendations concerning free movement.¹ The Commission recommended that Member States lift internal border controls and restrictions on free movement by 15 June 2020.² This recommendation came at the start of the summer period, a time that usually sees additional travel and movement throughout the EU. Nevertheless, even with formal internal border controls and travel bans lifted within the EU, some Member States continued to take their own measures. Furthermore, as the summer came to a close and Member States started to experience increases in infection rates, some of them again sought to contain the spread of COVID-19 by adopting additional measures. While such measures were primarily aimed at containing the spread of COVID-19, some had detrimental effects on mobility.

When it comes to the measures taken, these could be placed into two general categories. First, Member States issued travel advice – often based on infection rates in other countries – to dissuade citizens and residents from travelling to high-incidence areas. Second, other requirements such as testing, quarantine periods and border controls imposed upon entry were some of the measures maintained by Member States. Some of these measures were likely to negatively affect cross-border mobility (i.e. resulting in entry restrictions).³ The restrictive effects of some measures on mobility, paired with a lack of coordination, resulted in a patchwork of measures with considerable impact on mobility, particularly in cross-border regions.

¹ See for example, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tourism and transport in 2020 and beyond, COM(2020) 550 final. See also European Commission, Communication Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls, COM(2020) 3250 final.

² European Commission, Communication from the Commission to the European Parliament, the European Council and the Council – On the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020) 399 final, p. 3. See further for an extensive evaluation of the national measures during the first months of the pandemic, the report by Carrera, S. and Luk, N.C., *Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area*, CEPS Paper No. 2020-04, April 2020.

³ It may be difficult to distinguish between different categories of COVID-19 measures and their restrictive effects. Section 2 of this report further examines the distinction between different types of measures taken by Member States to contain the spread of COVID-19.



In this context, it is important to consider that the EU's territory is, to a large extent (ca. 40 percent) made up of border regions where around 30 percent of the total population resides.⁴ The importance of continued cross-border movements – even in times of crisis – must therefore not be underestimated. Despite the predisposition of these regions to elevated levels of cross-border movements, they are also prone to experiencing obstacles arising from differences in legislation and policy in 'normal times'. The COVID-19 pandemic and the restrictive measures it brought to freedom of movement have, in some instances, exacerbated the obstacles already experienced in border regions. Indeed, the life and work of citizens living in cross-border regions were particularly affected by the measures taken. Cross-border workers, the self-employed with clients across the border, students and pupils as well as families living on both sides of the border were harmed by certain measures taken without the necessary cross-border coordination. Although Member States took more account of the unique situation of cross-border regions over the course of the COVID-19 pandemic, certain national measures – often taken suddenly, unilaterally and, on occasions, without coordination with neighbouring countries – had a considerable impact on the daily life of people living and working in these regions.

Considering this profound effect on cross-border regions, the present report seeks to devote particular attention to their position. The present report builds on, and elaborates, a previous ad hoc report by the authors concerning travel advice, which was drawn up in 2020 under the umbrella of the EU-CITZEN project.⁵ Considering the sizeable and rapid developments around COVID-19 measures and the increase in coordination efforts at different administrative levels (from EU to local), there is a need to examine how the situation concerning COVID-19 measures has developed almost a year on. The present contribution seeks to analyse the effects of measures taken in light of the COVID-19 pandemic specifically on cross-border regions. The focus is thus on cross-border regions as examples of regions where the effects of these measures and coordination efforts have come to fruition. Particular attention is thereby devoted to assessing the proportionality of measures taken to combat the spread of COVID-19 in light of the intensity of cross-border life and work mobility. Indeed, the adoption of COVID-19 measures merits a careful exercise of balancing public health interests with those relating to free movement.. Accordingly, several steps of the analysis examine the dynamics of the COVID-19 measures and coordination efforts in cross-border regions, as well as the extent to which they strike an adequate balance of interests from a proportionality perspective.

Before turning to the particular situation of cross-border regions, in Section 2 we first examine those types of COVID-19 measures that have been taken (e.g. travel advice and entry restrictions) and how they may be distinguished. We also analyse the measures in a selection of Member States at a designated point in time. An overview of measures is provided of the variety of different COVID-19 measures across the EU. Considering the rapid pace at which these measures change (also in light of changes in the epidemiological situation), an overview is provided **up to 8 June 2021**. Section 3

⁴ Communication from the Commission to the Council and the European Parliament – Boosting Growth and cohesion in EU border regions, COM(2017) 534 final, p. 2.

⁵ Schneider, H., Kortese, L., Mertens, P. & Tans, R., Travel Advice in Times of COVID-19: Assessing the Proportionality of Travel Warnings in light of EU Free Movement, EU-CITZEN Project – Ad Hoc Request – Final Report (September 2020).



subsequently examines various legal and policy sources⁶ in order to gain an understanding of how the principle of proportionality should be applied to balance public health interests with those of freedom of movement. In Section 4, the focus shifts to the cross-border regions. Here, a selection of EU cross-border regions as case studies for examining the impact of COVID-19 measures and coordination efforts. More specifically, these case studies serve to explore how life in several European cross-border regions has been affected by these measures aimed at combatting the COVID-19 crisis. The intensity of border crossings and the geographical spread thus provided the basis for selecting the following cross-border regions: The Meuse-Rhine Euroregion, the Nordic Countries, the German-Czech-Austrian Border, the Portuguese-Spanish Border, Hungary and surrounding border regions and the Grande Région. The analysis of the case studies, combined with the in-depth examination of the principle of proportionality of Section 3, enables an evaluation of the proportionality of certain measures taken at national level to be evaluated, ultimately allowing for the development of future recommendations (Section 5).

⁶ In particular, EU Treaties, secondary legislation (Schengen Borders Code, Directive 2004/38/EC and Council Recommendation on a coordinated approach to COVID-19 related travel measures), WHO and ECDC regulations and recommendations and national case law.



2. Distinguishing Entry Restrictions & Travel Advice

The first wave of COVID-19 was characterised by a national reflex, which had considerable detrimental effects on the freedom of movement as guaranteed by the EU Treaties.⁷ During the early stages of the pandemic, travel bans were issued and internal border controls were performed.⁸ In light of efforts by the European Commission, most internal border controls and travel bans were lifted in the summer of 2020. However, Member States continued to issue advice warning citizens against travel to other Member States. National **travel advice**, typically issued by foreign ministries, describes and assesses the situation in other countries. Based on this, Member States can advise or warn their citizens against travel to a particular country. Travel advice can differ in urgency, based on the risk perceived in a certain region. This risk assessment of other countries and regions performed by Member States is mostly on the basis of quantitative and qualitative indicators. Examples of quantitative indicators are the absolute number of COVID-19 cases or the incidence per 100 000 inhabitants. In contrast, most Member States use qualitative indicators to assess the measures against COVID-19, the evolution of the spread of the virus or the political situation.

While issuing travel advice may have been common practice in the case of local events such as natural disasters, it has not previously been deployed on such a large scale within the EU. Moreover, the quantitative and qualitative assessment of the level of risk perceived in countries and regions differed greatly, depending on the Member State undertaking the assessment. Travel advice is typically non-binding, aimed at discouraging. However, non-compliance can have (indirect) negative consequences for mobile citizens. These could, for example, entail a lack of insurance cover, limited availability of consular help or more indirect effects on employment (e.g. the need to take unpaid leave or even dismissal). Despite its non-binding nature, travel advice may therefore indirectly discourage mobility, since the potential consequences of ignoring it may negatively affect citizens.

Furthermore, requirements were introduced and imposed on passengers upon arrival. These **entry requirements** can be categorised into obligations or provisions on quarantine periods upon entry, negative COVID-19 test results before and/or after arrival and administrative obligations, such as a Passenger Locator Forms or health declarations. Entry requirements are introduced and defended by Member States in order to restrict the import of the virus from abroad. Entry requirements can be connected to the travel advice issued for a Member State, following the same risk assessment, but can also be a general measure for all incoming persons. They can also be based on other risk assessments or indicators. While travel advice may indirectly affect mobility due to the possible negative consequences of ignoring it, entry requirements are more liable to have a directly effect, since access to another Member State may depend on fulfilling them. Hence, in the context of this report,

⁷ For instance in Carrera, S. and Chun Luk, N.C., 'In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU', Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2020 and Marcus, J.S. et al, 'The impact of COVID-19 on the Internal Market', Committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2021.

⁸ For an extensive evaluation of the national travel measures during the first months of the pandemic, we refer to the work of Carrera and Luk; Carrera, S. and Luk, N.C., Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area, *CEPS Paper No. 2020-04*, April 2020.



requirements imposed on travellers that must be fulfilled before access can be gained to a Member State are considered as **entry restrictions**.

Non-essential versus essential travel

On both travel advice and entry restrictions, most Member States make a distinction between essential and non-essential travel. Therefore an important question is what is deemed essential travel and how that is translated into possible exemptions. This question is interpreted differently by the Member States, even though coordination at the European level has been sought. In light of the patchwork of travel advice, entry restrictions and the national criteria thereof, coordination at the European level was established by the Council on 13 October 2020 with a Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.⁹ This Recommendation was based on the earlier proposal published by the Commission, which addressed the impact of the national measures on the right of EU citizens to move and reside freely in the EU.¹⁰ The Council Recommendation established:

- (1) the application of common criteria and thresholds helping Member States to decide when to introduce restrictions to free movement;
- (2) a common epidemiological map with colour codes, to be published weekly by the European Centre for Disease Prevention and Control (ECDC);
- (3) a coordinated approach for determining what is appropriate as a measure (i.e. proportionate) to apply on a mobile person, given a certain risk level.

The scope of the Council Recommendation is focused on coordinating entry restrictions and can be perceived as guidelines for what type of measures (i.e. entry restrictions) are deemed to be proportionate and in line with EU legislation on the freedom of movement. By doing so, it provides an overview on which travel can be perceived as essential. More specifically, point 19 of the Council Recommendation provides a list of essential functions, such as cross-border workers and students, transport, transit, seafarers, journalists, travellers with imperative business or family reasons and patients. This list has already a larger scope than the earlier Communication from the Commission on Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, where the focus was more limited to workers exercising critical occupations.¹¹ In the first update of the Council Recommendation on 1 February 2021, point 19b was added, also emphasising the border region by urging sufficient exemptions for people who live in border regions and travel across the border on a regular basis. The Council Recommendation will be elaborated in more depth in section 3.3.3.

⁹ Recommendation of the Council (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337). The Recommendation is discussed extensively in Section 3.3.3 of this report.

¹⁰ Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, COM(2020) 499 final.

¹¹ Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03).



Another Recommendation was adopted by the Council on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction of 30 June 2020.¹² This Council Recommendation followed the decision of Member States between March - June 2020, following the Communications of the Commission, to restrict all non-essential travel from third countries into the EU+ area. It also provided both a list with 'safe' countries as well as a list of exemptions for essential travel. The exemption for the travel restrictions is based on categories of persons¹³ and on the purpose of the travel.¹⁴ On the latter, Annex II of the Council Recommendation provides a list with essential functions or needs, which again corresponds more or less with the list under point 19 of the other Council Recommendation. Regarding the category of persons, a general exemption should hold for EU citizens and third-country nationals (TCNs) who enjoy rights of free movement, as well as their respective family members, referencing to Articles 2 and 3 of the EU Free Movement Directive 2004/38/EC¹⁵. Here, the wording of 'imperative family reasons' should at least be compliant with the human right of family reunification under Article 8 of the ECHR and Article 7 of the Charter and therefore be perceived as essential.¹⁶

Therefore, the Council Recommendations provide a guideline for determining what is essential and what is not, while remaining both vague in terms of concrete definitions and non-exhaustive.¹⁷ The national interpretation can be different; the case studies under Section 4 will also touch upon this issue. While providing greater coordination on entry restrictions, the issuance of travel advice thus appears to be unaffected. As the case studies in this report also show, the determination of risk areas via national travel advice and the issuance thereof via colour codes often differs from the risk classification performed by the ECDC (which follows the Council Recommendation). An important distinction therefore has to be made between the maps used to issue travel advice at national levels and the risk classification map of the ECDC, which is based on the Council Recommendation. For some Member States – for example, Belgium – these maps and the risk classification by the ECDC coincides with the travel advice by the national government.¹⁸

¹² Recommendation of the Council (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restrictions (OJ L 208I).

¹³ Point 5 of the Council Recommendation 2020/912.

¹⁴ Annex II of the Council Recommendation 2020/912.

¹⁵ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State (OJ L 158/77).

¹⁶ Thym, D. and Bornemann, J., 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics', *European Papers*, Vol. 5, 2020, No 3, p. 1143-1170, <https://doi.org/10.15166/2499-8249/420>.

¹⁷ *Ibid.*

¹⁸ See for example the news article on the adjustment of risk classification of Belgium by the ECDC: Radio1.be, *België kleurt deze week mogelijk oranje op de Europese kaart: "Verantert weinig, vooral symbolisch belangrijk"*, <https://radio1.be/belgie-kleurt-deze-week-mogelijk-oranje-op-europese-kaart-verandert-weinig-vooral-symbolisch>.

2.1 Travel-related COVID-19 Measures in force on 8 June 2021: A Selection of Member States

Over the course of the COVID-19 pandemic, Member States have established a range of measures to limit the spread of the disease. These included those with effects on cross-border mobility. These measures ranged from the temporary reintroduction of border controls to the temporary closure of internal borders. Earlier publications have examined these border-related measures.¹⁹ The present study seeks to conduct an in-depth examination of the situation in several EU cross-border regions where the COVID-19 border-measures can be expected to have a major impact on all aspects of daily life. As mentioned, a selection of cross-border regions was made based on the intensity of border crossings and geographical spread. The table below summarises the national rules regarding intra-EU travel for these Member States. Considering the rapid rate at which COVID-19 measures are being adapted (also in light of the epidemiological situation), the present section presents an overview of the measures in place in a selection of Member States up to **8 June 2021**. Particular focus is thereby placed on intra-EU travel, criteria for the risk assessment of regions, rules concerning quarantine, necessity for (PCR) tests and administrative obligations. While the table below therefore seeks to provide an overview of measures, the case studies in Section 4 seek to examine the impact of COVID-19 measures and (lack of) coordination in the cross-border regions between the Member States in the table.

Member State	Intra-EU travel (outward and inward)	Risk assessment of a region for advice: high infections vs. virus mutations	Rules concerning quarantine	Test <ul style="list-style-type: none"> • PCR/rapid • Pre/after arrival • Who pays? 	Passenger locator form or other administrative obligations
Austria ²⁰	Travellers from countries with a low incidence rate who can show relevant documentation (see: Test) may enter. On 8 June, this	The Federal Ministry for Social Affairs, Health, Care and Consumer Protection applies country-specific advice based on the Council	From low incidence countries no isolation is required if documentation can be presented either on tests, vaccine or past infection.	Upon entry, one of the following documents must be presented: a negative PCR test no older than 72 hours or an antigen test no	All travellers must register digitally in advance to obtain pre-travel clearance (PTC),

¹⁹ See for example Carrera, S. and Luk, N.C., ‘In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU’, Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, 2020; Peyrony, J., Rubio, J. and Viaggi, R., ‘The effects of COVID-19 induced border closures on cross-border regions’, Mission Opérationnelle Transfrontalière, Luxembourg: Publications Office of the European Union, 2021; Thym, D. and Bornemann, J., ‘Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics’, *European Papers*, Vol. 5, 2020, No 3, p. 1143-1170, <https://doi.org/10.15166/2499-8249/420>; Marcus, J.S. et al, ‘The impact of COVID-19 on the Internal Market’, Committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2021.

²⁰ Entry into Austria, <https://www.austria.info/en/service-and-facts/coronavirus-information/entry-regulations>, Bundesministerium Soziales, Gesundheit, Pflege und Konsumentenschutz <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Haeufig-gestellte-Fragen/FAQ-Einreise-nach-Oesterreich.html>.



	includes most European countries. Travellers from other countries may enter for certain purposes only (e.g. business, medical reasons).	Recommendation that is updated regularly. Countries and areas are into divided to those of low epidemiological risk, virus variant areas and those not falling under these categories.	Travellers from other countries must quarantine for ten days, which can be shortened by a negative test taken after five days.	older than 48 hours, a vaccine certificate or proof of past infection. In the event that none of these documents can be presented, a PCR or antigen test is required upon arrival.	which is presented upon entry. Regular cross-border commuters must obtain PTC every 28 days.
Belgium ²¹	All non-essential (intra-EU) travel to and from Belgium is discouraged, but possible. As of 1 July 2021, country-specific travel advice is issued.	Travel advice will be based on colour-coding: green, orange and red. The colour codes and the criteria follow what is published on Thursday every week by the ECDC. ²² The entry restrictions are dependent of the colour code.	A ten-day mandatory quarantine period applies for travellers from a risk area (code red), who have been there for at least 48 hours and wants to stay in Belgium for at least 48 hours. The quarantine period can be limited to 7 days in the case of a negative PCR test on day 7. Some categories are exempted.	Non-residents who have been in a high-risk area (code red) for 48 hours and will stay in Belgium for at least 48 hours have to possess a negative PCR test, carried out less than 72 hours before departure. Residents who have been in a high-risk area for at least 48 hours are obliged to undergo a PCR test on day one following arrival in Belgium. Both non-residents and residents have to undergo a PCR test on day seven after arrival in Belgium.	In the event of travelling by organised transport (e.g. bus, train, plane), travellers are obliged to complete the Passenger Locator Form at least 48 hours before arrival in Belgium. For those travelling by private transport, this is only an obligation when the traveller has been in a risk area for at least 48 hours and when they will stay in Belgium for at least 48 hours.

²¹ Federale Overheidsdienst Buitenlandse Zaken, <https://diplomatie.belgium.be/nl>.

²² ECDC, 'Maps in support of the Council Recommendation on a coordinated approach to travel measures in the EU', <https://www.ecdc.europa.eu/en/covid-19/situation-updates/weekly-maps-coordinated-restriction-free-movement>



				If insured in Belgium, the mandatory tests after arrival can be reimbursed.	
The Czech Republic ²³	Entry conditions depend on the epidemiological risk assessment of the country of departure. An exception applies to those who stay less than 12 hours in the country or less than 24 hours when travelling to/from neighbouring countries.	The Czech Republic adopts its own national classification of risk areas. Countries are divided to low, medium, high, very high and extreme risk of COVID-19 transmission. Cross-border commuters are exempt from the requirements of self-isolation, testing and the passenger locator form.	Travellers from countries of high risk must isolate until a negative test result is presented. The same holds for countries of very high risk, except the negative test result may not be submitted sooner than five days after arrival. Those arriving from countries of extreme risk must wait ten days until a negative test is submitted.	Travellers from countries of: Medium risk: Negative antigen test before departure (max. 24 hours) or PCR (max. 72 hours before departure) High risk: same as above + PCR test within five days after arrival Very high risk: Negative PCR max. 72 hours before departure (except Czech citizens, residents and their family members may present antigen test no older than 24h) + PCR test five days after arrival Extreme risk: Negative PCR max. 72 hours before departure + PCR within the first 24 hours of arrival and	All travellers must complete a public health passenger locator form.

²³ Ministry of the Interior of the Czech Republic, <https://www.mvcr.cz/mvcren/article/coronavirus-information-of-moi.aspx>. On cross-border commuters, <https://www.mvcr.cz/mvcren/article/cross-border-workers-so-called-pendlers.aspx>.



				<p>the second no sooner than the tenth day after arrival.</p> <p>When vaccinated in Czech Republic, Slovakia, Germany, Austria, Poland, Hungary, Slovenia or Croatia, and travelling from EU countries with medium or high risk, no test or self-isolation is required.</p>	
Denmark ²⁴	<p>Colour categories determine the applicable travel restrictions from a country or region. Currently, most Schengen and EU countries are labelled as orange or yellow.</p> <p>Danish nationals, persons resident in Denmark and those holding a valid residence permit may enter Denmark regardless of their purpose. Persons resident outside Denmark can enter</p>	<p>Travel restrictions are based on colour coding individual countries or regions by yellow (less than 50 infections/100 000 inhabitants/week), orange (over 60/100 000/week) or red (decision taken by the national COVID-19 task force).²⁵ The colour coding is revised weekly, based on objective criteria and the health situation of the country or region. The Ministry of Foreign Affairs</p>	<p>Those arriving from orange- and red-coded areas must isolate for ten days after arrival. In the event that the person has received a vaccination or has been previously infected with COVID-19, isolation is only required for those travelling from red-coded areas.</p>	<p>Those travelling from orange- or red-coded areas are required to have a negative COVID-19 test. Following arrival, a mandatory test obligation applies to all travellers.</p> <p>In the event that a person has been previously infected with COVID-19, no test obligations are imposed. Those who are vaccinated are only subject to the testing requirements in the</p>	

²⁴ Ministry of Foreign Affairs of Denmark, 'Coronavirus/COVID-19', <https://um.dk/en/travel-and-residence/coronavirus-covid-19/>, Nationalt Kommunikations Partnerskab COVID-19, 'Entry into Denmark', <https://en.coronasmitte.dk/rules-and-regulations/entry-into-denmark>.

²⁵ Ministry of Foreign Affairs of Denmark, 'Categorization of countries', <https://en.coronasmitte.dk/rules-and-regulations/entry-into-denmark/categorization-of-countries>.



	only from a red area with a worthy purpose (work and business, legal reasons and certain private matters such as family ties). Exceptions are provided for residents habitually resident in cross-border regions.	advises against unnecessary travel to orange-coded countries, and advises against all travel to red-coded countries. ²⁶		event that they have travelled from red-coded areas. The requirement to take a test before arrival does not apply to Danish nationals or foreigners resident in Denmark.	
Estonia ²⁷	Persons holding Estonian citizenship or residing in Estonia may enter the country, as well as citizens and residents of EU and EEA and persons arriving from the EU or Schengen Area. Exceptions on entry restrictions are provided for multiple categories of persons, for example to those working in healthcare or other essential services.	Risk countries are determined based on infection levels: when infection rate is higher than 150 persons/100 000 inhabitants/14 days. The country list is updated weekly.	Self-isolation is mandatory for anyone who is symptomatic. Persons travelling from risk countries (or those countries without infection rate data) have to remain in self-isolation for ten days. The period can be reduced by two tests: first at 72 hours before arrival and second on the sixth day from the first test. The obligation to self-isolate does not apply to those who have contracted COVID-19 in the past six months or who have been vaccinated.	A negative COVID-19 test is not mandatory upon entry, but it may reduce the required self-isolation period. The traveller either tests negative 72 hours before their travel or can test immediately upon arrival in Estonia.	All persons arriving in Estonia may complete an electronic health declaration 24 hours before their arrival. Otherwise, a paper declaration at the border crossing must be completed. The declaration includes personal data, contact and travel information.

²⁶ Ministry of Foreign Affairs of Denmark, 'Rejsevejledninger', <https://um.dk/da/rejse-og-ophold/rejse-til-udlandet/rejsevejledninger/>.

²⁷ Estonian government, 'Travelling', <https://www.kriis.ee/en/travelling-commercial-freight>.



Cross-Border Mobility in Times of COVID-19

<p>Finland²⁸</p>	<p>The current entry restrictions remain in place until 15 June 2021.</p> <p>Internal border controls with Schengen Area countries are also in place until 15 June 2021, where only essential travel is permitted. Exceptions are provided, for example, to residents of border communities between Finland and Norway.</p> <p>No internal border controls are imposed between Finland and Iceland or in leisure boating between Schengen Area countries.</p>	<p>Traffic light system: green for countries with a low incidence (no more than 25 cases /100 000 citizens/14 days) or red for high incidence when these values are exceeded.</p>	<p>When entering Finland from a high-incidence country, a 14-day period of self-isolation is recommended. It is possible to shorten the period by testing negative for two COVID-19 tests. The first can be taken on arrival or less than 72 hours before arrival, the second test no earlier than 72 hours after the first test.</p> <p>Where a person tests positive, a doctor specialised in infectious diseases may place them under quarantine.</p> <p>Cross-border workers between Finland-Norway and Finland-Sweden need not quarantine if they have tested negative within the last seven days.²⁹</p>	<p>All travellers from high-incidence countries must undergo a health check, which may include a COVID-19 test.</p> <p>Those persons who have already received a negative test result or have recovered from COVID-19 do not need to be tested.</p> <p>In addition, a negative PCR test result may be required by a transport company.</p>	<p>Each cross-border worker must register in the entry registration system before each entry.</p>
<p>France³⁰</p>	<p>Inward intra-EU travel is strongly discouraged but nevertheless permitted. In</p>	<p>France maintains a three-colour scheme to decide the severity of regulations that</p>	<p>In principle, self-isolation is not necessary when travelling</p>	<p>A negative RT-PCR test carried out less than 72 hours before departure is</p>	<p>Apart from presenting a negative RT-PCR test, travellers entering France</p>

²⁸ Finnish Government, 'Entry restrictions and health measures in place in Finland', <https://valtio.neuvosto.fi/en/entry-restrictions>.

²⁹ Finnish institute for health and welfare, 'Travel and coronavirus pandemic', <https://thl.fi/fi/web/infektiotaudit-ja-rokotukset/ajankohtaista/ajankohtaista-koronaviruksesta-covid-19/matkustaminen-ja-koronaviruspandemia>

³⁰ For information on the measures in place in France, please consult France Diplomacy, 'Coronavirus – Advice for Foreign Nationals in France', <https://www.diplomatie.gouv.fr/en/coming-to-france/coronavirus-advice-for-foreign-nationals-in-france/>.

	<p>order to enter France, the following need to be presented:</p> <ul style="list-style-type: none"> - A sworn declaration indicating a person does not show signs of COVID-19, has – to their knowledge – not been in contact with anyone who has COVID-19 in the 14 days before travel, agreeing to submit to a RT-PCR test; - A negative RT-PCR test result carried out 72 hours before departure. <p>Health checks do not apply for designated categories:</p> <ul style="list-style-type: none"> - hauliers - cross-border workers (especially those who cannot work from home)³¹ 	<p>apply for those travelling from certain regions. The codes are red, orange and green. The colour code depends on designated health indicators.³²</p> <p>While countries are actively labelled as red or green, orange countries constitute a residual category.</p> <p>On 2 June 2021 (prognosis in preparation of 9 June reopening of borders), all EU countries were considered to be green.</p>	<p>from another EU Member State.</p> <p>However, a seven-day mandatory isolation period nevertheless applies for persons who cannot take an RT-PCR test in the 72 hours before departure from their home Member State/country of departure. The costs of quarantine are born by the individual travelling.</p> <p>In contrast, persons who present a negative RT-PCR test that is not more than 72 hours old are not subject to mandatory quarantine.</p> <p>From 9 June onwards, travel opportunities depend on vaccination. If vaccinated, a</p>	<p>required for anyone over 11 years of age. The fact that a person needs to provide the negative result upon entering France means that the individual bears the costs of testing.</p> <p>If an RT-PCR test cannot be carried out in the home Member State, a person can ask for an exemption form from the French embassy/consulate in their country. Nevertheless, this will only be granted if there are pressing grounds for travel. Upon arrival in France, a person will then be subjected to a virological screening test, seven days isolation in a designated establishment and an RT-</p>	<p>- both over and under 11 years of age - need to present a sworn declaration. In that form they must declare:</p> <ul style="list-style-type: none"> - to have no COVID-19 symptoms - to have no knowledge of having been in contact with a person with COVID-19 during the 14 days prior to travel - agree that a virological screening test may be conducted upon arrival in France (for those aged over 11 years). <p>From 9 June onwards, no additional administrative requirements need to be fulfilled. Persons who are</p>
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³¹ Additional provisions on the situation of cross-border workers see Communiqué conjoint – COVID-19: Situation des travailleurs frontaliers (19.03.20), at: <https://www.diplomatie.gouv.fr/fr/le-ministere-et-son-reseau/actualites-du-ministere/informations-coronavirus-covid-19/coronavirus-declarations-et-communiqués/article/communique-conjoint-covid-19-situation-des-travailleurs-frontaliers-19-03-20>. When it comes to taxes of cross-border workers in times of COVID-19, France also made an agreement with Germany, Belgium and Switzerland. To this end see Ministère de l'Économie des Finances et de la Relance, 'Crise sanitaire liée au Covid-19: situation des travailleurs frontaliers', <https://www.economie.gouv.fr/covid-19-travailleurs-frontaliers/>

³² See Gouvernement, Strategy for reopening the borders from 9 June: Fighting the COVID-19 epidemic, https://www.diplomatie.gouv.fr/IMG/pdf/dp_ouverture_frontieres_anglais_ok_cle8511dc.pdf.



	<p>- residents of cross-border areas (if the border is within 30 km radius of a person's residence and for a duration of less than 24 hours)</p> <p>Outward intra-EU travel is strongly discouraged but nevertheless allowed (i.e. no restrictions).</p> <p>Nevertheless, travel was set to reopen on 9 June depending on the health status of the country of travel and the traveller's vaccination status.</p>		<p>person must provide proof of this upon arrival in France.</p> <p>A negative PCR test, not older than 72 hours, is nevertheless still required for those who are not vaccinated.</p> <p>PCR tests upon arrival in France are no longer necessary for persons travelling from green regions.</p>	<p>PCR virological test at the end of the isolation period. The costs for the isolation period are at a person's own expense.</p> <p>From 9 June onwards, France will no longer maintain an isolation requirement for persons travelling from countries labelled as green (i.e. all EU countries).</p>	<p>vaccinated nevertheless must provide proof of their status.</p>
Germany ³³	<p>Travel is possible to and from other EU Member States, but all non-essential travel to risk areas is strongly discouraged.</p> <p>As of 1 July 2021, only non-essential travel to high-incidence areas and virus</p>	<p>Risk areas are identified by the Robert Koch Institute (RKI) based on quantitative (>50 cases per 100 000 inhabitants in seven days) and qualitative aspects. A further distinction is made between high-incidence areas (>200 cases per 100</p>	<p>A distinction is made between persons travelling from risk areas and travelling from virus variants areas. From risk areas, a ten-day quarantine is imposed but this can be avoided (or shortened) with a negative test or proof of vaccination. There are some</p>	<p>For persons from risk areas, a negative test is required within 48 hours following entry. For persons from high-incidence or virus variant areas, a negative test is required, not older than 48 hours prior to arrival.</p>	<p>Persons entering Germany who travel from a risk area are required to fill in a <i>Einreiseanmeldung</i> before or upon entry. There are some exemptions depending on the risk classification;</p>

³³ Auswärtiges Amt, 'COVID-19-Reisewarnung', <https://www.auswaertiges-amt.de/de/ReiseUndSicherheit/reise-gesundheit/gesundheitsfachinformationen/reisemedizinische-hinweise/Coronavirus>.



	variants-areas is discouraged.	000/7 days) and virus variants areas, where the spread of virus mutations is more severe than in Germany.	exceptions for, for example., short visits and cross-border commuters. For those travelling from virus variants areas, the quarantine obligation is a strict 14-day period.	There are some exemptions for, for example, short visits and cross-border commuters and vaccinated persons, depending on risk classification.	for short visits, while cross-border commuters only have to do it once per week.
Hungary ³⁴	Entry is only permitted for Hungarian nationals and those residing in Hungary. Foreign nationals can enter Hungary only in exceptional circumstances, for example when they travel for healthcare reasons or to participate in a family event.	Hungary maintains its own classification of risk areas and does not apply the EU traffic light model.	All travellers are subject to a mandatory quarantine of ten days. In the event that the person does not have suitable residence in Hungary, quarantine is to take place at a government-designated location. The period of quarantine may be reduced where two negative PCR test are available, the first five days after arrival and the second at least 48 hours after the first test.	Upon entry, the person is subject to a mandatory medical examination (temperature check). Entry can be refused if there are signs of COVID-19 infection. Otherwise, a test is not mandatory but it may shorten the period of quarantine.	Foreign nationals entering Hungary on basis of an exception must apply for the exemption at the police.
Luxembourg	Travel to and from Luxembourg is possible for EU and Schengen Area citizens, as well as citizens of San Marino, Andorra, Monaco and the		Until 31 March inclusive, any person travelling by air from a country that is not a member of the EU or part of the Schengen Area and who refused to submit to a test had	All travellers arriving by air need to undergo a free PCR test at Findel airport. Passengers must be tested on their day of arrival.	The Ministry of Foreign and European Affairs invites all persons who plan to travel abroad to declare their travel plan on the site 'Lëtzebuurger

³⁴ YourEurope, 'Hungary - Covid travel rules, EU Digital Covid Certificate, restrictions and measures in place' https://europa.eu/youreurope/citizens/travel/travel-and-covid/hungary/index_en.htm.

	<p>Vatican/Holy See, regardless of the purpose of the stay.</p> <p>Third-country nationals (including, from 1 January 2021, UK nationals not covered by the Withdrawal Agreement) may no longer enter the territory until 30 June 2021, with an exemption for several countries.³⁵</p>		<p>to remain in quarantine for 14 days.³⁶</p> <p>Until 30 June inclusive, a quarantine requirement is applicable for all travel originating from India and the UK. For travel from other countries, there is no requirement for quarantine on arrival.³⁷</p>	<p>As of 29 January 2021, all passengers aged six years or over travelling to Luxembourg by air transport must present a negative result at time of boarding. This PCR or viral antigen test needs to have been performed less than 72 hours before the flight. The negative result must be presented, if necessary, along with a translation either in one of the administrative languages of Luxembourg or in English, Spanish, Italian or Portuguese. These obligations do not apply to travel by land or sea. Exemptions from the testing requirement exist for</p>	<p>am Ausland’ prior to embarking on their trip.³⁹</p>
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³⁵ Le Gouvernement du Grand-Duché de Luxembourg, ‘Visiter le Luxembourg’, <https://covid19.public.lu/fr/voyageurs/visiter-luxembourg.html>.

³⁶ Le Gouvernement du Grand-Duché de Luxembourg, ‘Prolongation des mesures sanitaires pour les déplacements par voie aérienne à destination du Grand-Duché de Luxembourg’, https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2021/03-mars/04-prolongation-mesures-deplacement.html.

³⁷ Le Gouvernement du Grand-Duché de Luxembourg, ‘Communiqué en relation avec les Nouvelles mesures sanitaires pour tout déplacement depuis le Royaume-Uni à destination du Grand-Duché de Luxembourg’, https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2021/06-juin/05-deplacements-royaumeuni.html.

³⁹ <https://demarches.services-publics.lu/fpgsa-maee/Controler>.



				certain categories of people. ³⁸	
The Netherlands ⁴⁰	Travel is possible to and from other EU Member States, while country-specific travel advice is given regarding non-essential travel (as of code orange, it is discouraged)	Travel advice is based on colour codes (green, yellow, orange and red). The colours are based on qualitative indicators such as the political situation as well as quantitative indicators, such as the European epidemiological data of a region/nation.	A distinction is made between risk areas (code yellow), high-risk areas, very high-risk areas and extraordinarily high-risk areas (code orange or red). There is a strong recommendation for travellers from high-risk areas to undergo a ten-day quarantine period; for travellers from very/extraordinary high-risk areas this is a legal obligation. The period can be shortened by a test on the fifth day. The list of exemptions is adjusted in line with the Council Recommendation, such as cross-border workers and -students.	Persons entering the Netherlands from a (very/extraordinary) high-risk area (code orange and red) need to have a negative NAAT (PCR) test, taken max. 72 hours before, upon arrival or before boarding. There are some exemptions, for example for short stay, cross-border workers and students. For passengers arriving by air or sea from very or extraordinarily high-risk areas there is a double-test approach: a rapid antigen test, taken max. 24 hours before departure is also required; alternatively, a NAAT (PCR) test, max. taken 24 hours before departure.	Passengers arriving by air are required to complete a health declaration. In the event that the region of departure is a very or extraordinary high-risk area, travellers fall under the quarantine obligation. With this obligation, travellers need to fill in a quarantine declaration (<i>quarantaine verklaring</i>) before arrival.

³⁸ Le gouvernement luxembourgeois - CORONAVIRUS, 'Visiter le Luxembourg- FAQ', <https://covid19.public.lu/fr/voyageurs/visiter-luxembourg.html>.

⁴⁰ Nederland Wereldwijd, 'Coronavirus, veelgestelde vragen reizen naar het buitenland', <https://www.nederlandwereldwijd.nl/documenten/vragen-en-antwoorden/coronavirus-veelgestelde-vragen-reizen-naar-het-buitenland>.



<p>Norway (as part of the EEA and Nordic Region)⁴¹</p>	<p>As of 3 June 2021, only Norwegian citizens or foreigners residing in Norway are permitted to enter the country. Exceptions are applied for certain categories of persons, for example those with immediate family members residing in Norway or who are working in essential societal-critical roles. Also, daily cross-border commuters from Sweden or Finland and health personnel from Sweden or Finland who are employed by a Norwegian health service are permitted to enter.</p>	<p>A traffic-light system is used (green-yellow-red). Countries or regions with fewer than 25 cases/100 000 inhabitants/14 days are considered areas with sufficiently low transmission (yellow).⁴²</p>	<p>All travellers from areas of high incidence (red colour) from EEA/Schengen Area and UK must stay in quarantine (either in a suitable location or a quarantine hotel). They can leave the quarantine on day three or day seven the earliest, depending on the rate of infection of the country of origin. Those arriving from other countries must remain in quarantine for the entirety of the quarantine period (ten days). From 3 June 2021, travellers can be released from the quarantine if they have been vaccinated or have contracted COVID-19 in the last six months.</p>	<p>Mandatory testing is imposed at the border for persons who have been in a country or a region of high incidence within the last 14 days that necessitates quarantine. These travellers must present a negative test result taken less than 24 hours before arrival. Regular commuters from Finland or Sweden are exempt from providing a negative test result upon entry.⁴³ Persons who refuse to be tested without reasonable grounds are either fined or asked to leave the country voluntarily.</p>	<p>All persons arriving from countries and areas that are subject to quarantine (defined by red colour) must register prior crossing the border.</p>
<p>Portugal⁴⁴</p>	<p>Intra-EU (non-essential) travel into Portugal is allowed for EU citizens if</p>	<p>Portugal makes a distinction between incidence rates. This means that persons</p>	<p>A 14-day isolation is maintained for persons travelling from (non-EU)</p>	<p>A negative RT-PCR test is required for all EU citizens travelling to Portugal. The</p>	<p>Passengers travelling by plane are asked to fill out a Passenger Locator Card</p>

⁴¹ Norwegian Government, 'Travel to Norway' <https://www.regjeringen.no/en/topics/koronavirus-covid-19/travel-to-norway/id2791503/>.

⁴² Norwegian Institute of Public Health, 'Entry quarantine upon arrival in Norway' <https://www.fhi.no/en/op/novel-coronavirus-facts-advice/facts-and-general-advice/entry-quarantine-travel-covid19/>.

⁴³ Helsenorge, 'International travel' <https://www.helsenorge.no/en/coronavirus/international-travels/>.

⁴⁴ For information on the measures enacted in Portugal, please consult Visit Portugal, 'COVID-19 | Measures', <https://www.visitportugal.com/en/node/421175>.

	<p>they have had a negative RT-PCR test a maximum of 72 hours before boarding time.</p> <p>Apart from the general measures maintained in Portugal, the Azores and Madeira, regional governments have adopted specific measures including declarations and COVID-19 screening tests.⁴⁵</p> <p>Cross-border movements with Spain have been restored as of 1 May 2021.</p>	<p>travelling from countries with an incidence rate of 500 cases per 100 000 inhabitants in the last 14 days may only travel if it is essential. Essential travel is defined as travel for professional purposes, study, family reunion, health and humanitarian reasons. Furthermore, they must present a negative RT PCR Test carried out within 72 hours before departure. Upon arrival in Portugal, they must undergo a 14-day mandatory isolation period.</p>	<p>countries with an incidence rate of 500 cases per 100 000 inhabitants. Persons entering Portugal for essential travel and those whose stay on national territory does not exceed 48 hours are exempt from this isolation period.</p>	<p>test must have been taken within 72 hours prior to boarding a flight to Portugal.</p>	<p>that may either be filled in online or is provided by the airline company during the flight.</p>
Spain ⁴⁶	<p>No restrictions apply for travel to and from EU Member States. Spain introduced new measures on 7 June 2021.⁴⁷ From that</p>	<p>When it comes to categorising EU Member States depending on risk, Spain maintains the traffic light criteria established by</p>	<p>No quarantine measures are maintained. Only passengers travelling from India need to undergo a ten-day quarantine.⁵⁰</p>	<p>All unvaccinated passengers who enter Spain must undergo a negative diagnostic test result (NAAT or RAT). Children aged</p>	<p>All persons aged over who are travelling to Spain must fill in a Health Control Form electronically, after</p>

⁴⁵ See Visitazores.com, 'Travel to the Azores', <https://www.visitazores.com/en/trip-info>; Discover Madeira, 'COVID Safe Tourism', [http://www.visitmadeira.pt/en-gb/useful-info/corona-virus-\(covid-19\)/covid-safe-tourism](http://www.visitmadeira.pt/en-gb/useful-info/corona-virus-(covid-19)/covid-safe-tourism).

⁴⁶ For an overview of all measures on COVID-19 in Spain, please consult Spain.info, 'Practical information for tourists in the COVID-19 crisis', <https://www.spain.info/en/discover-spain/practical-information-tourists-covid-19-travel-spain/> and Ministerio de Sanidad, 'Spain Travel Health', <https://www.mscbs.gob.es/en/profesionales/saludPublica/ccayes/alertasActual/nCov/spth.htm>.

⁴⁷ For more information on the measures applicable to EU citizens see Ministerio de industria, comercio y turismo, New Health Requirements for entry into Spain as from 7 June, https://travelsafe.spain.info/wp-content/uploads/2021/06/NUEVOS_REQUISITOS_DE_ENTRADA_EN_ESPANA_A_PARTIR_DEL_7_DE-JUNIO_eng.pdf.

⁵⁰ See Ministerio de Sanidad, FAQs – Prevention measures against COVID-19', <https://www.spth.gob.es/faq?tab=0>; Ministerio de Sanidad, 'Spain Travel Health', <https://www.mscbs.gob.es/en/profesionales/saludPublica/ccayes/alertasActual/nCov/spth.htm>.



	<p>date, all passengers must undergo a health control at the point of entry that at minimum includes a temperature control, a documentary check and a visual check of their health condition. Additionally, passengers must obtain a QR code by filling in an online Health Control Form. Additional evidence, such as proof of vaccination, negative test or COVID-19 recovery certificate, may be required depending on the health situation in the country of origin.</p> <p>Transport workers, frontier workers and persons resident in a cross-border region (within a radius of 30 km) are exempt from having to fulfil the regular</p>	<p>Council Recommendation (EU) 2020/1475 and 2021/119. The need for a diagnostic test depends on whether a country features on this list. When Spain introduced its new measures on 7 June, it also provided a new list that included all EU countries.⁴⁹ This means that all EU citizens must provide either proof of vaccination, a negative PCR or PCR-like test or a certificate of recovery.</p>		<p>under six are exempt from testing requirements but must nevertheless present the QR code they receive following completion of the Health Control Form.</p> <p>Vaccinated passengers may still be subject to a test if the health authority deems it necessary.</p>	<p>which they will receive a QR code to present upon arrival in Spain. Passengers on international cruises must use the EU digital Passenger Locator Form.</p> <p>Those travelling from high-risk countries or areas must provide additional documentation, such as a vaccination certificate, negative PCR or similar test or a certificate of recovery. The documents must be available in Spanish, English, French or German.</p>
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⁴⁹ Ministerio de Sanidad, 'Appendix II – List of countries and areas from which a negative diagnostic test for CoV-2 infection will be required from passengers before entering Spain', https://www.mscbs.gob.es/en/profesionales/saludPublica/ccayes/alertasActual/nCov/documentos/AnnexII_between_07062021-and-20062021.pdf.



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	documentation and testing requirements. ⁴⁸				
Sweden ⁵¹	On 28 May 2021, Sweden decided to maintain the entry ban on travel from EU/EEA countries, except where a negative COVID-19 test is presented. Nordic countries (Denmark, Finland, Iceland and Norway) are exempt from entry restrictions as of 31 May 2021.		Self-isolation is recommended for at least seven days after arrival.	Foreign nationals must present a negative COVID-19 test upon arrival, which has been taken no more than 48 hours before crossing the border. There is a recommendation to be tested again five days after arrival. ⁵²	

⁴⁸ Article 14 Resolución de 4 de junio de 2021, de la Dirección General de Salud Pública, relativa a los controles sanitarios a realizar en los puntos de entrada de España, BOE Núm. 134 de 5 de junio de 2021.

⁵¹ Government Offices of Sweden, 'Entry ban on travel to Sweden extended, but entry restrictions from Nordic countries lifted', <https://www.government.se/press-releases/2021/05/entry-ban-on-travel-to-sweden-extended-but-entry-restrictions-from-nordic-countries-lifted/>.

⁵² Ibid.



3. The Proportionality of Measures related to Mobility: Legislation, Case Law and More

Much of the discussion concerning entry restrictions and travel advice essentially centres on whether they can be considered necessary and proportionate to achieving their aim, namely the protection of the health of individuals. Proportionality therefore remains the main principle of assessing as to whether certain restrictions to free movement are permissible. In the context of the COVID-19 pandemic, proportionality can be constructed through following a number of sources, such as EU legislation (primary and secondary), CJEU case law, recommendations issued by the World Health Organisation (WHO), European Centre for Disease Prevention and Control (ECDC) and national-level case law. The following sections seek to assess these different sources to establish how proportionality is (and should be) understood in the context of the persisting health crisis. This section also analyses the proportionality of some of the most frequently seen COVID-19 measures (i.e. quarantining, testing, travel advice and the negative consequences thereof) on the basis of the aforementioned sources of legislation and policy. This assessment builds on findings made in an earlier ad hoc report by the authors on travel warnings.⁵³

3.1 Proportionality in the Area of Health at EU Level: Treaties & Case Law

It is recognised that the EU has limited competence to act in the area of health. In accordance with Article 6(a) TFEU, the Union may support, coordinate or supplement Member State actions. Article 168(1)(2) TFEU subsequently specifies that the Union is competent to perform this ancillary role when it comes to, among others, preventing physical illness and diseases, taking action in fighting major health scourges by promoting research into the causes, transmission and prevention, and combating serious cross-border threats to health. Incentive measures may subsequently be adopted to combat cross-border health scourges or serious threats.⁵⁴ While these assigned roles seem to provide the Union with ample opportunity to play a prominent role in a crisis such as that posed by the present pandemic, the scope of these activities is limited by a prohibition of harmonisation of national law.

Despite this restricted competence, Article 168 TFEU may nevertheless imply that the EU has more opportunities for action than the prohibition of harmonisation assumes. For example, Purnhagen et al. examined COVID-19 responses and their sources in the EU Treaties. In their analysis, they conclude that the COVID-19 responses were spread throughout the EU's enabling Treaties (predominantly Article 168 TFEU and its various paragraphs). However, these competence norms taken together encompass what is described as a "web of competence", which is stronger than its individual threads, thus extending the EU's legal powers beyond each of the separate strands.⁵⁵ In a similar vein, Guy argues that EU-level fiscal policy, and assessments of national fiscal policies, mean that Member State

⁵³ Schneider, H., Kortese, L., Mertens, P. & Tans, R., Travel Advice in Times of COVID-19: Assessing the Proportionality of Travel Warnings in light of EU Free Movement, EU-CITIZEN Project – Ad Hoc Request – Final Report (September 2020).

⁵⁴ Article 168(5) Treaty on the Functioning of Europe (TFEU).

⁵⁵ Purnhagen, K.P. et al., 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak', 11 *European Journal of Risk Regulation* 2 (2020), p. 303.



competences on health are actually less extensive than they initially appear.⁵⁶ Here, Guy particularly refers to the Country Specific Recommendations (CSR) issued in the context of the European Semester as evidence of an interaction of the EU and the Member States on health policy.⁵⁷ Despite the importance of the discussions over competences for the further development of health policy at EU level, the extent of the EU's competence in the area of health and its interaction with that of the Member States does not provide an answer to the central issue in this report, namely the legitimacy of entry restrictions and travel advice (and the resulting restrictions on the freedom of movement). When it comes to public health restrictions in relation to freedom of movement, these have long been considered as both unnecessary and ineffective methods of solving public health problems particularly given the level of EU integration.⁵⁸

3.1.1 Proportionality in CJEU Case Law

The prohibition of harmonisation taken up in Article 168 TFEU means that health-related matters have frequently been dealt with through other EU policy areas. Before the introduction of the formal legal basis contained in Article 168 TFEU, the topic existed only in the context of other EU policies, most notably the internal market.⁵⁹ Indeed, in its development, EU health law has been inextricably linked to internal market law and, coincidentally, freedom of movement. Early legislation concerning public health restrictions was adopted on the basis of Treaty provisions governing the freedom of workers, establishment and services.⁶⁰ Here, the most important expression of the internal market approach to the area of health may be seen in CJEU case law. Indeed, much of the initial CJEU case law in cases, such as *Kohll* and *Decker*, approached health from an internal market perspective by defining it as a service.⁶¹ In light of these judgments, the Court can be said to have adopted a standard approach to assessing potential restrictions on the freedom of movement in relation to public health and their proportionality.⁶²

⁵⁶ Guy, M., 'Towards a European Health Union: What Role for Member States?', 11 *European Journal of Risk Regulation* 4 (2020), p. 758.

⁵⁷ *Ibid.*, p. 762.

⁵⁸ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (Directive 64/211/EEC), COM(1999)372 final, p. 12.

⁵⁹ Guy, M. and Sauter, W. 'The history and scope of EU health law and policy', in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), p. 17; De Ruijter, A., *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care* (Oxford University Press, 2017), p. 1-2 and 5; Greer S.L. and Vanhercke, B., 'The hard politics of soft law: the case of health', in E. Mossialos (ed.), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (Cambridge University Press, 2010), p. 199-202.

⁶⁰ Preamble Council Directive of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (64/221/EEC), (OJ L 850/64). See Weiss, F. and Woodridge, F., *Free Movement of Persons within the European Community*, Kluwer, The Hague, London 2002, pp. 143 ff.

⁶¹ Case C-158/96 *Kohll v. Union des caisses de maladie*, EU:C:1998:171; Case C-120/95 *Decker v. Caisse de maladie des employés privés*, EU:C:1998:167; Greer, S.L. and Vanhercke, B., in: E. Mossialos (ed.), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (Cambridge University Press, 2010), p. 200.

⁶² See for example Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez v. Consejería de Salud y Servicios Sanitarios and Principado de Asturias*, EU:C:2010:300, para. 43-44 and 61; Case C-169/17 *Hartlauer v. Wiener Landesregierung*, EU:C:2009:141, para. 29-30, 33 and 44; Case C-372/04 *Watts v. Bedford Primary Care Trust*, EU:C:2006:325, para. 92, 94 and 106; Case C-141/07 *Commission v. Germany*, EU:C:2008:492, para. 51; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes v. Saarland*, EU:C:2009:316, para. 18-19, 22 and 25; Case C-322/01 *Deutscher Apothekerverband v. DocMorris*, EU:C:2003:664, para. 103; Case C-157/99 *Geraets-Smits and Peerbooms*, EU:C:2001:404, para. 44-46, 60-61 and 71.



In the context of this case law, it can be considered a general rule that Member States adhere to EU law, even in those areas where the EU has restricted competence. Particular account should be taken of the fundamental freedoms, as these prevent Member States from introducing or maintaining unjustified restrictions. Nevertheless, this obligation is again balanced against the importance of health, meaning that Member States have a certain discretion in determining the level of protection they wish to award public health; accordingly, the level of protection may vary between Member States. In order to determine whether a measure is appropriate, the Court examines whether the public health justification matches the case facts. This is to ensure that Member States do not have other motives (unrelated to public health) for restricting free movement.⁶³ Another important factor in determining whether there is a public health justification is the existence of scientific evidence that supports a restriction. In particular, a lack of scientific consensus, combined with an absence of harmonisation, allows Member States to determine the appropriate degree of protection for their citizens. As a result, differences in level of protection may arise between Member States.⁶⁴

Ultimately, the CJEU's guiding line of reasoning is that restrictions are prohibited unless they are sufficiently justified. To express this principle, the Court can be said to have developed a multi-step approach. As a first step, the Court will assess whether a certain measure can be considered a **restriction**. The criterion maintained here is often whether a measure renders the exercise of free movement **less attractive or even prevents it**. In the context of this contribution, it is clear that COVID-19 measures imposed as a precondition for entry into a Member State are indeed liable to render free movement less attractive and are therefore restrictive by nature. Furthermore, when it comes to travel advice – as attested by the table in Section 2 – the multiplicity of such advice, its rapidly changing nature and the potential costs and negative consequences are also liable to indirectly hinder or render the exercise of the freedom of movement less attractive. Hence, both travel advice and entry restrictions may be considered restrictions requiring an examination of proportionality. Indeed, the next step after identifying restrictions is to focus on **justifications**. As a rule, restrictions must apply **without discrimination** on grounds of nationality; they may be justified for **overriding reasons of general interest** if **appropriate to attain the objective pursued** and if they **do not go beyond what is necessary** (i.e. cannot be achieved by less restrictive rules).

3.1.2 Beyond Proportionality: A Look into the Precautionary Principle

While the parameters of the principle of proportionality are clearly set in the CJEU's case law, it is not the only general principle of EU law of relevance in relation to infectious diseases. In this context, attention should also be given to the precautionary principle elaborated in secondary legislation on food law and animal health.⁶⁵ That principle requires authorities to “take appropriate measures to

⁶³ Craig, P. and de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford University Press, 2015), p. 699-700.

⁶⁴ *Ibid.*, p. 701.

⁶⁵ See Frischhut, M. and Greer, S.L., 'EU public health law and policy – communicable diseases', in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), p. 331, footnote 70. For more on the precautionary principle, see Van Asselt, M.B.A., Everson, M.E. and Vos, E., *Trade, Health and the Environment: The European Union put to the test* (Routledge, 2014) and Science Communication Unit (UWE), *Science for Environment Policy Future Brief: The precautionary principle: decision-making under uncertainty*, September 2017 (Issue 18).



prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests”.⁶⁶ More specifically, it allows for the adoption of risk management measures aimed at ensuring a high level of health protection when harmful effects on health are identified but scientific evidence is inconclusive.⁶⁷ Authorities can thus “take protective measures without having to wait until the reality and seriousness of those risks become fully apparent ... or until the adverse health effects materialise”.⁶⁸ It is not necessary for scientific evidence to be conclusive (in fact, the application of the precautionary principle *de facto* means that there is a certain level of uncertainty), but measures cannot be based on a hypothetical approach to the risk detected.⁶⁹ Therefore, despite the absence of conclusive scientific evidence, there must be a genuine scientific basis in support of preventive measures. In particular, such measures may be taken if the risk appears adequately supported by the scientific data available at the time when the measure was adopted.⁷⁰

As in the case of the proportionality principle, a lack of scientific consensus (and absence of harmonisation) gives Member States greater leeway for determining the appropriate level of protection. On the precautionary principle, Frischhut and Greer have found that the CJEU grants broad discretion to both EU and national level actors when enacting precautionary measures, limiting the level of judicial scrutiny.⁷¹ In its case law on the precautionary principle, the Court has also placed the protection of human health above economic considerations.⁷² In particular, the Court has argued that health taking precedence over economic considerations may even justify *adverse* economic consequences.⁷³

Although the precautionary and proportionality principles have originally each been applied in different areas of EU law (food and animal health and environmental law vs. free movement law respectively), the COVID-19 pandemic poses the question of how to balance these two principles against one another in relation to measures to prevent the spread of COVID-19, thus calling for CJEU case law on the matter.⁷⁴ Meßerschmidt has studied the precautionary principle in detail and urges

⁶⁶ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 66.

⁶⁷ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 67; Case T-70/99 *Alpharma v. Council*, EU:T:2002:210, para. 152.

⁶⁸ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 68; Case T-70/99 *Alpharma v. Council*, EU:T:2002:210, para. 152.

⁶⁹ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 75; Case T-70/99 *Alpharma v. Council*, EU:T:2002:210, para. 155-156.

⁷⁰ Case T-70/99 *Alpharma v. Council*, EU:T:2002:210, para. 157 and 159.

⁷¹ Frischhut, M. and Greer, S.L., in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), p. 332.

⁷² *Ibid.*, p. 341-342.

⁷³ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 64.

⁷⁴ As of yet, limited case law in relation to COVID-19 appears to be submitted to the CJEU. As of yet, limited case law in relation to COVID-19 appears to be submitted to the CJEU, of which most of the cases thus far have not concerned the interrelationship of the precautionary and proportionality principles in relation to free movement. Case law related to COVID-19 thus far mainly concerned a preliminary ruling (Case C-220/20) on the paralysis of civil and criminal justice courts in relation to COVID-19 and a string of cases (Case T-238/20, Case T-259/20, Case T-378/20, Case T-379/20 and Case T-388/20) initiated by Ryanair against Commission decisions to grant state aid only to particular air travel companies in several Member States.



against using it too widely. Rather, he argues for the application of the principle to specific instances.⁷⁵ As previously mentioned, there is considerable leeway in applying precautionary measures. Nevertheless, the precautionary principle should not be ‘over-invoked’ in order to justify disguised forms of protectionism.⁷⁶ While it is clear that enacting the precautionary principle serves the objective of maintaining safety as a value, it is important to remember that freedom – as its related value – may be at risk when applying legislation with measures to combat the spread of COVID-19.⁷⁷ In relation to the rule of law, Meßerschmidt argues that – together with the principle of proportionality – the rule of law “builds a bridge to the world of facts and thus reinforces to a certain extent good law-making principles”.⁷⁸ More specifically, restrictions imposed on the freedoms of individuals must be objectively justified and proportionate. Under this interpretation, proportionality is again used in order to assess the legitimacy of precautionary measures. Indeed, this is a reading that is also supported by a Commission Communication on the precautionary principle. There, recourse to the precautionary principle does not cancel any obligation to rely on other general principles of risk management such as **proportionality and non-discrimination**.⁷⁹ In relation to proportionality, the Commission expressly provided that precautionary measures must make it possible to **achieve the appropriate level of protection** and **cannot aim for zero risk**.⁸⁰ More specifically, “risk reduction measures should include **less restrictive alternatives** which make it possible to achieve an equivalent level of protection”.⁸¹

At this point, it is clear that proportionality concerns are the core criterion for determining whether certain measures, including entry restrictions and travel advice, can be considered as not constituting a violation of EU free movement law. The following sections are dedicated to exploring this notion further by looking at provisions made by the WHO and ECDC as well as examining in detail specific provisions made in the Schengen Borders Code (Regulation (EU) No. 2016/399), Directive 2004/38/EC and Council Recommendation (2020/1475).

3.1.3 COVID-19 Measures and Fundamental Rights: Case Law of the European Court of Human Rights

As well as CJEU case law, there is another source of European-level case law that may be consulted for insights into the proportionality of COVID-19 measures in relation to mobility, namely the European Court of Human Rights (ECtHR). Indeed, some of the measures relating to COVID-19 may encroach upon fundamental rights as laid down in the European Convention for Human Rights (ECHR). Although an examination of the ECtHR’s case law can be considered a study in its own right, it is of importance to devote some attention to its case law relating to public health.

In a similar vein to the CJEU, the ECtHR found in previous case law that “matters of health care policy, in particular as regards general preventive measures, are in principle within the margin of appreciation

⁷⁵ Meßerschmidt, K., ‘COVID-19 legislation in the light of the precautionary principle’, 8 *The Theory and Practice of Legislation* 2, p. 273.

⁷⁶ Communication from the Commission on the precautionary principle, COM(2000) 1 final, p. 8.

⁷⁷ Meßerschmidt, K., 8 *The Theory and Practice of Legislation* 2, p. 281-282.

⁷⁸ *Ibid.*, p. 284.

⁷⁹ Communication from the Commission on the precautionary principle, COM(2000) 1 final, p. 17.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*



of the domestic authorities who are best placed to assess priorities, use of resources and social needs".⁸² Based on its prior case law, States may be held as having a certain duty to prevent the spread of contagious diseases.⁸³ When it comes to entry restrictions, in the past the ECtHR has noted that in the case of highly contagious diseases – cholera, yellow fever and SARS were given as examples – entry restrictions could be considered appropriate for preventing the spread of diseases by excluding travellers who may transmit them.⁸⁴ Nevertheless, it is important to note that proportionality must still be assessed for entry restrictions, which means that not all will be compatible with the **ECHR**.⁸⁵

Although the above-mentioned previous case law can be said to deviate from the general line set by COVID-19 tailored legislation and policy taken up in this report, which strongly discourages or even prohibits travel bans, it is important to stress that the lines of reasoning set out previously are based on case law preceding the COVID-19 pandemic. Indeed, much of the reasoning on communicable diseases was often based on measures related to preventing the spread of HIV. This was a disease that – also in the merits of the ECtHR – was different in nature from other diseases that were more contagious and had a shorter incubation period.⁸⁶ Since the start of the pandemic in early 2020, several cases have been submitted to the ECtHR on measures taken specifically to combat the COVID-19 pandemic.

For example, in *Terheş v Romania*, the application of a night curfew and advice not to leave home during the day were contested in relation to Article 5(4) ECHR (Right to liberty and security). In particular, the applicant claimed that he had been subject to an administrative detention from which he demanded to be released directly, so as to have a right to exit his home without having to present a document attesting to a valid reason for doing so (and without the risk of sanctions).⁸⁷ The applicant also argued that the legal basis was neither clear nor predictable and that the rule was generally unnecessary in a democratic society.⁸⁸ The ECtHR commenced its reasoning by stressing the individual application of Article 5. Indeed, the Court indicated that in order to see whether an individual was deprived of their freedom, their concrete situation should be the starting point, thus taking into account a whole range of factors such as the type, duration, effects and manner of implementation of the measure concerned.⁸⁹ Thus, the context of the measure was also important, since the public could be called upon to bear restrictions to the freedom of movement in light of the general interest. The ECtHR found that there was particular urgency over the sanitary situation and that all necessary legal procedures and consultations had taken place before adoption of the legislation concerned.⁹⁰

⁸² ECtHR, *Shelley v. United Kingdom*, Judgment of 4 January 2008, Application No. 23800/06, p. 11.

⁸³ Tsampi, A., 'Public Health and the European Court of Human Rights: Using Strasbourg's Arsenal in the COVID-19 Era', <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/public-health-and-the-european-court-of-human-rights-27-03-2020?lang=en>.

⁸⁴ ECtHR, *Kiyutin v. Russia*, Judgment of 10 March 2011, Application No. 2700/10, para. 68.

⁸⁵ Tsampi, A., 'Public Health and the European Court of Human Rights: Using Strasbourg's Arsenal in the COVID-19 Era', <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/public-health-and-the-european-court-of-human-rights-27-03-2020?lang=en>.

⁸⁶ To this end see for example ECtHR, *Kiyutin v. Russia*, Judgment of 10 March 2011, Application No. 2700/10, para. 68.

⁸⁷ ECtHR, *Terheş v. Romania*, Judgment of 13 April 2021, Application No. 49933/20, para. 11.

⁸⁸ *Ibid.*, para. 33.

⁸⁹ *Ibid.*, para. 36.

⁹⁰ *Ibid.*, para. 40.



Furthermore, the ECtHR found that the objective of the measures was to mitigate the social and economic effects of the COVID-19 pandemic and to protect the right to life.

The ECtHR therefore based its assessment on the individual situation of the applicant. In this context, the ECtHR found that the applicant was not subject to an individual preventive measure but rather was the subject of a general measure.⁹¹ Furthermore, as the applicant was still able to leave their home, the ECtHR found that the COVID-19 measure could not be compared to house arrest (which Article 5 ECHR was primarily said to relate to).⁹² The ECtHR also found that the applicant had not sufficiently demonstrated how the measures impacted them (i.e. failing to show that they were forced to remain at home constantly during lockdown).⁹³ Ultimately, the ECtHR concluded that Article 5 ECHR was not applicable in the present situation. Interestingly, however, the ECtHR commenced its evaluation by indicating that the applicant had not cited Article 2 of Protocol No. 4 of the ECHR and therefore did not seek to demonstrate that the general confinement measure not only constituted a limitation to the freedom of movement but also a deprivation of the right of liberty.⁹⁴ The question therefore rises as to whether the Court perhaps may have reached a different conclusion had the applicant relied on Article 2 of Protocol No. 4.

Recently, a case related to COVID-19 measures imposed by Croatia was communicated to the ECtHR. Similarly to *Terheş v. Romania*, the case concerns lockdown measures. In addition, the case *Magdiç v. Croatia* also concerns a prohibition on public gatherings and a suspension of religious gatherings. Apart from invoking Articles 9 (freedom of religion) and 11 (right of peaceful assembly), the applicants in the current case invoked Article 2(1) of Protocol No. 4 (freedom of movement).⁹⁵ Considering the ECtHR's comment in relation to Article 2 of Protocol No. 4 in *Terheş v. Romania*, it will be interesting to see whether the Court takes a different interpretation to lockdown measures when Article 2 of Protocol No. 4 is invoked in *Magdiç v. Croatia*.

3.2 Developing Perspectives to Proportionality: The WHO and ECDC

Both the WHO and the ECDC play a crucial role in issuing expert recommendations on how to handle the spread of diseases across borders. The ECDC publishes data on the COVID-19 situation in the EU/EEA and the UK on a daily basis. Based on this data, risk assessments are made for the whole of Europe. In the 11th update of its risk assessment, the ECDC indicated that the number of actual cases where the virus was imported from one Member State to another was relatively low.⁹⁶ However, as is the case at the national level, mobility remains a risk for transmission. In its report, *Considerations for*

⁹¹ *Ibid.*, para. 42.

⁹² *Ibid.*, para. 43. For a discussion surrounding the suitability of the qualification of Article 5 ECHR only comprising house arrest see Green, A., 'Falling at the First Hurdle? *Terheş v. Romania*: Lockdowns and Normalising the Exception', <https://strasbourgobservers.com/2021/06/18/falling-at-the-first-hurdle-terhes-v-romania-lockdowns-and-normalising-the-exception/#more-5403>.

⁹³ ECtHR, *Terheş v. Romania*, Judgment of 13 April 2021, Application No. 49933/20, para. 44.

⁹⁴ *Ibid.*, para. 38.

⁹⁵ *Magdiç v. Croatia*, Application No. 17578/20.

⁹⁶ ECDC, 'RAPID RISK ASSESSMENT Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK', eleventh update, <https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-rapid-risk-assessment-20200810.pdf>.



travel-related measures to reduce spread of COVID-19 in the EU/EEA,⁹⁷ the ECDC sheds light on the limitations to travel and entry restrictions. In relation to the latter, the Centre finds that the closure of borders or other broad entry restrictions are unlikely to have significant impact in containing the virus, given the advanced state of European integration. Indeed, measures that radically disrupt trade and movement (e.g. blanket quarantines) have been found to provide insufficient protection against communicable diseases.⁹⁸ Instead, such protection is more likely to be achieved through international coordination and cooperation,⁹⁹ such as that of the ECDC. The ECDC recommends that Member States use a Passenger Locator Form, which supports contact tracing.¹⁰⁰ Other travel measures are not expressly supported by the ECDC, particularly when prioritised over other public health activities such as testing and contact tracing.

In its 14th update of 15 February 2021, ECDC the risk associated with further spread of COVID-19 in the EU/EEA was assessed as high to very high due to the virus variants and increased transmissibility.¹⁰¹ Given the high risk in the EU/EEA, the ECDC recommended that all non-essential travel should be avoided and that a robust system of escalated measures should be put in place. These could include the testing and quarantining of travellers and enhanced contract tracing. In the view of the ECDC, travel measures cannot completely prevent the introduction or spread of the virus; however, they can prevent the triggering of larger outbreaks. These measures should be implemented for travellers from areas with high community transmissions, particularly when these are due to virus variants, irrespective of the local situation at place of destination. Such measures should also apply for travel within countries or in areas where the transmission levels are high.¹⁰² Furthermore, travel measures should be used as complementary to the implementation of necessary community measures (e.g. testing, contact tracing, isolation of cases), rather than replacing them.

In the event that the risk in the EU/EEA is assessed as lower, such as in the 15th update of the Risk Assessment, travel measures could be beneficial in the event that the situation in the region of departure differs greatly from that in the region of arrival.¹⁰³ This is particularly the case when there is a very low level of transmission in the receiving region or when the region of departure has an epidemiological situation of high or serious concern level. Nevertheless, if the epidemiological situation is reasonably comparable between regions, the impact of the travel measures will be more limited.¹⁰⁴ Therefore, instead of restricting cross-border movements, the ECDC finds that regional epidemiological data can help national policymakers to issue travel advice, particularly when regional

⁹⁷ ECDC, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA*, ECDC Technical Report, 2020.

⁹⁸ Frischhut, M. and Greer, S.L., 'EU public health law and policy – communicable diseases', in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), p. 318.

⁹⁹ *Ibid.*, p. 318-319.

¹⁰⁰ ECDC, *Considerations relating to passenger locator data, entry and exit screening and health declarations in the context of COVID-19 in the EU/EEA and the UK*, ECDC Technical Report, 2020.

¹⁰¹ ECDC, Risk assessment 15 February 2021. <https://www.ecdc.europa.eu/sites/default/files/documents/RRA-covid-19-14th-update-15-feb-2021.pdf>.

¹⁰² *Ibid.*, p. 17.

¹⁰³ ECDC, *Risk assessment Assessing SARS-CoV-2 circulation, variants of concern, non-pharmaceutical interventions and vaccine rollout in the EU/EEA, 15th update*, 10 June 2021, <https://www.ecdc.europa.eu/sites/default/files/documents/RRA-15th-update-June%202021.pdf>. See also ECDC, *Q&A: COVID-19 and travel*, <https://www.ecdc.europa.eu/en/covid-19/questions-answers/questions-answers-travel>.

¹⁰⁴ ECDC, *Guidance for COVID-19 quarantine and testing for travellers*, ECDC Technical Report, 2021.



data is compared to other regional data of that same country.¹⁰⁵ The use of regional data, however, should always be interpreted with a broader range of aspects in mind, such as national measures.

Where implemented, the ECDC's *Guidance for COVID-19 quarantine and testing for travellers* provides guidelines for policymakers on the most commonly used entry restrictions: quarantining and testing. Such measures can be useful when travellers come from areas with a high level of community transmission or with the presence of virus variants. Again, such measures are particularly relevant in the situation where the epidemiological situations are different between the areas of departure and arrival. Member States are urged to carefully balance the expected public health benefit against the other consequences. Not only a test prior to arrival, but also - or even more so - a test at the place of destination is considered useful. A combination of pre-departure (max. 48 hours before departure) and post-arrival (five to seven days after arrival) testing appears to be the best strategy. On isolation or quarantine of travellers, the ECDC states that this can be very effective if implemented at an early stage of the evolution of the epidemic. If implemented, travellers should be treated as local residents, meaning that the same recommendations should apply. A test after five to seven days should enable release from quarantine.

Earlier, the ECDC had already discouraged entry or exit screenings via temperature checks, health questionnaires or an immunity certificate.¹⁰⁶ Yet, the latter has to be adjusted with new evidence on vaccinated and recovered persons. In an Interim Guidance on the lifting of non-pharmaceutical interventions for vaccinated persons, the ECDC found that entry restrictions could be lifted or modified for these vaccinated travellers, given that the epidemiological context in the EU allows for such a move.¹⁰⁷ The first two measures are still not supported by scientific evidence.¹⁰⁸

Looking at the WHO, in 2020 the organisation issued the document '*Public health considerations while resuming international travel*'¹⁰⁹ in relation to the COVID-19 pandemic. According to the WHO, health measures, including quarantine, can be imposed on incoming travellers under the International Health Regulation 2005 (IHR 2005). Such recommendations more or less align with those of the ECDC.¹¹⁰ In addition, the WHO indicates: "[i]f countries choose to implement quarantine measures for all travellers on arrival, they should do so based on a risk assessment and consideration of local circumstances". Following the IHR, "countries shall not charge travellers for measures required for the protection of health, including (a) examinations to ascertain their health status; (b) vaccination or prophylaxis on arrival (not published 10 days earlier); (c) appropriate isolation or quarantine; (d) certificates specifying the measures applied; or (e) applied to baggage accompanying them".¹¹¹

¹⁰⁵ ECDC, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA*, ECDC Technical Report, 2020, p. 3-4.

¹⁰⁶ Ibid.

¹⁰⁷ ECDC, *Interim guidance on the benefits of full vaccination against COVID-19 for transmission and implications for non-pharmaceutical interventions*, Technical Report, 2021.

¹⁰⁸ ECDC, *Guidance for COVID-19 quarantine and testing for travellers*, ECDC Technical Report, 2021.

¹⁰⁹ WHO, '*Public health considerations while resuming international travel*', <https://www.who.int/news-room/articles-detail/public-health-considerations-while-resuming-international-travel>.

¹¹⁰ Chapter III IHR 2005.

¹¹¹ WHO, '*Public health considerations while resuming international travel*', <https://www.who.int/news-room/articles-detail/public-health-considerations-while-resuming-international-travel>.



In December 2020, the WHO published its interim guidance '*Considerations for implementing a risk-based approach to international travel in the context of COVID-19*'.¹¹² To a great extent, the key points follow the arguments of the ECDC, as shown above. In the guidance, the WHO addresses the need for a risk-based approach to international travel, where the risk is assessed on the basis of epidemiological data in a comparative way, travel volumes, the public health and health services capacity and the total package of measures that have been adopted. Based on these elements, risk mitigation measures, such as travel advice and entry restrictions, can be implemented. Here, the WHO also recommends the use of international contact tracing and discourages exit and entry screenings via temperature checks. On testing requirements, the WHO finds that "international travellers should not be categorised as suspected COVID-19 cases".¹¹³ Therefore it is not recommended to make travellers a priority group for testing. However, requiring a test could be useful in high-risk settings, for example due to high incidence or virus variants. When it comes to quarantine, the WHO states that international travellers should not by definition be considered as contacts of COVID-19. Yet, for countries with very low case levels, quarantine measures for travellers from countries with higher incidence might be useful. If implemented, countries should respect the travellers' dignity, human rights and fundamental freedoms and comply with the IHR 2005.

Based on the expert recommendations of the WHO and the ECDC, one can conclude that mandating or urging travellers from risk areas to undergo quarantine or requiring a test before or upon arrival can be proportionate in light of the public health threat. However, travel measures should be used as complementary measures next to the implementation of other necessary community measures, and are more useful specifically for regions where COVID-19 transmission is significantly different. By contrast, travel measures are of more limited effect when issued to travellers from areas with a similar or better epidemiological situation. However, as the ECDC's recommendations show, forbidding travel from other countries (i.e. travel bans or other entry restrictions) is not efficient, meaning that border closures should be discouraged. The ECDC publishes regional epidemiological data that helps Member States' foreign ministries when issuing their travel advice and is particularly useful when data of regions within one country is compared in order to improve this advice. Therefore, one could argue that issuing regional, rather than national, advice allows for a more accurate depiction of the situation on COVID-19, making it accordingly more proportionate. Furthermore, it can be argued that – from a proportionality perspective, entry restrictions should be risk-based and targeted at those travellers from regions with significantly greater risk (e.g. in terms of incidence or virus variants) within the scope of the complete package of national risk mitigating measures when the risk in the EU/EEA is assessed as high. These conclusions can be supported by the findings of a recent research by Lemey, Ruktanonchai, Hong, et al., which was still under review while this report was being finalised (July 2021).¹¹⁴ The researchers reconstructed the spread of the virus, particularly the variants, resulting from increased mobility between June - August 2020. They found that mobility did import the virus

¹¹² WHO, *Considerations for implementing a risk-based approach to international travel in the context of COVID-19*, <https://www.who.int/news-room/articles-detail/considerations-for-implementing-a-risk-based-approach-to-international-travel-in-the-context-of-covid-19>.

¹¹³ WHO, *Considerations for implementing a risk-based approach to international travel in the context of COVID-19*, p. 5.

¹¹⁴ Lemey, P., Ruktanonchai, N., Hong, S.L. et al. Untangling introductions and persistence in COVID-19 resurgence in Europe. *Nature* (2021). <https://doi.org/10.1038/s41586-021-03754-2>.



(variants), while this was particularly the case for those countries with low incidence rates at that time and, to a lesser extent, for countries that already experienced relatively high incidences. The export of virus (variants) particularly occurred from regions coping with (relatively) higher incidences or virus variants, while the importation appeared to be limited. Where regions are more similar from an epidemiological point of view and/or regions cope with higher epidemiological risks, the effects of mobility are more limited. The results underline the importance of a risk-based approach, where travel measures take into account both the situation in the region of departure as well as the local situation.

3.3 Limiting Freedom of Movement: The Schengen Borders Code, Directive 2004/38/EC and Council Recommendation

Although the concept of the freedom of movement was originally introduced in the context of the EU single market, the development of the EU from an economic into a political union has seen free movement become a fundamental part of other areas of EU law. In the discussions over proportionality and the mobility-restricting effects of COVID-19 measures, the most important are those concerning the Schengen Area, EU citizenship and the Council Recommendation on a coordinated approach to COVID-19 travel measures. Accordingly, the difference in the way potential restrictions on health grounds are taken up in the secondary legislation applicable to these areas subsequently leads to questions as to whether, and if so how, proportionality is interpreted depending on the policy area one is looking at.

3.3.1 Restrictions to Free Movement through the Schengen Borders Code

The Schengen Borders Code¹¹⁵ includes provisions on potential restrictions relating to mobility. In particular, it allows mobility restrictions on the grounds of public policy or security concerns. Public health is not expressly included as a legitimate basis for reintroducing internal border checks under the Schengen Borders Code.¹¹⁶ Nevertheless, the COVID-19 pandemic has shown that the provisions on reintroducing border controls have been used by Member States to counter the spread of the disease.

Limitations on the reinstatement of border controls are laid down in the Schengen Borders Code.¹¹⁷ More specifically, it establishes that border controls may only be reintroduced temporarily to remedy a threat to public policy or internal security.¹¹⁸ Within the Code, several such procedures exist, ranging from introducing controls for foreseeable events to a one in the event that immediate action is necessary. Considering the extended duration of the COVID-19 pandemic, the former procedure may

¹¹⁵ For an extensive analysis of the Schengen Borders Code in relation to COVID-19 see Carrera, S. and Luk, N.C., In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU, Study for the LIBE Committee (August 2020).

¹¹⁶ Furthermore, the exclusion of public health from the Schengen Borders Code was a conscious decision by the European Commission at the time of the negotiation of the Code. In particular, the Commission considered that in an event of an outbreak of a disease with epidemic potential, the most appropriate and proportionate reaction was not to conduct border controls but rather to take dedicated health measures such as quarantines; *Ibid.*, p. 49 and 57.

¹¹⁷ Articles 25-35 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), (OJ L 77/1).

¹¹⁸ Article 26 Schengen Borders Code.



be more likely to be maintained by the Member States. In that case, border controls can apply for up to 30 days or “for the foreseeable future of the serious threat if its duration exceeds 30 days”.¹¹⁹ The border controls must be a last resort and may last a maximum of six months.¹²⁰ Nevertheless, a 2020 study conducted by Carrera and Luk indicates that Member States initially relied on the ‘immediate action’ provision contained in Article 28 of the Schengen Borders Code, after which they fell back on the Article 25-procedure to extend the period during which border controls could be applied. In their report, they note that the Schengen Borders Code does not allow these procedures to be used interchangeably, meaning that the Member States that used this structure to extend the application of their border controls were in violation of the Schengen Borders Code’s procedural requirements.¹²¹ In a similar vein, they found that some Member States failed to fulfil the Code’s procedural requirements by interpreting the notions of public policy and internal security in an expansionist way, thus going beyond the individual case-by-case assessment required by the CJEU for the reasons for reintroducing border controls.¹²²

Again, the reintroduction of border controls must be both proportionate and necessary to respond to the threat. Member States are obliged to assess proportionality, since Article 26 of the Schengen Borders Code requires an assessment as to the extent to which border controls remedy or impact the public goal being pursued.¹²³ Furthermore, Member States must notify their border controls and provide other Member States, the European Commission, European Parliament and the Council with a list of detailed information on, among others, the reasons for the reintroduction and all relevant data demonstrating what constitutes a serious threat to its public policy or internal security.¹²⁴ Within a month following the lifting of the border control, Member States must also reflect on the impact on the free movement and effectiveness of the border controls as well as an ex-post proportionality assessment.¹²⁵ An extra check is introduced in Article 25(4) of the Schengen Borders Code, through which the Commission may issue an opinion if it has concerns over the necessity and proportionality of the planned reintroduction of border controls.

Member States have made use of the provisions provided by the Schengen Borders Code to introduce temporary border controls in light of COVID-19. Although many Member States had recourse to border controls over the course of the pandemic as a measure to combat the spread of COVID-19, not all countries sufficiently substantiated the reason for the border controls. Although a majority of countries relied on epidemiological data to support the decision to temporarily reintroduce border controls, some Member States provided no substantive arguments for the border controls and even fewer recognised the exceptional and last resort nature of the controls when notifying their measures.¹²⁶ As far as border controls – or even closures – are concerned, their usefulness in

¹¹⁹ Article 25(1) Schengen Borders Code.

¹²⁰ Article 25(2)(4) Schengen Borders Code.

¹²¹ Carrera, S. and Luk, N.C., *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*, Study for the LIBE Committee (August 2020), p. 50 and p. 54-55.

¹²² *Ibid.*, p. 57.

¹²³ *Ibid.*, p. 50.

¹²⁴ Article 27(1)(2) Schengen Borders Code.

¹²⁵ Article 33 Schengen Borders Code.

¹²⁶ Carrera, S. and Luk, N.C., *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*, Study for the LIBE Committee (August 2020), p. 68.



combatting the spread of COVID-19 has been questioned and even disproved.¹²⁷ Indeed, several of the case studies in Section 5 of this report will demonstrate in greater detail how border controls have been used by Member States as a measure to advance the health situation in relation to the COVID-19 pandemic. Suffice to say that border controls must be duly substantiated and regularly assessed in order to fulfil the requirements of the Schengen Borders Code.

3.3.2 Directive 2004/38/EC: Restrictions to Free Movement Rights connected to EU Citizenship

Following this distinction in EU policy areas granting EU citizens free movement rights, we may also perceive a difference in the way restrictions to free movement are instituted. Concerning EU citizenship, these limitations are laid down in Directive 2004/38/EC.¹²⁸ Following Article 29(1) of this Directive, the threshold for restrictions on the freedom of movement on public health grounds is high. In fact, “the only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization (WHO) and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State”.¹²⁹ In March 2020, the COVID-19 outbreak was declared a pandemic by WHO Director-General Ghebreyesus.¹³⁰ The threshold to institute restrictions to free movement under Directive 2004/38/EC has therefore been met.

Considering the fulfilment of the Article 29(1) criterion, the core question is not so much whether the travel advice and entry restrictions are permitted, but rather whether their severity is suitable in relation to the principle of proportionality. Article 29 is taken up in Chapter VI of Directive 2004/38/EC, which provides possibilities to restrict the right of entry and residence on grounds of public policy, public security or public health. Chapter VI therefore provides the possibility to restrict, where justified, the exercise of a right derived directly from the Treaty.¹³¹ While public policy and public security restrictions must be based on individual assessments and personal conduct, such person-specific measures have no analogies under the public health restriction.¹³² This means that broader measures restricting freedom of movement would appear to be permitted under the Directive.

¹²⁷ See for example ECDC, ‘RAPID RISK ASSESSMENT Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK’, eleventh update, <https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-rapid-risk-assessment-20200810.pdf>; ECDC, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA*, ECDC Technical Report, 2020; Frischhut, M. and Greer, S.L., ‘EU public health law and policy – communicable diseases’, in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), p. 318; Carrera, S. and Luk, N.C., *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*, Study for the LIBE Committee (August 2020), p. 68-69.

¹²⁸ Article 1(c) and 27(1) 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 (OJ L 158/77).

¹²⁹ This article was a revision from the Directive 64/221/EEC and differentiates from it.

¹³⁰ WHO, ‘WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020’, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹³¹ Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, p. 13.

¹³² Coutts, S., ‘Citizenship, Coronavirus and Questions of Competence’, 5 *European Papers* 1 (2020), p. 431; Fremuth, M.L., ‘Coronavirus und Menschenrechte: Die Bekämpfung des Coronavirus – Menschenrechtliche Grundlagen und Grenzen’, Ludwig Boltzmann Institut – Universität Wien, 28 März 2020, p. 15-16.



However, paragraphs 2 and 3 of Article 29 ensure that any disease may not constitute grounds for expulsion if a person has resided in a Member State other than the home Member State for longer than three months.¹³³

Following Article 29(1) of Directive 2004/38/EC, Member States can therefore be held to have a wider margin of discretion over epidemic threats to public health as opposed to individual threats to public policy or public security (Article 27 of the Directive).¹³⁴ Nevertheless, restrictions are not without limits, since they must be proportionate and non-discriminatory.¹³⁵ Indeed, the Commission has stressed the need for proportionate and non-discriminatory restrictions in its guidelines issued early in the COVID-19 pandemic.¹³⁶ The importance of adhering to these principles was reiterated in the Council Recommendation (EU) 2020/1475.¹³⁷

3.3.3 The Council Recommendation: Towards a European Risk Assessment and Approach for Entry Restrictions

With a patchwork of national entry restrictions, travel advice and related criteria, the right of free movement of EU citizens may be seriously hindered. The case studies in the following section will elaborate this point further. The current section focuses on the activities of the Council of the EU in contributing to the balancing act between freedom of movement and the protection of public health. Following several Commission initiatives, the Council adopted a Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in October 2020.¹³⁸ This Recommendation was based on the earlier-published Commission proposal addressing the impact of national COVID-19 measures on the right of EU citizens to move and reside freely in the EU.¹³⁹ It may therefore be recalled that the Council Recommendation established (1) the application of common criteria and thresholds for the decision when to introduce restrictions to free movement; (2) a common epidemiological map with colour codes; and (3) a coordinated approach for determining what is an appropriate measure to apply on a mobile person, given a certain risk level.

¹³³ Conversely, it follows from Article 29(2)(3) of Directive 2004/38/EC that a person may be expelled within the first three months of stay in a second Member state and that a medical examination may be performed to determine whether the person suffers from the disease referred to in Article 29(1). See Klaus, S., 'Geschlossene Gesellschaften: Einreisebeschränkungen und andere ausländerrechtliche Maßnahmen infolge der COVID-19-Pandemie', 14 *Neue Zeitschrift für Verwaltungsrecht* 39 (2020), p. 5.

¹³⁴ Thym, D. and Bornemann, J., 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics', *European Papers*, Vol. 5, 2020, No 3, <https://doi.org/10.15166/2499-8249/420>, p. 1162; Thym, D., 'Travel Bans in Europe: A Legal Appraisal (Part I)', <https://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/>.

¹³⁵ Thym, D., 'Travel Bans in Europe: A Legal Appraisal (Part I)', <https://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/>. S. Coutts, 5 *European Papers* 1 (2020), p. 431.

¹³⁶ European Commission, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, C(2020) 1753, p. 1-2.

¹³⁷ Recital 10 Recommendation of the Council (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337).

¹³⁸ Recommendation of the Council (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337).

¹³⁹ Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, COM(2020) 499 final.



With the emergence of new virus mutations in late 2020 and early 2021, new and additional measures were introduced by Member States in order to limit the ‘importation’ of these virus variants of concern. Ultimately, the desire to prevent the spread of virus mutations even led some Member States to impose travel bans on certain regions or countries. Furthermore, the higher transmission rates of the new virus mutations required an update to the earlier coordinated risk assessment. Following the proposal of the Commission,¹⁴⁰ the Council accepted a second Recommendation amending its earlier Recommendation (EU) 2020/1475.¹⁴¹ This provided a common framework for assessing the new virus variants of concern and facilitating essential travel, while discouraging non-essential travel in light of the epidemiological situation. Guidelines have therefore been provided to determine what constitutes essential travel.¹⁴² The table below includes an overview of the core provisions of the Council Recommendation.

Common Principles

Non-discrimination:

- Restrictions should be based on the location of a person in the last 14 days;
- No discrimination between Member States or between nationalities; no rules more favourable for neighbouring countries.

EU Citizenship:

- Member States should always admit their own nationals;
- Member States should always admit EU citizens and their family members resident in their territory.

Common Risk Assessment

Criteria:

- Member States should base their restrictive measures on (1) the 14-day cumulative COVID-19 case notification rate; (2) the test positivity rate; (3) the testing rate;
 - As of the third update of the Council Recommendation: (4) vaccination uptake; (5) prevalence of COVID-19 variants of concern or interest;
- Member States should assess the risk on a regional level, to the extent that data is available.

Common risk classification:

- The ECDC publishes a weekly map with the risk assessments of regions;
- Green: 14-day cumulative COVID-19 rate <25 and test positivity rate <4%;
 - Changed by the 3rd update to: 14-day cumulative COVID-19 rate <50 and test positivity rate <4%; OR 14-day cumulative COVID-19 rate <75 and test positivity rate <1%.
- Orange: 14-day cumulative COVID-19 rate <50 and test positivity rate >4%; OR 14-day cumulative COVID-19 rate 25-150 and test positivity rate <4%.

¹⁴⁰ Proposal for a Council Recommendation amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, COM(2021) 38 final.

¹⁴¹ Council Recommendation (EU) 2021/119 of 1 February 2021 amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 361).

¹⁴² See point 19 Recommendation of the Council (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337).



- Changed by the 3rd update to: 14-day cumulative COVID-19 rate <50 and test positivity rate >4%; OR 14-day cumulative COVID-19 rate 50-75 and test positivity rate >1%; OR 14-day cumulative COVID-19 rate 75-200 and test positivity rate <4%;
- Red: 14-day cumulative COVID-19 rate >50 and test positivity rate >4%; OR 14-day cumulative COVID-19 rate 150-500;
 - Changed by the third update to: 14-day cumulative COVID-19 rate 75-200 and test positivity rate >4%; OR 14-day cumulative COVID-19 rate 200-500;
- Dark red: 14-day cumulative COVID-19 rate >500.

Common Framework for entry restrictions

Measures:

- Requiring a Passenger Locator Form to be filled in; and/or;
- Requiring to undergo quarantine; and/or;
- Requiring a test prior to arrival; or;
- Requiring undergoing a test after arrival (in case a test prior to arrival is not possible).

Thresholds:

- Member States should not impose quarantine on travellers from green regions;
- Member States can require a test and/or quarantine from a person travelling from a region that is classified other than green;
- However, Member States should respect the differences in the epidemiological situation between the risk classifications and differentiate between them in restrictive measures;
- Member States should take into account the epidemiological situation in their own territory;
- Member States should discourage non-essential travel from red regions;
- Member States should strongly discourage non-essential travel from dark red regions: require travellers to undergo a test prior to arrival AND undergo quarantine after arrival;
- As of the 2nd update of the Council Recommendation:
 - Member States should not impose quarantine on travellers from orange regions;
 - Member States can require travellers from red regions to undergo quarantine, unless they have a valid test certificate;
 - Member States should not require quarantine for minors travelling with their parents or another person where such requirement is not imposed on the accompanying person.

Common Exemptions

Travellers with an essential function or need should not be required to undergo quarantine:

- *An exemption holds for travellers from a dark red area: if no disproportionate impact, quarantine holds;*
- Workers or self-employed persons in critical occupations such as health, frontier and posted workers;
- Transport workers, seafarers, diplomats and journalists;
- Patients (for medical reasons);
- Cross-border pupils, students and trainees;
- Persons travelling for imperative family or business reasons;
- Passengers in transit.



Transport workers should also be exempt from testing requirements; if required, only rapid antigen tests should be used.

With the introduction of the *Certificate*, the holders should, in principle be relieved of restrictions, unless the 'emergency brake' is triggered.

Common approach for cross-border regions

- In cross-border regions, persons are more likely to cross the border daily or frequently for work, business, education, family, medical care or caregiving;
- Member States should not require these persons to undergo a test or quarantine;
- If a test obligation is imposed, the frequency should be proportionate for those cross-border commuters;
- If the epidemiological situation is similar on both sides of the border, no requirements should be imposed;
- Member States should inform neighbouring Member States about requirements and coordinate the measures.

Next to the amendments to the Council Recommendation, the final text of the European Digital COVID-19 Certificate (hereafter: Certificate) was also adopted by the European Parliament and the Council on 14 June 2021, following political agreement on 20 May 2021. Entering into force on 1 July 2021, the European Certificate aims to facilitate non-essential cross-border travel within the EU by harmonising the requirements and issuance of certificates of full vaccination, recovery or negative testing and safeguarding their interoperability. Following the legislative work on the Certificate, the European Commission adopted a Communication on a common path to a safe and sustained re-opening¹⁴³ as well as another proposal to update the Council Recommendation.¹⁴⁴ The latter has been adopted by the Council on 14 June 2021.¹⁴⁵ This means that the Council Recommendation has since been amended to now also coordinate the gradual lifting of free movement restrictions. As stated in the context of the update, measures that could apply to travellers should be linked more closely with the colour code for the place of departure. Therefore, the Recommendation urges Member States to link entry restrictions with the risk assessment made on indicators that are defined by the Council Recommendation and the colour map updated by the ECDC. Travellers from green areas should still be excluded from any obligation or from holding the Certificate. In addition, the update introduced a more risk-based approach in point 17, where it is indicated that Member States can require a negative test before arrival from travellers from an area classified as orange, red or grey. If not in possession of a negative test, Member States may require a test after arrival, travellers from red or grey areas may be required to undergo quarantine until a negative test result is obtained. Furthermore, exemptions on any entry restrictions should be in line with the Certificate. In principle, holders of a Certificate

¹⁴³ Communication from the Commission to the European Parliament, the European Council and the Council – A common path to safe and sustained re-opening, COM(2021) 129 final.

¹⁴⁴ Proposal for a Council Recommendation amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, COM(2021) 294 final

¹⁴⁵ Council Recommendation (EU) 2021/961 of 14 June 2021 amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 213I).



based on full vaccination or recovery should not be subject to additional restrictions such as testing or quarantine.¹⁴⁶ However, an ‘emergency brake’ has been introduced, allowing Member States to – exceptionally and temporarily – require a test and/or quarantine from a holder of a Certificate in the event that the epidemiological situation in a region deteriorates rapidly. This is particularly the case where virus variants increase transmissibility and infection severity or where there is no comparable relevant community transmission in the EU.¹⁴⁷ To simplify intra-EU travel, the updated Council Recommendation also provides standard validity periods for COVID-19 tests. A NAAT test must be carried out not more than 72 hours prior to arrival, while a shorter validity period of not more than 48 hours is justified for a rapid antigen test.¹⁴⁸

While public health mainly falls within the scope of national competency, Member States still need to comply with the principles of EU law, adhere to the obligations in primary and secondary law and safeguard the rights of EU citizens. Where measures are imposed, they need to be proportionate and non-discriminatory. The Council Recommendation is intended to support Member States in applying these principles and in bringing their national measures impacting mobility in line with EU law.¹⁴⁹ Therefore, the Council Recommendation can be considered as a guideline for which measures (i.e. entry restrictions) and when they are deemed to be proportionate. However, it is important to stress that the issuance of travel advice appears to have remained unaffected by the new amendments made to the Council Recommendation. Considering that negative consequences of ignoring such travel advice may also discourage mobility, it may be worthwhile to recommend including certain coordinated standards on issuing travel advice in possible future versions of the Council Recommendation.

Despite its importance in setting the parameters for COVID-19 measures that affect travel, the fact that the Council sets such parameters in a Recommendation means they have no legally binding effect.¹⁵⁰ This also means that the implementation of the Council Recommendation differs between Member States, as the case studies in Section 4 will show. Nevertheless, the Commission has clearly monitored the Member States on compliance with general principles of EU law - such as proportionality and non-discrimination - and reminded them on the agreements that have been made in the Council Recommendation.¹⁵¹

3.4 National Perspectives to Proportionality: Case Law, Policy & Practice

There is currently a lack of CJEU case law on COVID-19 measures that have potentially restrictive effects on the freedom of movement in the EU. Therefore, the interpretation of the principle of

¹⁴⁶ Point 17aa ad 17ab of the Council Recommendation.

¹⁴⁷ Point 18a of the Council Recommendation.

¹⁴⁸ Recital 16 of Council Recommendation (EU) 2021/0021 of 10 June 2021 and Principle 17 of the Council Recommendation.

¹⁴⁹ Recital 10 and point 1 of the Council Recommendation.

¹⁵⁰ Article 288 TFEU.

¹⁵¹ See for example the Letter from Commissioners Johansson and Reynders addressed to the EU Ministers for Home Affairs and Justice on travel restrictions in the context of the COVID-19 pandemic, https://ec.europa.eu/commission/commissioners/2019-2024/johansson/announcements/letter-commissioners-johansson-and-reynders-addressed-eu-ministers-home-affairs-and-justice-travel_en.



proportionality as found in national case law becomes the source from which the operationalisation of that principle is to become apparent. In this Section, we examine a selection of national cases on COVID-19 measures in order to gain a more thorough understanding of proportionality in relation to those measures which may have the effect of restricting cross-border mobility. We give particular attention to dedicated themes, in particular, the legality of COVID-19 legislation, quarantine rules, test measures and the relationship between precaution and proportionality.

3.4.1 The Legality of COVID-19 Legislation

During the COVID-19 pandemic, many Member States adopted legislation dedicated to combatting the spread of the disease. In the early days of the crisis in particular, the unexpected, rapid and dramatic spread of the disease led Member States to rapidly adopt legislation to prevent the further spread of the disease. In some countries, legislation to combat the pandemic was based on legal provisions enabling its swift adoption to help deal with pressing safety and security matters. Nevertheless, such practices eventually met with resistance as the pandemic progressed, and some Member States continued to maintain and/or adopt COVID-19-related legislation on the basis of the same ‘emergency legal basis’ used at the start of the pandemic.

The Netherlands

This exact situation presented itself in the Netherlands, when the Government sought to adopt a curfew as a means of further combatting the spread of COVID-19 on the basis of the *Wet buitengewone bevoegdheden burgerlijk gezag* (Act on extraordinary powers of civil authority – Wbbbg). That Act allows the Government to adopt a curfew without having to undergo a legislative procedure (requiring parliamentary approval). The activist group *Viruswaarheid* (Virus Truth) lodged an appeal, stating that the Dutch State had acted illegitimately as there was no exceptional and emergency situation on which to base the adoption of the curfew.¹⁵² Furthermore, they argued that the curfew constituted a manifest limitation of the fundamental rights of citizens as laid down in the Dutch Constitution (inter alia Article 10) and international treaties (inter alia Articles 2 and 8 ECHR). They furthermore argued that the State had provided insufficient justification for imposing the curfew, which they also considered to be in violation of the principles of proportionality and subsidiarity.

The national court commenced its ruling by confirming the need for an emergency, since the curfew was indeed considered a measure to considerably restrict fundamental rights of citizens.¹⁵³ The State referred to the advice of the Outbreak Management Team to justify the curfew.¹⁵⁴ Although the judge did consider the argument raised by *Viruswaarheid* that the number of cases was fluctuating and was not as high as earlier in the pandemic, the judge ultimately concluded that– at that time – the new mutation of the virus was still placing hospitals under extreme pressure.

¹⁵² Rb. Den Haag 16 February 2021, ECLI:NL:RBDHA:2021:1100, para. 3.2.

¹⁵³ *Ibid.*, para. 4.2.

¹⁵⁴ *Ibid.*, para. 4.3.

In so doing, the judge also indicated that, in times of a pandemic, the State has an obligation to safeguard the health of its citizens and accordingly has considerable leeway to adopt measures – in light of proportionality and subsidiarity.¹⁵⁵ The argument was also raised that the matter was not urgent enough to meet the *Wbbbg*-criteria, since the measure had been considered before and had been the subject of an emergency debate in parliament. The judge recalled that the *Wbbbg* was intended only for those cases where the situation was so pressing that there was no time for any of the aforementioned activities.¹⁵⁶ The argument that the curfew was intended to prevent the situation from escalating was not accepted, since the measure was deemed overly severe to justify its use and that the argument still did not attest to there being an emergency situation.¹⁵⁷

Concerning proportionality, the judge seriously questioned the reasoning behind the State's motivation for the emergency warranting the curfew. This was particularly the case since the pandemic had already lasted almost one year at that time, and the pressure on the national healthcare system was not as high as it had been before (when a curfew was not considered necessary).¹⁵⁸ *Viruswaarheid* had argued that a less restrictive measure, such as the urgent advice to citizens not to leave home after a certain time, would have been a more suitable alternative. The court added the argument that the Outbreak Management Team had not provided sufficient proof that the curfew was likely to combat the spread of COVID-19.¹⁵⁹ All these arguments led the judge to conclude that the *Wbbbg* was activated incorrectly, meaning that the curfew was to be abandoned immediately.

The judgment of the court was nevertheless not the conclusion of the case, since the State lodged an appeal against that judgment that was ultimately granted by a higher judge.¹⁶⁰ That judge considered that the decision on the proportionality and subsidiarity of the COVID-19 relief measures primarily relied on political considerations. Accordingly, it found that adequate political considerations had taken place when it came to introducing the curfew, as attested to by an explanatory memorandum as well as the decision to consult parliament before adopting the curfew.¹⁶¹ In addition, the judge found that the court that had previously assessed the case had to be reticent when judging matters that fall within the policy freedom of the State. Only if it was evident that the State had made incorrect choices, meaning the State could not reasonably have chosen the policy pursued – or if it was using its power without a legal basis – was there room for judicial intervention.¹⁶²

The court of appeal also found that the concept of exceptional circumstances required to enable the curfew were fulfilled, since the Netherlands had been dealing with the effects of the pandemic for more than a year.¹⁶³ Moreover, the pandemic had global reach with large numbers of victims, including in the Netherlands. The probability of more contagious variants was then held to create the need for additional measures to keep the number of infections as low as possible in order to prevent a third

¹⁵⁵ *Ibid.*, para. 4.5.

¹⁵⁶ *Ibid.*, para. 4.7.

¹⁵⁷ *Ibid.*, para. 4.9.

¹⁵⁸ *Ibid.*, para. 4.12.

¹⁵⁹ *Ibid.*, para. 4.13.

¹⁶⁰ Gh. Den Haag 26 februari 2021, ECLI:NL:GHDHA:2021:285.

¹⁶¹ *Ibid.*, para. 6.3.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, para. 6.7.



wave. The fact that the Government based itself on the advice of the Outbreak Management Team was held to be legitimate, as there was no alternative available.¹⁶⁴ This meant that the Government could rely on the advice issued by the Outbreak Management Team. Furthermore, the State was found to have sufficiently justified that it could reasonably assume the curfew to be effective. The argument brought forward by *Viruswaarheid* that the Wbbbg could only be triggered in the event of an imminent emergency was not followed by the court of appeal, which considered that too high a threshold. It would render the curfew ineffective as an instrument and also did not result from the history of the Wbbbg.¹⁶⁵

Concerning proportionality, the Court of Appeal considered that although the curfew was clearly limiting certain fundamental rights, the rights at stake (mentioned above) could be limited when necessary for the protection of public health (according to the judge, this was also a fundamental right on the basis of Article 22 of the Dutch constitution and Articles 2 and 8 ECHR).¹⁶⁶ Such a limitation could be permitted if: (1) it served a legitimate purpose; (2) was provided for in law; and (3) was necessary in a democratic society. The latter criterion particularly requires the limitation of fundamental rights to be proportionate, meaning there are no other less restrictive measures. The Court of Appeal considered that the State had a particularly wide margin of appreciation. Accordingly, the Court of Appeal considered the restriction to serve a legitimate objective and was provided for in law.¹⁶⁷ It proved to also be satisfied with the State's argumentation over proportionality. In particular, less restrictive measures were held not to exist and the curfew was held to only limit the exercise of fundamental rights later in the evening and at night when mobility was lower anyway. Indeed, a closer look at the advice of the RIVM (i.e. National Institute for Public Health and the Environment in the Netherlands) on the curfew on behalf of the Outbreak Management Team (OMT) shows that – at the request of the Ministry of Health, Welfare and Sport – alternative measures were considered, but were held not to have a similar impact.¹⁶⁸ Continuing with the theme of proportionality, the Court of Appeal also found that there were sufficient exceptions to the curfew enabling tailor-made solutions for those who needed to leave their homes during curfew hours. The alternative solution, of opting for an urgent advice to stay home, was considered to be too much of a risk and one the State could reasonably refuse to take.¹⁶⁹ The Court of Appeal even considered the curfew to be a lesser measure than the last resort, which was to declare a state of emergency (*noodtoestand*).¹⁷⁰

Belgium

In a similar case in Belgium, the Brussels court indicated that the Belgian State should provide a better legal basis for its COVID-19 related measures. The group *Liga voor Mensenrechten* (League for Human Rights) had initiated a procedure claiming that the coronavirus measures did not fully respect

¹⁶⁴ Ibid., para. 6.8 and 6.9.

¹⁶⁵ Ibid., para. 6.11.

¹⁶⁶ Ibid., para. 6.13.

¹⁶⁷ Ibid., para. 6.14.

¹⁶⁸ RIVM, Advies n.a.v. 96e OMT (0012/2021 LCI/JvD/at/sb), p. 3-5.

¹⁶⁹ Gh. Den Haag 26 februari 2021, ECLI:NL:GHDHA:2021:285, para. 6.15.

¹⁷⁰ Ibid., para. 6.18-6.6.19.



fundamental rights.¹⁷¹ Their claim was aimed in particular at the Ministerial decree of 28 October 2020 and its subsequent decrees.¹⁷² The applicants sought to have those decrees revoked until a specific law was adopted on which COVID-19 measures could be based, recognising how the rights and freedoms of citizens could be affected during a pandemic.¹⁷³ According to the Belgian Government, there was no urgency to treat the case, since a legislative proposal providing a legal basis was underway.¹⁷⁴ Similarly, the Belgian Government considered the legal basis for the decrees indisputable. The Court considered that the restrictions to public life were considerable and particularly grave given their extended duration.¹⁷⁵ The Court considered that the applicants had advanced sufficient concrete evidence to show that immediate action was necessary, by citing - among others - the psychological impact, the negative effects on education and the social exclusion of elderly people as results of the measures.¹⁷⁶

The Ministerial decrees had been based on three different laws, namely on civil protection, on police functioning and on civil security.¹⁷⁷ The court closely examined the provisions of these laws to determine whether they provided a suitable legal basis for the Ministerial Decrees. On the basis of its analysis, the court concluded that the emergency provisions taken up in those laws were to be interpreted restrictively and in a predictable manner, which did not appear to cover the COVID-19 pandemic – or indeed any pandemic, for that manner.¹⁷⁸ The court indicated that arguing that the emergency legislation was suitable as a legal basis would be the same as conferring a general scope on an ordinary law equal to removing safeguards from a law of special powers.¹⁷⁹ Furthermore, the court considered - although legislation on which the decrees were based was a suitable legal base early in the pandemic due to the urgency of the situation - that this that argument could not hold one year into the pandemic.¹⁸⁰ While the court first considered these arguments to apply to one of the laws on which the decrees were based, it ultimately considered the same reasoning to also apply to the other laws serving as legal basis.¹⁸¹

The Belgian Government ended up appealing to the decision of the Court of First Instance. As was the case in the Netherlands, the Court of Appeal did not end up following the Court of First Instance in finding the COVID-19 legislation lacked a suitable legal basis.¹⁸² In particular, the Court of Appeal considered that the federal government in Belgium had a particular residual competence regarding

¹⁷¹ See Windey, F., 'Belgische staat moet van rechter binnen 30 dagen wettelijke basis voorzien voor coronamaatregelen', <https://www.vrt.be/vrtnws/nl/2021/03/31/belgische-staat-veroordeeld-tot-opheffen-van-de-coronamaatregele/>.

¹⁷² The decrees particularly covered working remotely, a curfew, the prohibition to convene in public and private spaces, closure of schools, closure of cultural spaces and non-essential professional activities. For violations on many of the restrictions criminal sanctions were imposed.

¹⁷³ Tribunal de première instance francophone de Bruxelles, 2021/14/C, 31 mars 2021, para. 1. Particular rights touched upon were inter alia Articles 12, 15, 19, 22, 23, 24 and 26 of the Belgian Constitution ranging from right to individual freedom to right for respect for private and family life.

¹⁷⁴ *Ibid.*, para. 53.

¹⁷⁵ *Ibid.*, para. 56.

¹⁷⁶ *Ibid.*, para. 57.

¹⁷⁷ *Ibid.*, para. 62.

¹⁷⁸ *Ibid.*, para. 66.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, para. 67.

¹⁸¹ *Ibid.*, para. 73 and 74.

¹⁸² Cour d'appel de Bruxelles, 2021/KR/17, 7 juin 2021.



health policy, civil protection and civil security.¹⁸³ Nevertheless, the Court of Appeal did find that a number of the Ministerial Decrees had to be submitted to the legislative section of the Council of State for its opinion.¹⁸⁴ However, the violation of the obligation to consult the Council of State could not justify the Court discarding the general application of the Ministerial Decrees. The Court of Appeal pointed to the separation of powers as a fundamental principle of Belgian constitutional law. This prevented judges from making rules that would have a general application or from issuing decisions that would have binding effects on persons other than the parties to the dispute.¹⁸⁵

Apart from the matter regarding the legal basis, the League for Human Rights had also argued that the Minister for Internal Affairs was only awarded a coordinating role, not a regulatory one.¹⁸⁶ However, since a similar question had been raised in a case before the Belgian Constitutional Court, the Court of Appeal did not consider that it could declare the matter of a possible delegation of tasks to the Minister for Internal Affairs unconstitutional and that therefore a decision by the Constitutional Court was to be awaited.¹⁸⁷ The Court of Appeal reached a similar conclusion relating to fines that could be imposed in relation to violation of COVID-19 measures. This indicated that - since such questions were also taken up in the same case before the Constitutional Court - the result of that case was to be awaited.¹⁸⁸

France

In a similar case in France, the Conseil d'État (Council of State) was confronted with a call to annul legislation containing various COVID-19 measures, including a curfew.¹⁸⁹ The relevant legislative framework enabling the adoption of such COVID-19 measures indicated that the Prime Minister could authorise measures such as home confinement as long as they were strictly proportionate to the health risks incurred and appropriate to the circumstances.¹⁹⁰ The applicants in the case aimed their action in particular at the Article in Decree No. 2020-1262, which prescribes the general measures necessary to deal with the COVID-19 pandemic. The applicants alleged that the measure manifestly infringed personal freedom as well as the freedoms of movement, enterprise, assembly, association and the right to lead a normal family life.¹⁹¹ Article 51 of the aforementioned Decree established that the prefects (*préfets*) of the departments most affected by the COVID-19 pandemic had to maintain a curfew between 9 PM and 6 AM in the areas they defined.¹⁹² The Council of State in this context argued that competent authorities had the responsibility to take all measures likely to prevent or limit the effects of the COVID-19 pandemic, including measures that could restrict fundamental rights and

¹⁸³ *Ibid.*, para. 15.

¹⁸⁴ *Ibid.*, para. 34. Interestingly, the Council of State was consulted in relation to the last amendment made to the Ministerial Decrees containing the COVID-19 measures. See Arrêté ministériel modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, *MB* 4 juin 2021 (ed. 2).

¹⁸⁵ *Ibid.*, para. 36.

¹⁸⁶ *Ibid.*, para. 18.

¹⁸⁷ *Ibid.*, para. 22. Questions were raised in a case brought on 18 March 2021 by the Tribunal de police du Hainaut (division Charleroi) to the Constitutional Court.

¹⁸⁸ *Ibid.*, para. 25-26.

¹⁸⁹ Conseil d'État, 23 octobre 2020, N° 445430, ECLI:FR:CEORD:2020:445430:20201023.

¹⁹⁰ *Ibid.*, para. 6.

¹⁹¹ *Ibid.*, para. 8.

¹⁹² *Ibid.*, para. 9.



freedoms where necessary, appropriate and proportionate.¹⁹³ The Council thus considered the latter aspects of particular importance in the case of measures prohibiting persons from leaving their homes. Nevertheless, given the worsening situation relating to COVID-19 at the time and the fact that most infections occurred in private places, the Council did not consider the curfew to be manifestly unjustified.¹⁹⁴ Furthermore, the fact that Article 51 provided for various derogations and was less restrictive than a total confinement meant that the measure was not manifestly unnecessary. On proportionality, the Council questioned the efficacy of less restrictive measures. It indicated that it was not clear whether less restrictive measures could be implemented effectively, thus indicating that it was up to the Prime Minister and prefectural authorities to end measures without delay in the event that they were no longer necessary.¹⁹⁵ The Council of State therefore ultimately concluded that the measure was permitted.

Norway

The legality of COVID-19 legislation in Norway has also been the subject of evaluation. On 27 May 2021, the European Free Trade Agreement (EFTA) Surveillance Authority (ESA) sent a letter of formal notice to the Norwegian government, finding that the Norwegian travel restrictions violated the EEA agreement.¹⁹⁶ Although the case does not strictly consider national legislation alone, it is interesting to examine how the Authority assessed the proportionality of COVID-19 legislation of an EEA country.

The EEA agreement prohibits discrimination against citizens of EEA Member States. Similar to EU Member States, EEA countries are bound by EU law with respect to freedom of movement, as laid down in Directives 2004/38/EC and 2006/123/EC. Restrictions on free movement are only permitted when they are based on public policy, public security or public health and only where such measures are necessary, proportionate and non-discriminatory.¹⁹⁷ In its notice, the Authority expressed concerns over the conditions for entry and quarantine. On 1 February 2021, Norway prohibited entry from all foreigners (including EEA nationals and their family members) on the grounds of public health. The Temporary Law on entry restrictions for foreigners for reasons of public health ('Temporary Law')¹⁹⁸ provides exceptions for entry to those who are resident in Norway. Following entry, there is an obligation to quarantine either at home, another suitable residence or at a quarantine hotel. As of 17 March 2021, those on 'unnecessary' travel were required to stay in quarantine hotels, whereas those travelling with a necessary reason could quarantine at their own home.

The Authority recalled that any derogations to the free movement of persons must be interpreted restrictively. Here, the Authority elaborated that while States may adopt measures to ensure the protection of public health, they must be consistent and their suitability to achieve the legitimate objective must be demonstrated *"along with genuinely reflecting a concern to attain that aim in a*

¹⁹³ Ibid., para. 10.

¹⁹⁴ Ibid., para. 11-14.

¹⁹⁵ Ibid., para. 15.

¹⁹⁶ EFTA Surveillance Authority, 'COVID-19 pandemic: ESA asks Norway to align entry restrictions with EEA rules' <https://www.eftasurv.int/newsroom/updates/covid-19-pandemic-esa-asks-norway-align-entry-restrictions-eea-rules>.

¹⁹⁷ Article 28(3) Agreement on the European Economic Area.

¹⁹⁸ *Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*.



consistent and systematic manner.” Furthermore, if the measure is suitable for achieving the aim (the protection of public health), it must be assessed whether the measure goes beyond what is necessary in order to attain that objective. This proportionality test implies that *“the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.”*

By concluding this assessment, the Authority found that the current rules violate the EEA agreements the above-mentioned Directives on free movement.¹⁹⁹ The current restrictions in place prevent EEA nationals from entering Norway for the first time before registering as residents. Furthermore, persons travelling from the same country of origin are subject to different obligations to quarantine, depending on whether their travel is considered necessary or not. While these restrictions may be justified on grounds of public health, in the view of the Authority, there was no clear logic as to why the ‘unnecessary travellers’ would pose a greater risk to public health. Furthermore, Norway has not demonstrated that EEA nationals arriving in Norway from the same country of origin, but who are not registered as resident in Norway, pose a greater degree of risk.

The prohibition on entry for this group was therefore deemed not to comply with the principle of proportionality. The Authority considered that less-restrictive measures, such as quarantine obligations, were available. Furthermore, requiring one group of travellers from the same country of origin (those travelling for unnecessary reasons) to quarantine in quarantine hotels for the reasons of public health does not satisfy the principle of consistency. Allowing these travellers to quarantine at home would be a less restrictive solution and result in achieving the same outcome; the protection of public health. Thus, the approach of the Authority in assessing proportionality revolves around similar evaluation as examined in this report. Next to the assessing the suitability and necessary nature of the measure for achieving the legitimate aim, the measures must also be applied consistently and systematically, meaning that groups with the same risk profile should be subject to similar measures (i.e. non-discriminatory).

3.4.2 Quarantine Rules and Confinement considered from a National Law Perspective

Quarantine periods have provided the basis for various cases before national courts. One early example of such cases occurred before the French Council of State. It was brought before the Council of State by the Young Doctors Union (*syndicat Jeunes Médecins*) with the objective of establishing an obligation for the French Prime Minister and Health Minister to declare a total confinement. This would mean it would be prohibited to leave the house except with authorisation obtained on medical grounds, the cessation of public transport and of non-essential professional activities.²⁰⁰ The union furthermore sought confirmation of an obligation on the Prime Minister and Health Minister to take sufficient measures to ensure sufficient screening tests. The Council of State commenced its reasoning by indicating that various authorities, including the Health Minister, had opportunities to take preventive measures potentially restricting certain fundamental freedoms, such as the right to

¹⁹⁹ More specifically Articles 4, 28 and 36 of the EEA Agreement, Articles 5, 6, 7, 8, 27, 28, 29, 30 and 31 of Directive 2004/38/EC, 7 and Articles 9 and 16 of Directive 2006/123/EC.

²⁰⁰ Conseil d’État, 22 mars 2020, n°439674, ECLI:FR:CEORD:2020:439674.20200322.



assembly or right to exercise a profession in order to protect public health.²⁰¹ An important precondition here concerns the necessity of the measures and their proportionality in relation to the objective the measures are pursuing.

The claim by the union was primarily aimed at the finding that the COVID-19 measures taken were insufficient, as there were too many exceptions, they gave rise to different interpretations and were being applied in an unequal manner. This constituted a failure of the authorities to protect the right to life and health – and particularly that of medical personnel subject to the risk of contamination.²⁰² The Council of State considered that extensive measures had already been taken (e.g. closure of public spaces, limitation of movement, limits to the size of events). A total confinement would not be feasible and furthermore could harm the protection of life, since confinement in one sector (e.g. food) was likely to be connected to other sectors.²⁰³ Disruption of activities in one sector was therefore held to have negative effects that reaching beyond a single sector. Although the Council of State therefore did not follow the union's demand for a full confinement, it did find that there were inconsistencies in the applicable legislation containing the COVID-19 measures. It therefore ordered the Prime Minister and Health Minister to take action to, among others, clarify the scope of the exemption from confinement.²⁰⁴

Germany – North Rhine-Westphalia

A similar case concerning quarantine rules took place in July 2020 before the *Oberverwaltungsgericht Nordrhein-Westfalen*.²⁰⁵ The case concerned an individual on holiday with his family in the south of Sweden (at a point when that country was considered a risk area by German authorities) who had to undergo a mandatory 14-day quarantine upon his return to North Rhine-Westphalia. Although quarantine could be avoided by providing a negative test, it was impossible for the individual concerned to undergo such a test. The argument against the mandatory quarantine put forward by the applicant mainly concerned the fact that not all those travelling into North Rhine-Westphalia could be considered as potentially being infected (*ansteckungsverdächtig*).²⁰⁶ According to him, the current legislation was unlawful since it did not differentiate between Swedish regions.²⁰⁷

In its ruling, the *Oberverwaltungsgericht* (OVG) mainly focused on the probability of infection and possible measures that may be taken to counter a potential infection. Whereas normally the particular situation of the individual concerned would have to be taken into account, the relevant legislation at stake also allowed for rules of a general nature. These had to be based on a concrete, comprehensible and reliable factual basis.²⁰⁸ The OVG consequently evaluated the infectious nature of the coronavirus based on data from the Robert Koch Institute.²⁰⁹ According to the OVG, the highly infectious nature of

²⁰¹ *Ibid.*, para. 3.

²⁰² *Ibid.*, para. 6.

²⁰³ *Ibid.*, para. 7 and 8.

²⁰⁴ *Ibid.*, para. 9-17.

²⁰⁵ OVG NRW, Beschluss vom 13.07.2020 – 13 B 968/20.NE.

²⁰⁶ *Ibid.*, para. 3.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, para. 17-19.

²⁰⁹ *Ibid.*, para. 20-27.



the virus would lead to a rapid and exponential spread in the event that no countermeasures were enacted.²¹⁰ The OVG also recognised a lack of precedent in case law regarding the present situation, and subsequently examined the conditions under which regions could be considered risk areas.²¹¹ In particular, it considered the reference value of 50 new infections per 100 000 inhabitants appropriate, as this value describes the upper limits for which the German public health authorities may trace infection chains and detain further spread of the virus.²¹² Exceeding that value could lead to the spread of the virus becoming uncontrollable.²¹³ Moreover, because the definition of a risk area was also based on data from the ECDC, the classification was considered to be based on a sufficiently concrete, comprehensible and reliable factual basis, thus providing no possible objections to requiring quarantine for the whole of Sweden.²¹⁴ Furthermore, a change in the data monitored by the Robert Koch Institute was not considered to directly lead to a change in the designation of a risk area. According to the OVG, a transitional period should be maintained to reassess the risk situation and clarify the stability of the situation as expressed in the data.²¹⁵ The OVG considered that whole countries may be designated as risk areas, due to persons being able to travel through those countries thus not leading to any legal obligation to designate risk areas on a regional basis.²¹⁶ The OVG also found risk areas to be evaluated regularly and according to clear and transparent conditions.²¹⁷

The OVG therefore concluded that the quarantine imposed upon return from a risk area was to be considered proportionate, since it was necessary, suitable and appropriate to counter the increased risk of infection paired with the return from a risk area.²¹⁸ The proportionality of the arrangement was furthermore held to come from the fact that protective measures are viewed in light of scientific advances and paired with assessments of the level of infection risk and concerns of a medical, psychological, social and economic nature. Therefore, even if the quarantine impacts the fundamental rights of individuals, these rights were held not to be unrestricted but rather subject to certain reservations necessary to safeguard the protection of life and health.²¹⁹ The OVG ultimately held that even if the quarantine had consequences for the social and professional life of the individual concerned, these did not outweigh the reasons for maintaining the quarantine.²²⁰

Therefore, we may conclude on the basis of the above case that the severity of COVID-19, and the potential spread thereof, ensures that the protection of public health through quarantine or isolation outweighs the interests of individuals. This leads to a conclusion that quarantine measures may be considered proportionate when travelling from a country considered a risk area, as was the case for Sweden in the aforementioned case. A different question arises in relation to quarantine periods when a person is travelling from a region with a lower incidence rate than the country to which they are

²¹⁰ Ibid., para. 28.

²¹¹ Indeed, evaluations regarding the spread of infectious diseases in case law had thus far only occurred in relation to individual cases; see para. 30 of the aforementioned case.

²¹² Ibid., para. 31.

²¹³ Ibid., para. 32.

²¹⁴ Ibid., para. 34.

²¹⁵ Ibid., para. 39.

²¹⁶ Ibid., para. 40.

²¹⁷ Ibid., para. 43-44.

²¹⁸ Ibid., para. 45.

²¹⁹ Ibid., para. 46.

²²⁰ Ibid., para. 48.



travelling. In that case, questions may be raised regarding the proportionality of blanket quarantine measures.

In a subsequent case from November 2020, the OVG was again confronted with a citizen objecting to the quarantine period, this time from a citizen who returned from Ibiza.²²¹ After having visited his property in Ibiza, the individual concerned then travelled to Tenerife, after which he wanted to return to Germany. His complaint was particularly directed at the relevant legislation laying down conditions for travel (i.e. the *Coronaeinreiseverordnung – CoronaEinrVO* of 6 November 2020). In particular, his complaint was directed at the provision requiring all persons travelling over land, sea or air to North Rhine-Westphalia, having previously stayed in a risk area, to undergo a 10-day quarantine.²²² In particular, these persons have to notify the relevant health authority of their travel into the country. The quarantine could nevertheless end after five days if the person could provide the health authority with a negative test result (taken in Germany) after travel into the country.

The individual concerned argued that there was insufficient basis for authorisation of the regulation concerning the rule on the quarantine period. In particular, he argued that one could not be suspected of being infected on the Balearic Islands where the incidence rate was much lower than in his home place of residence in Germany. More specifically, he argued the quarantine period imposed amounted to a violation of Article 3(1) of the Basic Law, since the quarantine applied across the board.²²³ In addition, he considered the quarantine to result in discrimination compared to persons who were owners of a second home in Germany.

The OVG then considered that the relevant provisions of the *Coronaeinreiseverordnung* could be in violation of the principle of equal treatment and could not be viewed as proportionate as formulated. They did not distinguish between different categories of travellers, nor did they take into account whether there were additional infection risks upon entry.²²⁴ In particular, the OVG considered there to be an equally high or even higher risk for persons within Germany to become infected with the coronavirus who, unlike those travelling abroad, did not have to quarantine.²²⁵ Accordingly, the infection risk of returnees was not to be considered different – in the event of comparable incidence rates – than if they had stayed at home. This situation therefore resulted in unjustified unequal treatment of comparable situations, ultimately violating the principle of equal treatment enshrined in Basic Law. The OVG did recognise that differential treatment of persons returning from abroad could be justified in principle if there was an objective reason for the differentiation. However, an objective reason could not be assumed for all travellers.

The OVG therefore also found the regulations to be disproportionate as far as the quarantine was concerned. The judge reasoned that such quarantine only appeared suitable to make a significant contribution to combatting the spread of COVID-19 if there was a higher risk of infection in the

²²¹ OVG NRW, Beschluss vom 20.11.2020 – 13 B 1770/20.NE.

²²² A risk area was defined as a country outside Germany that – at the time of travel – had a higher incidence rate for corona infection. The determination of a risk area was done by the Robert Koch Institute; *Ibid.*, para. 10.

²²³ *Ibid.*, para. 18.

²²⁴ *Ibid.*, para 39-40.

²²⁵ *Ibid.*, para. 43.



destination country as opposed to Germany.²²⁶ The relevant legislation nevertheless made no distinction and provided for blanket quarantine. The OVG therefore considered the quarantine generally had to be abandoned.²²⁷ Considering that the case took place in November 2020, the OVG also considered the case not to have had severe effects on the spread of coronavirus, since travel in those months was lower than at other times during the year.

Based on the cases described above in this section, we may conclude that quarantine requirements may generally be considered as proportionate as long as they genuinely serve the purpose of combatting the spread of COVID-19. As the two cases above from the OVG in North Rhine-Westphalia show, this is particularly the case when persons are returning from travel in areas where the incidence rate is high, meaning the chance of a COVID-19 infection is higher than in the home Member State.

Germany – Bavaria

Keeping with the topic of the proportionality of quarantine measures, a different question nevertheless arises when looking at preventive quarantines. In Section 3.1.2, the interactions between the precautionary and proportionality principles were already examined. In particular, it became clear that Member States may take precautionary measures to ensure the safety of their citizens in relation to public health, but must in any case ensure that the precautionary measures they adopt are proportionate and non-discriminatory. While this distinction may be clear in theory, the question becomes how to evaluate the proportionality of precautionary measures in practice. Again, national legislation on this matter may be of relevance, since it can provide insight as to how national courts balance different interests in relation to precautionary measures.

Here, reference may be made to a German case that concerned an assessment of the proportionality of a precautionary quarantine measure.²²⁸ In the case in question, a company cultivating cucumbers had employed harvesters (*Erntehelfer*) originating mostly from Romania, Hungary and Bulgaria. These workers temporarily resided in accommodation with 2-5 persons. In July 2020, 174 workers had tested positive for COVID-19. At the same time, 294 workers tested negative. The case centred on the question of whether maintaining a 14-day quarantine period as a preventive measure applying to all workers – meaning those tested positive as well as negative – was to be considered proportionate. According to the *Verwaltungsgericht Regensburg* (VG), this was indeed the case. In particular, the VG argued that the advantages of the quarantine outweighed the disadvantages, particularly considering the danger of COVID-19.²²⁹ Moreover, the VG considered quarantine a suitable measure to contain the spread of the virus and saw no other, less-intrusive, means of achieving the same objective.²³⁰ The VG considered this to be the case because of the uncertainty over the potential spread of the virus to those who had so far tested negative.²³¹ This case therefore presents a situation where a precautionary measure (i.e. quarantine to contain a further spread of COVID-19 imposed on persons of whom there is a real suspicion of infection) is deemed proportionate, appropriate and necessary.

²²⁶ *Ibid.*, para. 44.

²²⁷ *Ibid.*, para. 51-52.

²²⁸ VG Regensburg, Beschluss vom 04.08.2020 – RN 14 E 20.1311.

²²⁹ *Ibid.*, para. 61.

²³⁰ *Ibid.*, para. 59-60.

²³¹ *Ibid.*, para. 60.



In a similar vein, a balancing act regarding the precautionary nature of a measure against the limitations it imposed can also be seen in the Dutch case of the curfew.²³² It may be recalled that in that case, the Court of Appeal considered that the State had an obligation to protect public health and that is it had a wide margin of appreciation when deciding how to safeguard this.²³³ Although the State still had to take into account whether certain measures were proportionate (i.e. serving a legitimate purpose, laid down in legislation and necessary in a democratic society), it did argue that such considerations were primarily political in nature. Considering this wide margin of appreciation and political nature of considerations related to proportionality, the Court of Appeal argued that the judiciary should be reticent in judging matters that fell within the margin of appreciation of the State. More specifically, the judiciary should only intervene if it was evident that the State had either made incorrect choices or used its power to act without a suitable legal basis.

Cases such as the above show that the interpretation of some national courts at least align with those of the CJEU. Indeed, it may be recalled from Section 3.1 that the precautionary principle requires Member States to take measures appropriate for preventing risks to public health from materialising.²³⁴ Member States were thus even to give precedence to the protection of public health over economic interests. The principle was then held to be particularly relevant where scientific evidence was inconclusive, which meant that Member States have a wider margin of appreciation for determining the appropriate level of protection. While the CJEU is therefore mindful not to interfere in the event of precautionary measures taken to safeguard public health in the policy freedom of the Member States, the examples above show how such a trend may also be followed at the national level.

3.4.3 Measures Concerning Testing: National Courts' Rulings

As the table in Section 2 shows, testing measures are some of the most common ways of containing the spread of COVID-19 maintained by the Member States for travelling individuals. Considering the now common nature of the tests, it is interesting to look into case law from national courts on this topic. Several examples of PCR test-related cases took place in **the Netherlands**. One case was again submitted by the action group *Viruswaarheid*, joined by 29 other individuals staying abroad and looking to return to the Netherlands. In particular, the applicants argued that the ministerial regulations laying down the testing requirement should be abandoned in full or at least adapted so that they would not apply for persons resident in the Netherlands.²³⁵ They argued that there was no legal basis for the adoption of the testing requirement, that the requirement violated fundamental rights, was disproportionate and that decision-making surrounding the rule was unpredictable (the rule had been adopted over the Christmas holidays).

In its reasoning, the court first confirmed the existence of a suitable legal basis in the *Wet publieke gezondheid – Wpg* (Law on Public Health), which enabled the adoption of rules via ministerial

²³² Gh. Den Haag 26 February 2021, ECLI:NL:GHDHA:2021:285.

²³³ *Ibid.*, para. 6.13.

²³⁴ Case T-257/07 *France v. Commission*, EU:T:2011:444, para. 66.

²³⁵ Rb. Den Haag 8 January 2021, ECLI:NL:RBDHA:2021:63, para. 3.1.



regulation on access and use of facilities for transport of persons.²³⁶ That law, in combination with other specific legislation adopted to combat the COVID-19 pandemic, laid down broadly formulated provisions to permit far-reaching measures. More specifically, those provisions taken together constituted a safety net allowing considerable restrictions and enabling tailor-made solutions.²³⁷ The court furthermore accepted the reasoning of the State regarding the sudden adoption of the testing requirement, namely the health threat coming from the existence of new variants the further spread of which had to be halted as much as possible and as soon as possible.²³⁸ As far as the violation of fundamental rights was concerned, the court considered that the testing requirement fell within the limits of the possible restrictions that could be made to those rights (inter alia the right to inviolability of the body).²³⁹ Again, the court referred to the active duty of the State to advance public health, according to Article 22 of the Dutch Constitution and Article 2 ECHR. Thus the testing requirement could be considered as serving the objective of public health.

In terms of proportionality, the applicants had argued that PCR tests are not suitable for achieving the objective for which they are used, since they are unable to provide a diagnosis.²⁴⁰ The court here considered that the test is not used to make a diagnosis, but rather that its purpose is instead to minimise the risk of bringing the virus into the Netherlands by persons traveling from higher risk areas. Since the PCR test was sufficiently reliable at providing a positive test result when a person carries coronavirus, it was considered suitable for attaining the objective of minimising the spread of COVID-19.

In a different set of cases, the possibility of maintaining PCR tests as a requirement for travel to the Netherlands was confirmed by the Court of Appeal.²⁴¹ In this set of cases, the argument was raised that the testing requirement posed as an obstacle to Article 3(2) of the Protocol No. 4 to the ECHR (right to enter the country of nationality).²⁴² In the case preceding the appeal, the court had found that Article 3(2) concerned a refusal to be admitted to the country of nationality, as temporary measures did not constitute a refusal to access that country.²⁴³ Furthermore, if a Dutch citizen was unable to provide a negative test result, the testing requirement was held not to apply, meaning that there was also no barrier for Dutch citizens to return to the Netherlands.²⁴⁴

²³⁶ Ibid., para. 4.2.

²³⁷ Ibid., para. 4.4.

²³⁸ Ibid., para. 4.6.

²³⁹ Ibid., para 4.8.

²⁴⁰ Ibid., para. 4.13.

²⁴¹ See Rb. Den Haag 28 January 2021, ECLI:NL:RBDHA:2021:600 and De Rechtspraak, 'Nederlandse staat in gelijk gesteld in zaken over PCR-testen', <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Nederlandse-staat-in-gelijk-gesteld-in-zaken-over-PCR-testen.aspx>. The appeal to the aforementioned case concerned two separate cases. Of these, only the first is elaborated above since it touches upon free movement. Indeed, the first of which is elaborated above and concerned the question whether the testing requirement needed to access the Netherlands was in line with fundamental rights. The second of the cases (Gh. Den Haag 18 May 2021, ECLI:NL:GHDHA:2021:869), by contrast, concerned the objective of the test and the communication surrounding the COVID-19 pandemic.

²⁴² Gh. Den Haag 18 May 2021, ECLI:NL:GHDHA:2021:868, para. 5.4.

²⁴³ Ibid., para. 5.5.

²⁴⁴ Ibid., para. 5.7.



The Court of Appeal thus considered that the testing requirement did touch on other fundamental rights (right to free movement, physical integrity and family life). Nevertheless, it noted that these rights could be limited if the objective therefore was legitimate, was provided for by law and was necessary in a democratic society (including proportionality).²⁴⁵ The court considered those conditions had been fulfilled, since the objective was to protect public health by combatting the spread of COVID-19, the testing requirement was provided by law, and the temporary requirement of the test was reasonable and proportionate to protect public health. Although the applicants in the appeal considered the testing requirement to be disproportionate, the Court of Appeal considered that, given the severity of the COVID-19 pandemic, the State had a wide margin of appreciation over the taking of measures to combat it.²⁴⁶ Furthermore, it was not clear that there were potentially less-restrictive means for travellers from high-risk areas.

Interestingly, the applicants had also argued that the testing requirement was in violation of Article 23 of the WHO's International Health Regulation (IHR). Nevertheless, the Court of Appeal considered that national law provided for the possibility of retaining the testing requirement and that the IHR only concerned cooperation between States. This meant it lacked direct effect and could not be used by the applicants to enforce anything in court.²⁴⁷

3.4.4 Beyond Legality and Entry Restrictions: Looking into the Proportionality of other COVID-19 Measures

While previous sections focused on either the legality of COVID-19 legislation or on entry restrictions and their proportionality, this principle has also often been assessed in national case law that does not directly concern other type of COVID-19 measures. These include the opening of gyms, restaurant facilities and reunification of families in times of COVID-19.

The Netherlands – Closure of Gyms

An example of a case concerning the closure of gyms and other sporting facilities again took place in the Netherlands. In particular, a case was initiated where the main argument centred on the Government having acted disproportionately by not considering the important economic interests of gyms and the importance of exercise for public health.²⁴⁸ The court, in its ruling, considered that the legislator had a broad margin of appreciation when it came to the opening of gyms in relation to combatting COVID-19.²⁴⁹ The court repeated the formulation of an earlier case concerning the curfew, in which it was argued that the proportionality and subsidiarity of COVID-19 measures required political considerations that belong in the political domain. Thus the Government could base its policies on the advice of the Outbreak Management Team. This also meant that the judge should be reticent in judging the legitimacy of the acts of the State in its capacity as legislator. Only in case of legal errors was the judiciary held to be able to act (whereby the judiciary could nevertheless not oblige the

²⁴⁵ Ibid., para. 5.9.

²⁴⁶ Ibid., para. 5.10.

²⁴⁷ Ibid., para. 5.13.

²⁴⁸ Rb. Den Haag 4 June 2021, ECLI:NL:RBDHA:2021:5666, para. 3.3.

²⁴⁹ Ibid., para. 4.3.



legislator to adopt laws with a particular content).²⁵⁰ In evaluating the new rules concerning the opening of gyms, the court considered that – contrary to what the applicants claimed – there was a broad societal evaluation of interests in deciding on the opening of gyms.²⁵¹ The court therefore ultimately concluded that the limited reopening of gyms had a legitimate purpose in light of the epidemiological situation at that time and that any limitations to fundamental rights were necessary and proportionate, meaning that the State was able to reasonably opt for the policy chosen.²⁵²

France – Closure of Gyms

A similar case took place before the French Council of State. In that case, the Council of State was asked to rule on the closure of gyms and other sports facilities. The competence to take measures regulating the opening of certain types of establishments was to be delegated to a representative of the State by the Prime Minister, and the measures ultimately taken had to be proportionate to the health risks incurred and appropriate to the circumstances.²⁵³ In its reasoning, the Council of State indicated that infections, as well as hospital occupation rates, were relatively high, thus requiring appropriate measures to be taken by public authorities.²⁵⁴ The High Council for Public Health (*Haut Conseil de la santé publique*) had, on several occasions, indicated that there was a particular risk of infection linked with indoor sports activities due to, among others, direct contact between people and sharing of objects.²⁵⁵ The Council of State therefore argued that - in light of the current state of scientific knowledge - sports halls were places where coronavirus could be actively propagated.²⁵⁶ In terms to proportionality, the Council of State reasoned that a measure lighter than a temporary closure of gyms, for example, by seeking to select sports where the potential infection rate could be lower than others, did not appear feasible.²⁵⁷ The Council further considered that, despite the significant economic consequences, the applicants were not entitled to maintain that the closure of gyms constituted a violation to the right to respect for life. The infringement to other fundamental freedoms, such as the freedom of enterprise and freedom of trade and industry, was not manifestly illegal.²⁵⁸

France – Closure of Restaurants & Bars

In a similar vein to the abovementioned cases on the closure of gyms and sport facilities, cases have also been instituted against COVID-19 measures that required a closure of restaurants, hotels and cafés. One such example may be seen in France, where the Council of State was asked to adjudicate on a measure prohibiting all activity in traditional restaurants and drinking establishments.²⁵⁹ Much of the reasoning in the present case is analogous to that in the earlier case before the Council of State, on the general COVID-19 measures and maintained curfew. Indeed, the Council indicated that the

²⁵⁰ Ibid.

²⁵¹ Ibid., para. 4.4.1.

²⁵² Ibid., para. 4.5.

²⁵³ Conseil d'État, 16 October 2020, N° 445102, ECLI:FR:CEORD:2020:445102:20201016, para. 7.

²⁵⁴ Ibid., para. 9.

²⁵⁵ Ibid., para. 11-13.

²⁵⁶ Ibid., para. 14.

²⁵⁷ Ibid., para. 15.

²⁵⁸ Ibid., para. 17.

²⁵⁹ Conseil d'État, 8 December 2020, N° 446715, ECLI:FR:CEORD:2020:446715:20201208.

temporary closure and imposition of conditions of access on various establishments was a potential measure for protecting public health, as long as the measures are strictly proportionate to the health risks incurred and appropriate to the circumstances.²⁶⁰ The closure of restaurants and cafés was taken simultaneously with measures restricting mobility, such as home confinement.²⁶¹ In order to assess the proportionality of the closure of bars and restaurants, the Council examined the number of infections and hospitalisations and concluded that infection with COVID-19 mostly occurs in enclosed spaces.²⁶² Moreover, when examining possible less-restrictive measures, the Council found that alternatives such as a curfew or a reduction in the size of restaurant was unlikely to have a health effect comparable to that of a total closure.²⁶³ The infringement of the freedom of trade and industry occurring with the closure was – despite its significance – held to not be excessive in view of the health risks coming from restaurant attendance.

In that same case, the applicants also argued that the differences in health situation between French regions and cities required a geographically differentiated assessment of the COVID-19 measures taken. The Council of State nevertheless indicated that the health situation had put the entire national health system under pressure, meaning that patients had to be transferred between regions and neighbouring countries.²⁶⁴ According to the Council, there was no evidence from its investigations that a differentiated approach per region would have an effect in breaking the progressive dynamic of coronavirus related to the risk of visiting restaurants.

France – Family Reunification

A different set of cases concerns family reunification during times of COVID-19. Again, the French Council of State was confronted with a request to annul a decision ordering the suspension of the decision not to register or process applications for long-stay visas for family reunification.²⁶⁵ The Council of State commenced its reasoning by indicating that particular legislation taken to prevent the spread of COVID-19 in relation to travel predominantly concerned placing individuals in quarantine, which should be taken with regard to proportionality.²⁶⁶ Considering the worsening COVID-19 situation, the Prime Minister had decided to restrict movement on national territory from persons wishing to enter from abroad by refusing entry to all foreign nationals (except for designated exceptions).²⁶⁷ While spouses and children of French or EU citizens could ultimately enter national

²⁶⁰ *Ibid.*, para. 2.

²⁶¹ *Ibid.*, para. 5.

²⁶² *Ibid.*, para. 6-7. The Council referred to advice from the High Council for Public Health and a study on mobility network models of COVID-19 published in the journal *Nature*. In relation to the latter, the applicants had criticized the use of that study as a basis for policy indicating that it was primarily based on a study conducted in the US *Nature*, where, according to the applicants, a very different situation existed in relation to health protocols and consumption and travel habits as opposed to France. The Council of State nevertheless indicated that there was no evidence to indicate that conclusions of the US study could not be used by the French authorities in assessing risk.

²⁶³ *Ibid.*, para. 9.

²⁶⁴ *Ibid.*, para. 8.

²⁶⁵ Conseil d'État, 21 January 2021, N° 447878, ECLI:FR:CEORD:2021:447878.20210121.

²⁶⁶ *Ibid.*, para. 3.

²⁶⁷ *Ibid.*, para. 6.



territory, the same did not apply to the children and spouses of nationals of other nationalities unless they came from those rare countries exempt from restrictions.²⁶⁸

The Council showed particular urgency in this matter, since the number of persons who had benefitting from family reunification in 2020 had decreased considerably in compared to 2019.²⁶⁹ The Council of State subsequently set out the EU legislative framework applicable (based on the Schengen Borders Code, Directive 2011/95/EU, Directive 2003/86/EU and Council Recommendation (EU) 2020/912). In relation to the latter, the Council of State particularly noted that third country nationals and their family members who fulfil the admission conditions set out in - among others - the Long-Term Residents Directive, the Blue Card Directive, the Researcher and Student Directive, the Family Reunification Directive and the Intra-Corporate Transferee Directive had to be able to apply for a visa or residence permit, thus exempting them from the travel restriction.²⁷⁰ Under domestic law, the Council highlighted that grounds for refusal of access were primarily based on a failure to fulfil visa/residence requirements or a person possibly being a threat to public order.²⁷¹

The Council went on to consider that the flow of persons requiring a visa in the context of family reunification was minimal and could therefore not be considered to significantly contribute to increasing the exponential risk of contamination in airports.²⁷² Furthermore, in the event of new contagious virus variants, screening tests and quarantine measures could be strengthened without having to halt family reunification.²⁷³ The Council of State therefore ultimately ruled in favour of the applicants for suspension of the implementation of the decision not to register or process applications for long-stay visas for family reunification. It urged the Prime Minister to take measures strictly proportionate to the health risks associated with entry into France.²⁷⁴

3.5 Evaluating Proportionality of Entry Restrictions & Travel Advice

Over the course of the previous sections, the principle of proportionality has been examined in depth. The current Section seeks to analyse whether some of the most common measures taken by EU Member States to combat the spread of COVID-19 can be considered as being in accordance with that principle and, accordingly, with the principle of freedom of movement. In this Section, the focus is placed on testing requirements and quarantine or self-isolation periods as well as travel advice.

3.5.1 Testing Requirements, Quarantine or Self-isolation

Over the course of the pandemic, most Member States have, upon entry, obliged or urged travellers (particularly those travelling from higher risk areas) to undergo PCR tests, quarantine or self-isolation.

²⁶⁸ *Ibid.*, para. 10. Family reunification was also not possible for persons who had been recognised as refugees or who had obtained subsidiary protection and had already applied for family reunification.

²⁶⁹ *Ibid.* Furthermore, those ultimately granted the opportunity for family reunification were often able to do so after application to the interim relief judge of the Nantes administrative court.

²⁷⁰ *Ibid.*, para. 14.

²⁷¹ *Ibid.*, para. 15-17.

²⁷² *Ibid.* para. 18.

²⁷³ *Ibid.*, para. 19.

²⁷⁴ *Ibid.*, para. 23.



Over the course of the analysis in this Section, it became apparent that Member States have been granted a wide degree of discretion in taking restrictive measures in the event of diseases with epidemic potential.²⁷⁵

Examining this in greater detail, the Council Recommendation does indicate that both quarantine periods and COVID-19 tests may be considered suitable restrictions to free movement for persons travelling from higher risk areas (in the context of the Recommendation, those classified as other than green).²⁷⁶ Furthermore, the WHO's International Health Regulation (IHR) also provides an indication on whether such measures should be permitted. In particular, Article 31(2)(c) IHR 2005 provides countries with the right to oblige or advise travellers to undergo self-isolation or quarantine in the event of evidence of an imminent public health risk. Given that both the Council Recommendation and the WHO recommend that measures such as quarantine are maintained for travellers from a place with community transmission that differs from the local situation (i.e. risk areas or areas with higher incidence rates), it can be argued that higher levels of community transmission can be seen as evidence of an imminent public health risk. Here, it is important to refer back to the case before the *Oberverwaltungsgericht Nordrhein-Westfalen*, in which the court ruled that the quarantine measure maintained for travellers coming from countries where the incidence rate was not higher than in Germany was not to be considered proportionate, since the risk of infection was actually equal to, or lower than, when they would have stayed at home. Given that quarantine periods were not applicable to movements within the national territory, such periods were also to be considered disproportionate when travelling from lower-risk countries.

Furthermore, Member States may not charge incoming travellers for appropriate isolation or quarantine requirements under Article 40(1)(c) IHR 2005. Following these provisions, it can be concluded that the current national quarantine measures, which are either an obligation or urgently recommended to incoming travellers from risk areas, are to be considered proportionate as long as they are provided free of charge and the area of travel has a higher incidence rate than the destination country. On costs, it can be seen in the table in Section 2 that it is not always clear who bears the costs, particularly of the quarantine periods. The unequivocal wording of the IHR nevertheless leads to the conclusion that where such quarantine periods are obliged by a Member State that does not cover the costs of the facilities where the period must be completed, then the measure can no longer be considered a proportionate.

Similar conclusions may be reached when looking at national case law. Indeed, Section 3.4 showed that both testing requirements and quarantine periods were usually considered to be proportionate. National courts were generally asked to rule on the possible encroachment of testing requirements and quarantine periods on various fundamental rights. Nevertheless, in the cases analysed in the context of this report, national courts normally concluded that the limitation to certain fundamental rights resulting from testing requirements and quarantine periods was permitted in light of possible

²⁷⁵ Article 29(1) 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 (OJ L 158/77).

²⁷⁶ Point 17 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337/3).



restrictions contained in the fundamental rights themselves. Furthermore, testing requirements and quarantine periods were also considered proportionate to the aim of protecting public health and containing the spread of COVID-19. In certain cases²⁷⁷, the court highlighted the broad degree of discretion awarded to the legislator in taking measures to combat the spread of COVID-19.

3.5.2 Travel Advice

The COVID-19 pandemic saw the introduction of serious restrictions to free movement. At the height of the crisis, some Member States did not stop at issuing travel advice, even issuing travel bans. It is clear that travel bans have limited, if any, legal basis in EU law. For example, the Schengen Borders Code does not formally envisage any lawful option for Member States to apply any kind of travel ban.²⁷⁸ Furthermore, travel bans are problematic in light of proportionality, since less restrictive measures such as quarantine and testing may be used to pursue the same objective of protecting public health. Measures severely disrupting free trade and free movement have not necessarily proven to be effective in tackling the spread of infectious diseases.²⁷⁹

Over the course of the COVID-19 pandemic, the focus has nevertheless shifted away from travel bans to the issuance of travel advice. National travel advice issued by Member States is based on European statistics by the ECDC and their interpretation in the light of national political and policy responses to COVID-19. Yet while some countries list or code other countries entirely, other countries issue regional advice. The ECDC notes that, particularly when regional data is available for a country, national policymakers can make a more suitable estimate for their travel advice, since regional data within a country can be compared in a more reliable manner.²⁸⁰ This regional approach is also supported in the Council Recommendation.²⁸¹

When it comes to proportionality, we may therefore question whether issuing national, rather than regional, advice (where regional data is available) is necessary and thus proportionate. Nevertheless, this perspective is not necessarily maintained at national level. The table in Section 2, for example, showed that some Member States still maintain country categorisations. Furthermore, as we have seen in the case of the *Oberverwaltungsgericht Nordrhein-Westfalen* in Section 3.4.2, travel advice covering the entire territory of a Member State was considered to be proportionate, since governments were held to be unable to easily verify which regions within a country travellers pass through. Therefore, although travel advice can generally be considered to be proportionate, it nevertheless remains questionable as to whether travel advice covering the whole territory of a Member State does not go beyond what is necessary. This is particularly the case when considering

²⁷⁷ See, for example, Gh. Den Haag 18 May 2021, ECLI:NL:GHDHA:2021:868, para. 5.10.

²⁷⁸ Carrera, S. and Luk, N.C., In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU, Study for the LIBE Committee (August 2020), p. 49 and 61.

²⁷⁹ ECDC, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA*, ECDC Technical Report, 2020 and Frischhut, M. and Greer, S.L., in T. K. Hervey et al. (eds.) *Research handbook on EU health law and policy* (Edward Elgar Publishing Limited, 2017), pp. 318-319.

²⁸⁰ ECDC, *Considerations for travel-related measures to reduce spread of COVID-19 in the EU/EEA*, ECDC Technical Report, 2020, p. 3-4.

²⁸¹ Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337/3).



the differences in the geographical size of countries and the significant differences in regional epidemiological rates.

Questions over the proportionality of travel advice again arise when considering the distinction between essential and non-essential travel. It should be reiterated that travel bans must be considered unlawful under EU law²⁸² and that no distinction should be made as to the type of movement that may or may not be banned (essential or non-essential). While a ban on both essential and non-essential travel is therefore hard to reconcile in light of EU law, the two categories may face different type of restrictions. In their analysis of the Schengen Borders Code in times of COVID-19, Carrera and Luk found an hugely diverse and incoherent picture concerning the exact grounds, methods and indicators used to apply mobility restrictions, thus challenging the proportionality and non-discriminatory nature of such decisions.²⁸³ When looking at the Council Recommendation, we may see that travellers with essential functions travelling from countries labelled other than green should not be required to undergo quarantine and should generally ensure that “any formal requirements imposed on citizens and businesses provide a concrete benefit to the public health efforts to combat the pandemic and do not create an undue and unnecessary administrative burden”.²⁸⁴

As indicated in Section 2, the present Council Recommendation already includes more categories of travellers than the earlier Communications of Commission in early 2020. Whereas the focus was initially placed on persons conducting economic activities, the Council Recommendation can now be held to be more reflective of the categories of persons crossing borders in a ‘normal situation’. Indeed, travellers considered essential are, among others, various categories of workers and self-employed persons (including transport and frontier workers), pupils and students, persons travelling for family or business reasons and passengers in transit. Special attention was also given to border regions, where restrictions on cross-border movements have a greater impact in border regions than in most centrally located regions and where the right to free movement is exercised on a frequent basis within the scope of daily life. The generic right to free movement also applies to economically inactive persons, while their interests in crossing borders should be weighed against public health concerns.²⁸⁵ Travel should therefore generally be possible within the EU, although the Council Recommendation provides an indication of which travel is to be considered essential, thereby basically creating a distinction in entry requirements that may or may not have to be fulfilled. Indeed, for non-essential travel, persons may have to fulfil all entry requirements relating to, for example, testing and quarantine. In the case of essential travel, the quarantine requirement is lifted. When it comes to transport and frequent border crossings in border regions, even testing requirements are, to a great extent, discouraged.²⁸⁶

²⁸² Carrera, S. and Luk, N.C., In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU, Study for the LIBE Committee (August 2020), p. 61.

²⁸³ *Ibid.*, p. 60.

²⁸⁴ Point 19 and 22 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337/3).

²⁸⁵ Thym, D. and Bornemann, J., ‘Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics’, *European Papers*, Vol. 5, 2020, No 3, p. 1143-1170, <https://doi.org/10.15166/2499-8249/420>, p. 1165.

²⁸⁶ As elaborated in Section 3.3.3.



Of course, the discussion takes a different direction when considering travel from outside the EU to one of the Member States. Although this topic merits an in-depth study in its own right, it is important to mention that travel from third countries into the EU should in any case be possible for EU citizens and third country nationals (TCNs) who enjoy free movement rights equivalent to those of EU citizens due to EU Directives, designated agreements or national law.²⁸⁷ This exemption from the travel restriction also applies to the family members of these aforementioned EU citizens and TCNs. Family reunification should be understood as an imperative family reason, thus constituting essential travel.²⁸⁸ In this context, it is interesting to refer back to the ruling on family reunification by the Council of State in France.²⁸⁹ In particular, this case shows that a restriction on family reunification based on a possible increased risk concerning the spread of COVID-19 could not be upheld. More specifically, a suspension of family reunifications was considered disproportionate to the health risks associated with entry into France since ‘regular’ measures, such as quarantine and testing, could be employed to mitigate any risks of contagion.

Travel Advice and the Consequences of Ignoring It

While the topics of entry and return concern the relationship between the state and the individual (i.e. a vertical relationship), other potential negative consequences arising from an individual’s failure to adhere to the travel advice issued by Member States may have a horizontal aspect. In particular, employers may be reluctant – or even refuse – to bear the costs coming from an employee’s travel to a ‘negative advice Member State’. This may, for example, lead to limited sickness pay during mandatory quarantine periods or even dismissal by an employer. Similarly, a decision to ignore travel advice issued by a Member State may have consequences for insurance coverage. Accordingly, there is a need to assess these potential horizontal consequences of a failure to adhere to travel advice from an EU free movement perspective.

It is important to note that instances of situations such as the ones described above are not merely hypothetical, since they are taking place in some Member States. The Netherlands, for example, continues to maintain an orange colour code (travel discouraged) for several Member States.²⁹⁰ The code means that only necessary travel is recommended. While this is the official stance maintained by the Dutch Government, it appears that further consequences may be connected to the decision to travel to such countries or regions. For example, insurance providers may decide not to reimburse costs in the event of travel to a risk area. Similarly, in the summer of 2020, a discussion arose in the Netherlands on who is to bear the costs arising from the quarantine period. A spokesperson for AWWN, the Dutch Employer’s Organisation, even called for litigation to bring clarity to the matter.²⁹¹ According to a survey conducted by public broadcaster NOS among several large employers in late July 2020, they

²⁸⁷ Point 5 Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L 208 I/1.

²⁸⁸ See Section 2 of this report and Thym, D. and Bornemann, J., ‘Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics’, *European Papers*, Vol. 5, 2020, No 3, p. 1143-1170, <https://doi.org/10.15166/2499-8249/420>.

²⁸⁹ Conseil d’État, 21 January 2021, N° 447878, ECLI:FR:CEORD:2021:447878.20210121.

²⁹⁰ Nederland wereldwijd, ‘Reisadviezen’ <https://www.nederlandwereldwijd.nl/reizen/reisadviezen>.

²⁹¹ See NOS, ‘Bij vertrek vakantie code oranje? Mogelijk vakantiedagen opnemen voor quarantaine’, <https://nos.nl/artikel/2341620-bij-vertrek-vakantie-code-oranje-mogelijk-vakantiedagen-opnemen-voor-quarantaine.html>.



were planning to follow the Dutch Government's travel advice in relation to paid or unpaid leave during the quarantine period.²⁹² In particular, if the country's colour code changed during the stay, an employee could work from home during the quarantine period (if possible) and was not obliged to take unpaid leave. However, if the employee decided to travel to a country for which the colour code was already orange or red upon departure, the employee had to bear the risk and could be obliged to take leave or face a reduction in pay. Nevertheless, much appears to be up to the employer, and some employers (such as the Dutch railway services NS) have indicated they would make a distinction between those whose activities can be undertaken from home (continued pay) and those whose work must be conducted on-site (discontinued pay during quarantine).²⁹³

As is the case for employment relationships, travel insurances are essentially horizontal, rather than vertical situations and are governed by a different set of rules. The issue at stake here is whether EU law is even applicable to travel insurances to begin with. Travel insurances are private contracts between an individual and the insurer. Whether EU law, and in particular the right to freedom of movement, is applicable to these contracts is therefore a question of the horizontal effect of EU law. The horizontal effect of the freedom of movement provisions is still debated and has been predominantly developed through the case law of the Court of Justice.²⁹⁴ In its case law, the Court has gradually expanded the horizontal effect of certain Treaty provisions, but mainly vis-à-vis standard-setting and regulatory bodies, such as labour organisations in *Viking* and *Laval*.²⁹⁵ Insurers cannot be considered standard-setting or regulatory bodies, as they do not regulate the entry to a specific product market, nor is taking out travel insurance mandatory. Furthermore, excluding certain (foreseeable) risks forms part of insurers' business model.

Regardless of the horizontal effect, the question remains as to whether or not travel insurances cover risks in countries for which a negative travel advice is issued and whether that could hinder the freedom of movement of EU citizens.²⁹⁶ Insurers have always worked with the policy that unforeseen risk is covered by the travel insurance, but that foreseeable risk is not covered. Connected to this is the concept that travelling to a destination for which a negative travel advice is issued, brings with it a certain foreseeable risk. Therefore, travel insurances do not cover risks or expenses occurred in countries for which a negative travel advice is issued.²⁹⁷ However, this does not apply in the event that the travel advice changes during the stay abroad, as the citizen could not foresee that the change from

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Karayigit, M. T. (2011) 'The Horizontal Effect of the Free Movement Provisions', *Maastricht Journal of European and Comparative Law*, 18(3), pp. 303–335. The Court's case law includes seminal judgments such as Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, EU:C:1995:463 and Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, EU:C:2012:453.

²⁹⁵ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772 (*Viking*) and C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

²⁹⁶ A further distinction can be made between essential and non-essential travel. The travel advice issued by a Member State in general only concerns non-essential travel, while essential travel is still free. The Dutch *Verbond van Verzekeraars* (Alliance of Insurers) indicates on its website that travel insurances for business trips, which are in general considered essential, still apply when travelling to a country for which a negative travel advice is in effect (see ANWB, 'Coronavirus', <https://www.anwb.nl/verzekeringen/coronavirus>).

²⁹⁷ See for example: Allianz Travel, 'What Does Travel Insurance Cover', <https://www.allianztravelinsurance.com/travel/planning/unforeseen-event-coverage.htm>.



positive to negative.²⁹⁸ The policy of only covering unforeseen risk already existed before the COVID-19 pandemic and is maintained during the pandemic. It thus appears consistent that travel insurances do not cover risks or expenses occurred in countries for which a negative travel advice has been issued. Therefore, the restricted travel insurance coverage appears to represent a standard approach to handling travel advice and coincidentally may not be considered disproportionate.

When it comes to the negative consequences found to follow on a possible failure to adhere to travel advice, these mainly concern dismissal, unpaid leave or discontinuation of wages. These negative consequences may be held to generally follow on the requirement to undergo quarantine. When it comes to actual sickness, such situations are subject to national labour law provisions. For example, in a recent case in the Netherlands, the judge was asked to rule on the continued payment of wages in the event of an employee who exhibited symptoms common to COVID-19.²⁹⁹ The employee had been awaiting the evaluation of a company doctor. Despite not organising such a doctor's visit, the company indicated that it considered the employee's leave unauthorised, threatening to impose sanctions if they would not return to work. Ultimately, the judge ruled in favour of the employee because the employer had not followed the appropriate procedure to cease payment.³⁰⁰ The case therefore clarifies that the response to an employee suffering from COVID-19 should follow standard national procedures regarding sickness in relation to employment.

In another case, an employee was ultimately dismissed by his employer for failing to adhere to company policy prohibiting travel to a country labelled code orange in light of the COVID-19 pandemic.³⁰¹ The individual's employer did not permit travel due to the COVID-19 pandemic and the mandatory quarantine period was required upon return. The employee was informed beforehand of his possible dismissal should he decide to travel.³⁰² The dismissal ultimately materialised after the employee ignored the employer's warnings and decided to travel. The former employee objected to this and demanded his former employer pay reasonable compensation. The employer maintained that it had followed necessary procedures and had issued several prior warnings preceding the final one not to travel during COVID-19. Ultimately, the court sided with the employer, referring particularly to the repeated written warnings they had issued and that had been signed for reception by the employee. Regarding the travel to an orange-coded country, the court considered that the employer had been clear in its policy and that the prohibition to travel was appropriate, as the employee could not work from home (i.e. could not work upon return for ten days, as they would have to go into quarantine).³⁰³ The court found that there was a substantial business interest on the side of the employer not to have the employee travel and considered that these interests could justify the dismissal.

²⁹⁸ See for example: ANWB, 'Coronavirus', <https://www.anwb.nl/verzekeringen/coronavirus>.

²⁹⁹ Rb. Rotterdam 12 June 2020, ECLI:NL:RBROT:2020:5902.

³⁰⁰ Ibid., para. 5.5.

³⁰¹ Rb. Limburg 16 April 2021, ECLI:NL:RBLIM:2021:3110.

³⁰² Although the possible travel to an orange coded company was not the only reason for the pending dismissal of the employee it was ultimately the grounds that proved decisive for the employee's dismissal.

³⁰³ Rb. Limburg 16 April 2021, ECLI:NL:RBLIM:2021:3110., para. 4.5.



In relation to adhering to travel advice, we may distinguish two situations: travel on behalf of the employer and personal travel. The latter may be considered of primary importance in relation to dismissal and discontinuation of wages. Indeed, when travel to other Member States is discouraged, this primarily concerns non-essential travel.³⁰⁴ Furthermore, if travel is also considered essential by an employer, dismissal or discontinued payment of wages is highly unlikely to follow as a result of non-compliance with the travel advice. Nevertheless, EU law provides little basis to assess the proportionality of a possible dismissal or discontinuation of wages. As is the case for procedures concerning sickness, such matters fall within the realm of national labour law. Accordingly, any consideration as to the proportionality of a decision to dismiss an employee or discontinue their wages has to follow the safeguards guaranteed by law. Nevertheless, a perspective on dismissal and discontinued payment of wages may be distilled from the way insurers manage non-compliance with travel advice. Following their reasoning, it may be disproportionate for employers to dismiss or discontinue salary in the event an employee departed with a favourable travel advice that was altered during their stay abroad. By contrast, and as the case above shows, a conscious decision to ignore negative travel advice may prove more problematic. Considering this case, and looking back at the practice maintained by the Dutch railway services, one may wonder whether it would indeed be suitable to consider the nature of an employee's work in this context (particularly whether their work can be carried out remotely).

³⁰⁴ Although what is actually considered essential or non-essential travel is unclear and varies among Member States, essential travel is often held to take place within a professional context; see footnote 91 above and Carrera, S. and Luk, N.C., Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area, *CEPS Paper No. 2020-04*, April 2020, p. 24-25.



4. Border regions in times of COVID-19

Border regions can be considered as having particularly suffered in light of the COVID-19 crisis, due to the essential role cross-border movement plays in a cross-border society. While freedom of movement is the norm in the Schengen Area countries, the Schengen Borders Code does provide for the possibility of temporarily reintroducing border controls (as Section 3.3.1 showed).³⁰⁵ Reintroducing such controls must be as a last resort when there is ‘a serious threat to public policy or internal security’. They are limited in their duration, depending on the nature of threat of a particular situation and must be proportionate in any case. Member States have a duty to inform one another of the reinstatement of border controls, ideally four weeks prior to the reinstatement, although this period can be shortened depending on the specific circumstances surrounding the reinstatement.³⁰⁶ As of July 2021, four Schengen Area countries (Finland, Norway, Denmark and France) continue to maintain internal border controls in light of the COVID-19 pandemic.³⁰⁷

Looking back at Section 2, it is apparent that instituting border controls is not the only measure taken by Member States to restrict the spread of COVID-19. In fact, testing measures, quarantine or isolation periods as well as administrative provisions such as passenger locator forms are, at present, the most frequently observed measures. The previous sections have also shown that such measures are generally considered to deliver a suitable balance between freedom of movement and protection of public health. Nevertheless, such measures may still be considered as entry restrictions, as they are liable to hinder mobility or render it less attractive. Moreover, in the event of insufficient coordination of testing measures in cross-border regions, such regions may particularly suffer as a result of the different types of measures maintained by neighbouring Member States. In order to explore the consequences of border controls and restrictions of free movement on cross-border regions, this Section strives to analyse the situation in selected EU border regions in depth. These regions have been selected due to their advanced stage of cross-border cooperation and/or the severity of restrictions in cross-border movement. Particular attention will be given to the following border regions:

- Netherlands – Belgium – Germany (i.e. Meuse-Rhine Euroregion);
- Denmark – Sweden – Finland – Norway (i.e. the Nordic countries), including a brief view on the border between Finland and Estonia;
- Germany – Czech Republic – Austria;
- Portugal – Spain;
- Hungary and the surrounding border regions;
- Luxembourg – France – Germany – Belgium (i.e. the Grande Région).

For each of these border regions, the particular situation regarding restrictions of free movement within a certain time period is assessed. Therefore the case studies provide an insight, assessing the

³⁰⁵ See Article 22 and 25-27 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), (OJ L 77/1).

³⁰⁶ Article 27(1) Schengen Borders Code.

³⁰⁷ Article 27(4) Schengen Borders Code; 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. The Commission may nevertheless initiate infringement procedures against Member States who have not sufficiently



cross-border situation within a certain timeframe chosen on the basis of relevant events. For some of these case studies, particular examples of the effects of a lack of coordination on COVID-19 measures have occurred over the past months. Although some of these situations have since been mitigated, they are nevertheless included in this report because they serve as prime examples of a lack of coordination on COVID-19 measures and the difficulties such discoordination may bring in cross-border regions. The case studies pay attention to legislation, policy and advice given in the respective Member States regarding border crossings generally and cross-border workers/residents in particular. Furthermore, a proportionality assessment is conducted for each of the border regions to assess the suitability of COVID-19 measures in light of the legislation, case law and policy already explored in Section 3.

4.1 The Meuse-Rhine Euroregion: non-coordination of exemptions and a Belgian ban on non-essential travel

The Netherlands, Belgium and Germany (more specifically the state of North Rhine-Westphalia) have a relatively long history of intensive cooperation and cross-border development. Cross-border cooperation takes place on a bilateral as well as a multilateral level. An example of the latter is the Benelux Union. This cross-border cooperation occurs at both national level and at local and administrative levels. On the local level, the Meuse-Rhine Euroregion (EMR) is an example of a stable, well-established governance structure for cross-border cooperation between the partners, covering the area of the south-east of the Netherlands, the north-east of Belgium and the west of the German state North Rhine-Westphalia (NRW). The area of the EMR is characterised by cooperation on different themes, such as facilitating and coordinating cross-border transfers of patients, assistance in emergency cases and fostering cross-border working and living, for example via Border Information Points. The EMR thereby not only cooperates through the European Grouping for Territorial Cooperation (EGTC), but also through other forms of networks and agreements. Therefore, the cross-border region of the Netherlands, Belgium and NRW are strongly intertwined with cross-border movements at a fairly high level in favour of the border region.

Despite the different national regions being strongly intertwined, the COVID-19 pandemic has a considerable impact on cross-border mobility in the EMR. The first shock was the border closure with Germany and the Netherlands reinstated by Belgium during the first wave between 20 March 2020 and 15 June 2020.³⁰⁸ Despite the fact that essential workers could still cross the border,³⁰⁹ all roads, even the sidewalks and forest paths, were physically blocked and borders were heavily controlled.³¹⁰ While the border remained open between Germany and the Netherlands, random border controls

³⁰⁸ European Commission, Member States' notifications of the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 18 et seq. of the Schengen Borders Code.

³⁰⁹ It was only the essential cross-border economic activities that were still allowed, and it was not allowed to also refuel and carry groceries. Families and partners could also not be reunified.

³¹⁰ See for example also Peyrony, J., Rubio, J. and Viaggi, R., 'The effects of COVID-19 induced border closures on cross-border regions', Mission Opérationnelle Transfrontalière, Luxembourg: Publications Office of the European Union, 2021. Whereas it is not clear whether the border was closed to the same extent all along the Belgian border with all of its neighbouring countries, the effects of the closure in the EMR were considerable and hence the measures taken by Belgium in the EMR were to be considered an actual closure of the border.



were carried out.³¹¹ National steering impeded the regional cross-border structures, to an extent worsening the cooperation to the detriment of border regions and mobility. In light of the different measures, some level of coordination was sought by the newly created Cross-border Taskforce Corona on 20 March 2020 by NRW with Belgium and the Netherlands.³¹²

As lessons learned from the first wave, most national policymakers are aware of the far-reaching consequences of travel and border-related measures for cross-border regions and daily commuters. Nevertheless, with a second wave in the last quarter of 2020 and new virus mutations on the rise by the end of 2020, new divergent measures were imposed. Following the Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic,³¹³ national implementation shows differences in interpretation. Ultimately, Belgium reintroduced a ban on all non-essential intra-EU travel while taking into account the cross-border effects via exemptions. In particular, the details of the measures (and their exceptions), show a certain lack of coordination and harmonisation, leading to obstacles to mobility and confusion for the cross-border community. This case study on the EMR concentrates on the period of the Belgian ban on non-essential travel (January – April 2021).

4.1.1 Travel Advice and Travel Bans

While the Netherlands has never imposed a travel ban, it does issue travel advice at the regional level. Travel advice is based on epidemiological data and the political and policy developments in a region. This is translated into a risk assessment via colour codes (green, yellow, orange and red), but not one that is legally binding. Where red constitutes the advice not to travel at all, orange is recommended only for essential travel, while yellow also allows for non-essential travel, albeit with a warning.³¹⁴ On 3 November 2020, the Dutch government announced that a negative travel advice had been issued for *all* European regions and all non-essential intra-EU travel was strongly discouraged (code orange).³¹⁵ This general negative travel advice was extended multiple times up to 15 May 2021. Even though this travel advice is not legally binding, it has significant consequences, for example for travel insurances, consular help and wage continuation during quarantine. Alongside travel advice, entry restrictions were also introduced. It was argued by the national Outbreak Management Team that a travel ban was not necessary, since the combination of quarantine obligations and the ‘double test’ approach is effectively equivalent to a travel ban.³¹⁶

³¹¹ Ibid.

³¹² Land NRW, Ministerpräsident Laschet initiiert eine „Cross-Border Task Force Corona“, <https://www.land.nrw/de/pressemitteilung/ministerpraesident-laschet-initiiert-eine-cross-border-task-force-corona>.

³¹³ Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337/3); Council Recommendation amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, 2021/0021(NLE), 28.1.2021.

³¹⁴ Nederlandwereldwijd.nl, *Wat betekenen de kleurcodes bij reisadviezen*, <https://www.nederlandwereldwijd.nl/documenten/vragen-en-antwoorden/wat-betekenen-de-kleurcodes-bij-reisadviezen>.

³¹⁵ De Jonge, H., ‘Kamerbrief over coronamaatregelen die op 3 november 2020 zijn afgekondigd’, <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/11/04/kamerbrief-over-coronamaatregelen-3-november-2020>.

³¹⁶ OMT, ‘Advies n.a.v. 96^e OMT’, attachment to Kamerstukken II 2021/21, 25295, nr. 912.



An important question is therefore what is considered as ‘essential travel’. This is an open term, where only some guidance is provided by “Travel only in case of serious family concerns or for work that cannot be postponed and where physical presence is absolutely necessary”. For border regions, however, it is acknowledged that crossing the border to and from Belgium and Germany is more likely to be urgent, for reasons such as cross-border work, study, co-parenting or exceptional family visits.³¹⁷ What is considered as exceptional seems to be set out under the quarantine rules, which will be elaborated later.

In Germany, travel advice is issued on federal level by the *Auswaertiges Amt*. To do so, the *Robert Koch Institut* assesses and publishes the risks per region every week based on statistics from the ECDC.³¹⁸ With the emergence of virus mutations and following the updated Council Recommendation, a further distinction is made between risk areas (*Risikogebiete*) and high-risk areas, due to a widespread occurrence of virus variants of concern (VOC) (*Virusvarianten-Gebiete*) or a particularly high number of cases (*Hochinzidenzgebiete*). The risk classification is based quantitative and qualitative criteria, where the quantitative threshold is placed at >50 cases per 100 000 inhabitants per seven days for a risk area and at >200 cases per 100 000 inhabitants per seven days for a high-risk area. Only the designation of a VOC-area is not entirely clear. For all kind of risk areas, the *Auswaertiges Amt* issued a warning for non-essential travel until 1 July 2021, after which this warning only applied for high-risk areas.³¹⁹

As a reaction to the new virus mutations that have spread rapidly around the EU continent, Belgium reintroduced a temporary ban on all non-essential intra-EU travel³²⁰ and announced internal border controls as of 27 January 2021. This was prolonged until 18 April 2021 and was lifted thereafter.³²¹ Factually, it was a more positive rephrased measure. During the first lockdown, a list of exemptions to the general travel ban was included. That 2020 border closure had a particularly large impact on the border region and the list of permitted reasons to cross the border appeared to be limited.³²² With the ban on non-essential intra-EU travel, again a list was added to the legislation, including what is considered essential. Yet the legislative exemptions were broader and the problems of the first lockdown were acknowledged, where border controls were permanently established and road blockades were used.³²³

Nevertheless, as the Ministerial Decree describes, the national experts advised limiting travel as it increases the risk of broader spread of the virus mutations through importation. Furthermore, the

³¹⁷ Rijksoverheid, ‘Reizen naar het buitenland en naar Caribisch Nederland’, <https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/reizen-en-vakantie/reizen-buitenland>.

³¹⁸ See Robert Koch Institut, ‘Informationen zur Ausweisung internationaler Risikogebiete durch das Auswärtige Amt, BMG und BMI’, https://www.auswaertiges-amt.de/de/ReiseUndSicherheit/reiseratgeber/256726#content_0.

³¹⁹ Ibid.

³²⁰ 26 januari 2021 - Ministerieel besluit houdende wijziging van het ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken, bl. 5428.

³²¹ See European Commission, Member States’ notifications of the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 18 et seq. of the Schengen Borders Code.

³²² See for example Unfried, M., & Marks, S., *Cross-border Impact Assessment 2020 - Dossier 1: The impact of the Coronacrisis on border regions (TEIN) — Regional report Euregion Meuse-Rhine (EMR)*. Maastricht: ITEM, 2020.

³²³ See for example VRT NWS, *Premier De Croo wil tijdelijk verbod op niet-essentiële reizen: “Goede positie van ons land beschermen”*, <https://www.vrt.be/vrtnws/nl/2021/01/20/liveblog-20-januari-2021/>.



Decree refers to the already existing travel ban to the EU from non-EU countries and the actions other continental European countries take. Based on this information, the Belgian *Overlegcomité* found sufficient grounds for introducing a ban on non-essential travel, providing a list of what is considered as essential travel.³²⁴ In light of this list, cross-border work, study, co-parenting and urgent family visits among others remained possible. For the cross-border region, a specific essential reason was added on the list: travel to a neighbouring country by inhabitants of a municipality located at the border in the light of daily activities – admitted in their own country – that are perceived as essential. This also applies for inhabitants of cross-border regions – not further defined – who needed to provide additional proof of the necessity of the travel. This provision results from the experiences of the first border closure, which has shown how far-reaching the impact was on daily life in the border region. Still, questions and uncertainties arose on how this provision should be interpreted and how strictly the police checks are carried out. Lastly, with the ban on non-essential travel, an extra administrative obligation in this aspect has been introduced: the declaration on honour (*verklaring op eer*), in which the traveller has to explain the reason for, and necessity of, the travel. Depending on the reason, additional documents of proof have to be added. To limit the administrative burden, the form can be filled in for a certain period. Nevertheless, those failing to have a declaration on honour was fined. After the ban on non-essential travel, Belgium continued to issue negative advice for all non-essential travel.

Despite the arguments of national experts, the Council Recommendation (agreed in the same week) indicated that Member States should avoid travel bans by replacing them with more targeted measures falling under the category entry restrictions. The Commission therefore sent a letter to Belgium, urging it to apply the principles as agreed upon in the Council Recommendation.³²⁵ Indeed, given the agreements under the Council Recommendation and thus the guidelines on proportionality, the ban on non-essential travel is disproportionate, as lower and more-targeted means of discouraging non-essential travel are available, such as quarantine and test obligations that were already in force. However, given the fact that the cross-border region and the daily life on and across the border has been acknowledged as essential, it can be argued that the effective limitations of the Belgian ban on all non-essential travel was more limited on border regions and the cross-border territory than they appeared to be. This could also be seen as implementing another provision in the Council Recommendation, urging Member States to pay particular attention to border regions.³²⁶

4.1.2 Quarantine and test obligations

The Netherlands

In the period of the Belgian ban on non-essential travel (January – April 2021), the Dutch government adopted the *Tijdelijke wet maatregelen covid-19* (Temporary Act on measures COVID-19). It provided a legislative framework for the measures taken, via changes through regulations in the Act on public health. By law, the only legal obligation that was regulated was the testing obligation for incoming

³²⁴ Annex 2 of Ministerieel besluit houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree).

³²⁵ Euobserver, *Brussels: six EU states travel restrictions went 'too far'*, <https://euobserver.com/coronavirus/151031>.

³²⁶ Principle 6 of the Council Recommendation.

passengers to the Netherlands from risk areas. For these travellers, a double negative test obligation was applicable.³²⁷ This entails either a NAAT (PCR) test taken not more than 24 hours before departure or a NAAT (PCR) test taken not more than 72 hours before arrival and a rapid antigen test not more than 24 hours before departure.³²⁸ The obligation for a rapid antigen test does not hold for travel by bus or train. Among others, cross-border workers – who fall under the definition³²⁹ – and cross-border students are exempt from this obligation. Alongside the legislative test obligations, there is a strong recommendation to undergo a quarantine period of ten days following arrival in the Netherlands from a risk area. The same exemptions hold as for the test obligation, plus for transport-workers and for visits of a loved one, partner, child or parent in Belgium or Germany. The latter was restricted to the neighbouring countries only. Up until 15 May 2021, a general negative travel advice was issued and all Member States were coded orange, thus these measures were applicable for travellers from all Member States.

Given that the legal entry restrictions were, formally speaking, very limited (i.e. there was only a legal test obligation regarding passengers by arranged transport) and the rest of the measures regarding cross-border travel were based on recommendations, day-to-day life in the border region was not hindered to any great extent.

Latest adjustments

As of 1 June 2021, legislative changes on the legal and formal entry restrictions have taken place. As of then there is a distinction made between *risk areas*, *high-risk areas* (14-day incidence >150 per 100 000 inhabitants³³⁰), *very high-risk areas* (14-day incidence >500 per 100 000 inhabitants) and *extraordinary high-risk areas* (where virus variants are circulating at worrying levels or based on other qualitative grounds). The risk classification does correspond with the issued travel advice to a certain extent. The classification of a risk area corresponds with code yellow, but the differing high-risk areas can all share the same code orange.

All travellers from high-risk areas, regardless of their mode of transport, are obliged in principle to have a negative NAAT (PCR) test taken not more than 72 hours before arrival. Following the updated Council Recommendation, the option for a negative rapid antigen test, taken not more than 48 hours before arrival, was introduced as of 1 July 2021. They are again also strongly recommended to undergo a quarantine period of ten days. Both the test obligation, as the quarantine recommendation can be replaced by the EU Digital COVID-19 Certificate as of 1 July 2021. For travellers from very and extraordinary high-risk areas there is a legal quarantine obligation. For those travelling by air or sea from these areas, there is a double test obligation with a negative rapid antigen test result, not older than 24 hours, on top of the negative NAAT (PCR) test. The exemptions to the quarantine obligation

³²⁷ By Article 58p Wet publieke gezondheid.

³²⁸ Rijksoverheid, 'Eisen aan de negatieve NAAT (PCR)-testuitslag bij vertrek naar Nederland', <https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/reizen-en-vakantie/verplichte-negatieve-covid-19-testuitslagen/eisen-pcr-test>.

³²⁹ A person who works and lives in another EU Member State and returns at least one time per week to the resident state; IND, 'Grensarbeider', <https://ind.nl/werk/werken-in-nederland/paginas/grensarbeider.aspx>.

³³⁰ As of 1 July 2021: 14-day incidence >200 per 100.000 inhabitants, changed in accordance with the updated Council Recommendation.

and recommendations are more or less copied from the Council Recommendation, including cross-border workers and students, urgent visits to first and second-degree relatives, partners and so on.³³¹ Furthermore, there is a general exemption for short stays of less than 12 hours. The exemptions on the NAAT (PCR) testing obligation are somewhat more limited, for example not covering the visit of family or partners, but still covering cross-border workers and students, short stays of 12 hours.

Germany

In Germany, during the period of this case study, there is an interplay between rules at the federal and state levels. At federal level, the general test obligation and Passenger Locator Form were introduced,³³² while at state levels quarantine rules were formulated.³³³ All travellers who enter Germany who have been in a risk area within the last ten days are obliged, based on the German federal regulation *Coronavirus-Einreiseverordnung*, to fill in the *Einreiseanmeldung* before arrival. For arranged transport, the carrier will check that this criterion is fulfilled. In addition, there are some entry controls put in place by the federal police. In the event that the (digital) form is not filled in in advance, the regulation leaves room for completing the (digital) form at the moment of arrival. Particularly beneficial for the border region is the exemption foreseen for short visits - maximum 24 hours - to a risk area, or to Germany from a risk area, in the context of cross-border daily traffic.³³⁴ Furthermore, transit and transport are exempt from the administrative obligation. These exemptions do not hold for VOC-areas.³³⁵

For the test obligation at federal level and the quarantine obligation at state level, there is again a distinction between the applicable rules between risk areas, high incidence areas and VOC-areas. Here, the classification is the same as included in the travel advice, issued by the *Auswaertiges Amt*.

	Federal test obligation	State quarantine obligation
<i>Risk areas</i>	Travellers entering Germany who have been in a risk area within the last ten days, must be able to provide a negative test result within 48 hours of arrival. ³³⁶ Exempt are those who also do not need to fill in the <i>Einreiseanmeldung</i> ³³⁷ , cross-border workers and students – who return at least once a week to their resident state – and, in the case of stays of less than 72 hours, persons who visit first-degree relatives, spouses or partners, diplomats or police officers. ³³⁸	Regardless the mode of transport, persons who have been in a risk area or a high-incidence area in the last ten days who enter NRW are required to immediately undergo quarantine for ten days. However, this does not apply to persons who have had a negative test result – not older than 48 hours – at time of arrival or who undergo a test immediately after arrival. Generally exempt are persons who: are in transit; staying in NRW for less than 24 hours from

³³¹ Explanatory Memorandum of the *Wijziging van de Wet publieke gezondheid vanwege quarantaineplicht voor reizigers*.

³³² *Coronavirus-Einreiseverordnung* vom 13. Januar 2021 – CoronaEinreiseV, BAnz AT13.01.2021 V1.

³³³ For NRW in *Coronaeinreiseverordnung Nordrhein-Westfalen – CoronaEinrVO NRW*.

³³⁴ §2(1) CoronaEinreiseV.

³³⁵ §2(4) CoronaEinreiseV.

³³⁶ §3(1) CoronaEinreiseV.

³³⁷ §4(1)(1) CoronaEinreiseV, which are limited stay of maximum 24 hours, transit and transport.

³³⁸ §4(2) and (3) CoronaEinreiseV.



	Federal test obligation	State quarantine obligation
		the Netherlands, Belgium or Luxembourg or who have stayed the Netherlands, Belgium or Luxembourg for less than 24 hours; stay for less than 72 hours for reasons of visiting first-degree family or partners, transport or diplomats; and work or study across the border and return at least once per week. ³³⁹
High incidence areas	Travellers who have been in a high-incidence or VOC area need to bring a negative test result with them upon entry. The test result may not be older than 48 hours prior to arrival. ³⁴⁰ The only exemption is in the case those in transit.	Ibid.
VOC-areas	No exemptions are available. ³⁴¹	Irrespective of the mode of transport, persons entering NRW who have been in a VOC-area in the last ten days are required to undergo quarantine for fourteen days immediately upon entry. There are only limited exceptions; for persons in transit and transport workers or health professionals for a stay of maximum 72 hours. For cross-border students and workers to and from the neighbouring countries of the Netherlands, Belgium and Luxembourg, an exemption was added – only in the event that a physical presence is urgently needed. ³⁴²

For a long time, Belgium and the Netherlands were classified as risk areas. In these circumstances, the exemptions for risk areas do allow the daily life in the cross-border region to continue without burdens. However, as discussed, NRW took some preparatory actions to facilitate cross-border work and study without quarantine for the border region. In the period of 5 April 2021 to 30 May 2021, the Netherlands was classified as high-incidence area. As the case study on the Austrian-Czech-German border and the table above reveals, exemptions to the federal test obligation lapse. To limit the impact for regular cross-border commuters, the state of NRW issued a Decree (*Allgemeinverfügung*), stipulating that for cross-border commuters – who cross the border at least twice a week for work, study or family reasons – a negative test result was valid for 72, instead of 48, hours. By doing so, the burden was reduced to two tests per week. Still, day-to-day life in the border region was hampered,

³³⁹ §4 CoronaEinrVO NRW.

³⁴⁰ §3(2) and (3) CoronaEinreiseV.

³⁴¹ §4(2) and (3) CoronaEinreiseV.

³⁴² §1 up to §3 CoronaEinrVO NRW.



particularly for Dutch citizens, who were dependent on commercial test agencies.³⁴³ Despite the attempt to mitigate, the local Dutch media spoke of a ‘German wall’.³⁴⁴

Latest adjustments

As of 12 May 2021, all legal provisions on entry restrictions are covered by federal law via the renewed *Coronavirus-Einreiseverordnung*. Effectively, not a great deal changed, but exemptions were included for any quarantine and test obligations for fully vaccinated or from COVID-19-recovered travellers that had not been in a VOC-area in the last ten days.

Belgium

As in Germany, there is also an interplay between rules on federal level and the level of the districts and communities in Belgium. The Passenger Locator Form is federally regulated and is the digital form that has to be completed by all travellers 48 hours before entering Belgium from abroad.³⁴⁵ As with the German *Einreiseanmeldung*, certain exemptions are foreseen, such as for cross-border workers, students, co-parenting and persons travelling independently who have stayed abroad for less than 48 hours or will stay in Belgium for less than 48 hours.

Both the rules regarding test and quarantine obligations follow, to a great extent, the rules regarding the requirement to fill in the Passenger Locator Form and are determined by the *Overlegcomité*. There is a federal test obligation for travellers from red areas and who have been there for 48 hours or longer and want to stay in Belgium for 48 hours or longer.³⁴⁶ Here, a distinction is made between Belgian residents and non-residents. For non-residents, there is the obligation to have a negative test result *before* arrival. This test has to be taken within 72 hours before arrival and, if applicable, the carrier has to check whether this requirement has been met. For residents, there is no such a requirement, but they are required to undergo a test on the first day of quarantine after arrival. There is therefore a difference in the timing of the test for residents and non-residents, which can be explained because of the obligation of a Member State to accept its own inhabitants under EU law.³⁴⁷ Lastly, just like for the Passenger Locator Form, cross-border workers and students, transport personnel, transit passenger and persons visiting for less than 48 hours are exempted from the test obligation for non-residents.

The rules on quarantine are the responsibility of the districts and communities. In the *Overlegcomité*, it is agreed that travellers who have been in a red area for 48 hours or longer are regarded as a *hoogrisicocontact* (‘high-risk contact’).³⁴⁸ Following the general quarantine rules, one has to be in self-isolation for ten days, which can be reduced to seven days in case of a negative test result on day seven. The extent which this quarantine obligation can be enforced on legal grounds is debated by

³⁴³ German citizens have the right to get one rapid antigen test every week, the *BürgerTesting*.

³⁴⁴ Wiche, R., *Hoelang blijft Duitse ‘coronamuur’ voor Nederlanders nog in stand?*, De Limburger, 20 May 2021.

³⁴⁵ Article 21, §3 - §6 of Ministerieel besluit houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken.

³⁴⁶ Article 21 §7 of Ministerieel besluit houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken.

³⁴⁷ See also Section 3.

³⁴⁸ See Info-coronavirus.be, ‘Quarantaine en isolatie’, <https://www.info-coronavirus.be/nl/quarantaine-isolatie/>.



legal experts.³⁴⁹ As the legal competency is at local level, the quarantine cannot be enforced by the federal Ministerial Decree. However, the districts and communities often lack of sufficient legal regulations to genuinely impose quarantine at such a large scale. In Flanders, for example, there is a Decree³⁵⁰ that enables health officials to impose a quarantine obligation for a certain period for an individual if they pose a threat to public health, but it remains questionable whether this Decree can be used on a large scale. Leaving aside the question on enforcement and legality, the same exemptions hold as for the test obligation for non-residents. Therefore, work, study, visits of family or partners and short, minor daily activities across the border remains possible to and from Belgium without any formal obligations on administration, testing and quarantine.

Latest adjustments

As of 1 July 2021, the legal provision on entry restrictions has changed, with a greater emphasis on the travel advice issued for the Member State of departure.³⁵¹ Arrival from a green or orange zone is free from entry restrictions in terms of quarantine and tests. Travellers from red zones need to have a Digital COVID-19 Certificate and thus be fully vaccinated, have a recent negative PCR test or proof of COVID-19 recovery, in order to be exempt from quarantine. For Belgian citizens, it is possible to have a test after arrival and avoid quarantine.

4.1.3 The Effects in Border Regions and the Proportionality

The Dutch-Belgian-German border is characterised by a relatively high level of border crossings and cross-border cooperation. Yet, the COVID-19 related measures differ to a great extent, impacting the daily life in the region. The entry restriction measures also differ, where particular confusion arises from the details and exemptions. Indeed, concerning the exemptions, different indicators were used in the formulation and demarcation. The following table provides an overview.³⁵²

Indicator	NL	BE	NRW
Indicator distance	The PCR test obligation not applicable for the regional cross-border public transport (within 30km of the border)	-	-
Indicator time		Short stay: < 48 hours	Short stay: <24 hours
Indicator way of travel	No test obligation for independent transport (car,	Short-stay exemption for non-organised transport. Always	

³⁴⁹ See for example the researchers from KU Leuven in VRT Nieuws, 'Wordt corona het einde van de rechtsstaat?', <https://www.vrt.be/vrtnws/nl/2020/07/30/corona-het-einde-van-de-rechtsstaat/>.

³⁵⁰ Decreet van 21 november 2003 betreffende het preventieve gezondheidsbeleid.

³⁵¹ Info-coronavirus.be, *Overlegcomité – vrij en veilig reizen tijdens de zomer*, <https://www.info-coronavirus.be/nl/news/occ-0406/>.

³⁵² A simplified overview, based on Mertens, P. *Het ontlasten van de grensregio en terugdringen van reisebewegingen*, <https://www.maastrichtuniversity.nl/nl/blog/2021/02/item-blog-unfried-mertens-ontlasten-van-grensregio-en-terugdringen-reisebewegingen>.



	bike, etc.) and regional cross-border public transport	Passenger Locator Form for organised transport.	
Indicator territory	No quarantine for visits of family, parents, children in Belgium or Germany	All non-essential travel forbidden. Daily cross-border activities are essential for border regions	Short stay <24 hours in neighbouring countries
Indicator function	Exemption for cross-border workers and students	Exemption for cross-border commuters, students, co-parenting	Exemption for cross-border workers and students or stays of <72h for urgent family visits.

It was exactly because of this argument that the EGTC Meuse-Rhine Euregio decided to develop a webtool to inform its inhabitants on border crossings and the related rules.³⁵³ It was launched in November 2020³⁵⁴ and until March 2021 it had already answered half a million question from people. This can be seen as indicative of the confusion in the border region. Furthermore, the details of the national measures imply a degree of lack of coordination and non-recognition of policies. This is a partial cause of the confusion and also creates extra administrative burdens. An example can be found in the exemption based on the stay of a person across the border. While in Belgium and Germany this time-based exemption had been set at 48 and 24 hours respectively for quite a while already, the Netherlands decided on a different approach when introducing a legal framework on 1 June 2021, based on a time-based exemption of 12 hours. While the Council Recommendation urges neighbouring Member States to seek consultation and coordination³⁵⁵, and despite the trilateral Cross-border Taskforce Corona, the differing national rules and regulations evidently do not demonstrate this. Here, a short reference should also be made to the differences between national containment measures battling COVID-19. While these unilateral measures are not aimed at restricting cross-border mobility, they can effectively impact cross-border mobility and everyday life in border regions.³⁵⁶

Nevertheless, the time-based exemptions in entry restrictions in particular facilitated cross-border mobility in daily life in the border region. Given the general containment measures and the call to stay at home as much as possible, the so-called '*kleinen Grenzverkehr*'³⁵⁷ remained possible without obligations. As previously stated, the cross-border impact of the Belgian ban on non-essential travel was also somewhat limited due to the designation of cross-border mobility in the region as essential and the exceptions in the entry restriction regulations. While some confusion arose immediately after introduction, it soon became clear that the border crossings in light of day-to-day activities, including shopping or leisure just across the border are allowed as long as they are permitted in their own country. At the time of the case study, it was actually the Netherlands that was short on exemptions,

³⁵³ Crossing-borders, <https://crossing-borders.euregio-mr.info/nl/>.

³⁵⁴ EMR, 'Euregionales infoformular zum Grenzuebertitt geht online', <https://euregio-mr.info/de/aktuelles/meldungen/Euregionales-Infoformular-zum-Grenzuebertritt-geht-online.php>.

³⁵⁵ Point 6 Council Recommendation.

³⁵⁶ See also for example Unfried, M. & S. Marks, *Cross-border Impact Assessment 2020 - Dossier 1: The impact of the Coronacrisis on border regions (TEIN)* — Regional report Euregio Meuse-Rhine (EMR). Maastricht: ITEM, 2020. It can also induce more cross-border movements.

³⁵⁷ Small cross-border traffic, as named by NRW.



while the policy was merely via recommendations rather than legal obligations and thus not binding. More disturbing was the reclassification of the Netherlands by Germany as a high-incidence area, resulting in the elimination of the exemptions on testing requirements (with the exception of transport). Within the legal space of federal rules, however, NRW managed to adequately introduce some relief through the *Allgemeinverfügung*, restoring the testing frequency to an acceptable level for essential travel to and from the Netherlands in a limited sense. In line with point 19b of the Council Recommendation, the testing frequency was proportionate, as it effectively resulted in a maximum of two tests per week. Yet the scope was limited to cross-border workers, students and caregivers.

On proportionality, a certain contradiction can be seen. The Council Recommendation states that there may not be more generous rules to travel to and from a neighbouring state than to and from other Member States, on grounds of non-discrimination. At the same time, it is also recommended to pay particular attention to the specificities of cross-border regions and to bring back testing requirements to a proportionate level if implemented. The introduction of policies, particularly for neighbouring border regions, was relatively well-used in the EMR. Next to the *Allgemeinverfügung*, the German exemption for *kleinen Grenzverkehr* was also limited to neighbouring countries. The Netherlands also only provided exemptions for cross-border families and partners with Germany and Belgium at time of the case study. From a non-discrimination perspective, it can be argued that limiting the scope to neighbouring countries is disproportionate, particularly concerning family reunification rights. However, given the general constraints on mobility, a time-based exemption limited to neighbouring countries is likely to safeguard regional mobility while limiting other non-essential travel.

Of course, the Belgian ban on non-essential travel was particularly disproportionate, as other, lower means are available. The ban was introduced to limit travel to and from Belgium in terms of tourism and leisure³⁵⁸, which could also be achieved through the applicable entry restrictions and by limiting its exemptions. Furthermore, Belgium, the Netherlands and Germany all declared their neighbouring countries to be risk area. Nevertheless, in the colour codes used in the travel advice of Belgium and the Netherlands, there appears to be no further classification in the 'risk area' concept in both the travel advice or the imposing entry restrictions. Only Germany (NRW) makes a further distinction in the risk classification of regions through high-incidence and VOC areas. Yet the classification of a high-incidence area does directly correspond with the dark red colour code of the Council Recommendation, while dropping of exemptions to the entry restrictions do resemble the recommendations under point 16a and 17a of the Council Recommendation.³⁵⁹

Apart from the Belgian Passenger Locator Form³⁶⁰, all measures are connected to the classification as a risk area. In Section 3, it is concluded that blanket measures are not proportionate and the regional situation on COVID-19 in other Member States should be taken into account, distinguishing different risk profiles as in the ECDC epidemiological map. Particularly in absence of sufficient exemptions, the general application of entry restrictions to all risk areas and declaring all Member States as risk areas,

³⁵⁸ Info-coronavirus.be, *Overlegcomité beslist tijdelijk reisverbod en uitbreiding isolatie*, <https://www.info-coronavirus.be/nl/news/occ-22-01/>.

³⁵⁹ While Germany maintains >200 cases per 100 000 inhabitants per seven days, it is agreed in the Council Recommendation upon >500 cases per 100 000 inhabitants per 14 days.

³⁶⁰ Which is proportionate and even should be encouraged following the ECDC advice, see Section 3.2.



could effectively be equivalent to a travel ban.³⁶¹ Nevertheless, Belgium and particularly the Netherlands were missing this risk-based approach with tailored measures to the risk of a region.³⁶² It was later, as of 1 July 2021, that more targeted entry restrictions were introduced.

Last, a question mark can be placed on the reflective nature of the measures, travel advice and entry restrictions. While qualitative indicators are used next to quantitative indicators, a qualitative indicator such as ‘the local epidemiological situation compared to the situation abroad’ is not explicitly used.³⁶³ Nevertheless, the Council Recommendation urges doing so and, from the perspective of proportionality and scientific evidence, a balance should be made between the gain in public health against - among others - free mobility rights and social and economic costs. Given this, a quantitative comparison and qualitative consideration should be made as to whether travelling abroad really imposes a greater risk to public health than travelling internally. This assessment was clearly lacking in the period where the Netherlands was classified as high incidence area by Germany and was dark red on the ECDC epidemiological map, yet still continued to require tests and strongly recommend quarantine from travellers from abroad.³⁶⁴

4.2 The Nordic Countries: Facilitation Measures for Cross-border Workers

The COVID-19 pandemic marked a major setback for free movement in the Nordic region. The social, economic and political impact of border closures has been significant in the border areas of Denmark, Finland, Norway and Sweden.³⁶⁵ The introduction of border controls and variety of measures adopted in light of COVID-19 has challenged collaboration and integration in these regions. In particular, it has affected the areas between Denmark and Sweden, Finland and Sweden, Finland and Norway and Norway and Sweden, where most daily commuting occurs.³⁶⁶

In June 2020, a study was conducted by the Border Barriers Council under the Nordic Council of Ministers, which aims to remove obstacles to free movement in the Nordic countries. It was reported that the differing measures between countries were causing issues for 82,5 percent of persons living in cross-border regions. In an updated research conducted in December 2020, some 80 percent of persons reported that the travel measures had affected their ability to move across borders. In addition, most persons reported that the government had taken insufficient action to promote movement in these areas, and that they experienced additional concerns over country-specific restrictions related to their work or family members living on the other side of the border. Around 60 percent of respondents reported quarantine rules as also having been problematic.

³⁶¹ As argued in OMT, ‘Advies n.a.v. 96^e OMT’, attachment to Kamerstukken II 2021/21, 25295, nr. 912. See also Section 4.1.1.

³⁶² It can be referred to as an “all or nothing” approach.

³⁶³ At least, it is not published and communicated publicly.

³⁶⁴ In fact, during this period, the legislative proposal for mandatory quarantine periods and testing for incoming travellers was prepared.

³⁶⁵ Nordregio, ‘Closed borders and divided communities: Status report and lessons from COVID-19 in cross-border areas’ 2021.

³⁶⁶ Nordic Council Report, ‘Raja-alueet kärsijöinä – yhdeksän kymmenestä kokee lisähuolta koronarajoituksista’ 2021.



This case study focuses on the border areas of Finland, Sweden, Norway and Denmark, analysing how the movement of cross-border workers was facilitated during the COVID-19 crisis, more specifically during the period 1 January 2021 - 31 March 2021. It will also take a brief look at the situation at the Finnish-Estonian border, which will provide an interesting insight into whether free movement has been better facilitated within the Nordic cooperation than with a neighbouring Baltic state.

4.2.1 Travel Bans

Despite the reintroduction of border controls, there have been attempts in the Nordic countries to facilitate free movement in cross-border regions. Although Denmark imposed a general travel ban, exceptions were provided for cross-border regions. Danish and foreign nationals habitually resident in a border region could enter, regardless of the purpose of their travel and without a negative test result. Regionally, different rules were imposed. For instance, a test obligation was imposed for foreigners habitually resident in the border region in southern and western Sweden. Generally, a test obligation was also enforced after arrival in Denmark. This was not required from cross-border commuters staying in Denmark for less than 24 hours.

Sweden restricted entry for those arriving without a negative test result. A number of categories of persons were exempt from the test obligation, including Swedish nationals and residents, but not specifically persons living in cross-border regions. Instead, those who repeatedly crossed the border to work in Sweden or another State were subject to testing within a week prior to arrival. Different rules were applied to those travelling from Norway and Denmark, who were refused entry regardless of a negative test result. As an exception, Swedish citizens, people who live or work in Sweden, family and many other categories were permitted to enter. Certain persons were still obliged to provide a negative test taken within the last 48 hours before entry. As for cross-border commuters from other countries, those travelling from Norway and Denmark could conduct tests weekly rather than within the last 48 hours. There was therefore an attempt to facilitate those persons living in cross-border regions, but Norway and Denmark were subject to stricter rules on the categories of persons who were permitted to enter Sweden.

In Norway, a general travel ban was also in place. On 29 January 2021, the Norwegian border was closed to cross-border commuters. Following the increased restrictions, nearly all workers from Sweden and Finland who travelled daily into Norway were unable to come to work. The restrictions also affected Danish persons, who were refused entry due to the strict border measures. The only exceptions provided were for frontier workers who were either Norwegian citizens or who worked in socially critical sectors, transport of goods or healthcare. The restrictions entailed considerable consequences, particularly for those who lost their income due to the measures. It is estimated that the situation affected around 3 000 people.³⁶⁷ On 10 March 2021, Norway announced that cross-border workers who were affected by the border closure would be eligible for a new compensation scheme.

³⁶⁷ Swedish Government, 'Solution for daily commuters from Sweden and Finland with a strict testing and control regime', <https://www.regjeringen.no/en/aktuelt/solution-for-daily-commuters-from-sweden-and-finland-with-a-strict-testing-and-control-regime/id2836464/>.



From 1 March 2021 onwards, daily cross-border workers from Sweden and Finland were permitted to enter Norway under a strict test-and-control regime. The commuters were required to enter Norway at specific border-crossing points. Furthermore, in order to reduce the risk for this group in terms of infection control, they were subject to testing every seven days. Upon entry, the commuter had to present proof of residence in Sweden or Finland. A certificate from the Norwegian employer was also required, confirming that the individual was a daily commuter. Each worker was also obliged to enrol in an entry registration system before each entry.

In Finland, cross-border regions were subject to exceptions that were terminated on 27 January 2021. Prior to this date, travel in the border areas between Finland and Sweden and Finland and Norway was permissible. Due to higher infection rates following the termination of exceptions, only absolutely essential commuting was permitted.

The Finnish Ministry of Economic Affairs and Employment maintained a list of tasks that were considered essential from the perspective of security of supply and the functioning of society. Only return traffic to Finland, transit traffic, commuting or travel for other essential reasons was permissible. Entry required a separate form from the employer and entry was only permitted at specific crossing points. Without a border-crossing permit, crossing the border through other areas was not possible (with the exception on the border rivers between Finland and Sweden and Finland and Norway, where border crossing on ice was permissible). Exceptions were provided for the Sámi³⁶⁸ and those pursuing the Sámi economy and culture, who were also allowed to cross the land border and border rivers between Finland and Sweden and Finland and Norway from other areas than through the designated border crossing points. However, this did not entitle the Sámi to cross the border in a motor vehicle, with the exception of off-road vehicles.

Many challenges remained as a result of the border closures and restrictions. The Swedish and Norwegian frontier workers had a travel ban to Finland, and only those with essential reasons were permitted to enter. The Norwegian borders were neither open to all commuting. Still, at the end of March 2021, weekly travellers from Finland and Sweden, as well as Danish frontier workers, were not allowed to travel to their work.³⁶⁹

4.2.2 Requirements on Quarantine

In Denmark, cross-border commuters were exempt from isolation requirements. Permanent residents in border regions were also exempt from quarantine under specific purposes of travel. Exemption from isolation was also provided for Danish nationals and foreigners with permanent residence in Denmark who came into the country after working or providing a service in a border region, if they provided a negative test taken within 72 hours before arrival.

³⁶⁸ Indigenous Finno-Ugric people inhabiting the cultural region Sápmi, encompassing northern parts of Norway, Sweden, Finland and the Kola Peninsula of Russia.

³⁶⁹ Nordic co-operation, 'Rajaneuvosto: Ilohduttavaa että Norja avaa rajat rajatyöntekijöille', <https://www.norden.org/fi/news/rajaesteneuvosto-ilahduttavaa-etta-norja-avaa-rajat-rajatyontekijoille>.



In Sweden, a general recommendation was put in place to self-quarantine and test after arrival. However, cross-border commuters - including students, professional drivers and other workers who regularly cross international borders - did not have to isolate if they were tested regularly, i.e. at least once a week. In the event that testing was not undertaken on a regular basis, the person was subject to double testing: first upon arrival and then five days after arrival. Reindeer herders, mountain rescuers, frontier-zone workers and children who alternate living with parents in different countries were exempt from the recommendations to self-quarantine and be tested twice. They also did not need to be tested regularly.

In Norway, as a general rule, quarantine was required to be undertaken in a designated quarantine hotel. Persons arriving in Norway to carry out essential work or contract assignments and who were able to prove that their employer had placed pre-approved accommodation at their disposal were not required to stay in a quarantine hotel. Commuters from Finland and Sweden were exempt from quarantine if they were tested every seven days.

In Finland, self-isolation for 14 days was recommended. Regular cross-border commuters between Finland and Norway and Finland and Sweden did not need to quarantine if they had tested negative within the last seven days.

4.2.3 The Effect and Proportionality of the Measures

Cross-border commuters in the Nordic Region suffered disproportionately from differences in country restrictions and border closures. The study performed by the Nordic Council shows a pressing need for a joint Nordic plan. The issues that were reported related to poorer work opportunities for entrepreneurs, issues with family reunions, differential treatment (for instance, Swedish persons needed to provide a negative test result to enter Norway while Norwegians were exempt), unclear information, a lack of communication between the States, long waiting times at the border controls and implications for tax and social security for teleworkers.³⁷⁰ The closure of borders also revealed a structural problem of Nordic cooperation: the lack of official cross-border statistics.³⁷¹ The Nordic Council called for politicians to give assurances that the Nordic countries will manage the crisis better, in order to avoid situations where individuals are discouraged from seeking work across the border due to the uncertainties of the effect of the travel measures on their work or family life.³⁷² It was also noted that the failure to make use of existing collaborative platforms and the lack of communication demonstrated institutional weakness at Nordic level. The measures at the top/national level weakened the unique position of certain cross-border areas, where the authority of the local municipalities was undermined by the national government by introducing border closures.³⁷³

³⁷⁰ Nordic Council, 'Closed borders and divided communities: Status report and lessons from COVID-19 in cross-border areas' 2021.

³⁷¹ Nordic co-operation, 'How to solve the lack of cross-border statistics', <https://www.norden.org/fi/uutinen/ratkaisuja-rajat-ylittavien-tilastotietojen-puutteeseen>.

³⁷² Nordic co-operation, 'Korona teettää rajaneuvostolla lisätyötä myös vuonna 2021', <https://www.norden.org/fi/news/korona-teettaa-rajaneuvostolla-lisatyota-myos-vuonna-2021>.

³⁷³ Nordic Council, 'Closed borders and divided communities: Status report and lessons from COVID-19 in cross-border areas' 2021.



As the Schengen Borders Code (SBC) states, in general border closures are prohibited and the Member States are obliged to notify the European Commission if they are planning to reintroduce temporary border controls. By March 2021, in context of COVID-19, such notification had been made by Finland, Norway and Denmark.³⁷⁴ Pursuant to Articles 25 and 29 of the SBC, only Finland and Norway have supplied the list of internal border crossing points to the Commission.

Finland, Sweden and Denmark were some of the countries that the European Commission addressed in their letter concerning travel restrictions on February 2021. The Commission urged them to adhere to the travel restriction recommendations issued by the European Council. On 4 March 2021, the Finnish Ministry of Interior responded that the restrictions on the freedom of movement in place were necessary to combat the further spread of COVID-19 and its new variants. It was argued that Finland is in a special situation compared to other countries, where the overall level of infections has remained low throughout the pandemic and thus these measures were necessary. The aim was to safeguard public health and every individual's right to life, and the restrictions respected the human and fundamental rights as enshrined in the Constitution. Furthermore, the Government had submitted a proposal for improving health security at the borders with the aim of transitioning to more targeted measures in line with the recommendations of the Council.³⁷⁵

In all Nordic countries examined in this report, with the exception of Sweden, a travel ban – the strongest form of restriction on free movement – was imposed. The countries adopted the measures based on the same reasoning that Finland had used in their response to the Commission: to combat the rising infection levels and to prevent a new variant of COVID-19 virus entering the country or being spread to other countries. However, as discussed under Section 3, border closures are relatively inefficient in containing the virus and should be discouraged. As the Nordic countries applied other measures such as quarantine and testing obligations alongside the travel bans, it can be concluded that such a ban goes beyond what is necessary and cannot be considered proportionate.

The situation in Finland is, however, slightly different to those in the other countries. As stated in its response, the travel restrictions were justified by highlighting the country's strong epidemiological situation. In comparison to the other Nordic countries, Finland has the fewest confirmed cases of COVID-19.³⁷⁶ In these situations, as held by the ECDC, travel measures may prove useful. However, it may again be recalled that entry bans are not scientifically proven as efficient in preventing contamination, and that such measures should not be applied as a blanket policy but rather should focus on regional epidemiological situations. This is also true from the perspective of the precautionary principle – reducing the risk of virus variants should be pursued through less restrictive alternative measures. Therefore, while the travel bans may not be deemed appropriate, the measures of

³⁷⁴ 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.

³⁷⁵ Ministry of Interior, 'Entry restrictions imposed by Finland currently necessary to slow down spread of pandemic', https://valtioneuvosto.fi/-/1410869/suomen-asetamat-maahantulon-rajoitukset-ovat-talla-hetkella-valtamattomia-pandemian-leviamisen-hidastamiseksi?languageld=en_US.

³⁷⁶ WHO Coronavirus (COVID-19) Dashboard, <https://covid19.who.int/>.



quarantine and testing in Finland may be necessary and effective, following the reasoning of WHO and ECDC.

Overall, the heaviest forms of restrictions on free movement in these Nordic countries were imposed by Norway. Alongside the travel ban, there were requirements for mandatory testing, specific border stations with limited opening hours, entry registration, quarantine and quarantine hotels and required certificates of residence or employment. For a period from 29 January – 1 March 2021, persons were not able to enter at all, even where these requirements would have been met. By the end of March 2021, certain cross-border commuters from Sweden and Finland were exempt from the testing obligation and quarantine if they were tested every seven days. Although the authorities provided exceptions for categories of cross-border persons, there were frontier workers who crossed the border weekly or Danish persons who did not fall under these exceptions.

While Sweden and Finland only recommended isolation following arrival, Norway imposed an obligation to quarantine that meant that some travellers could only isolate in quarantine hotels. Those travelling for necessary reasons could quarantine at home, whereas those on ‘unnecessary travel’ were required to stay in quarantine hotels. This measure was applied beyond what was necessary to protect public health, as – travellers were subject to different quarantine requirements even when travelling from the same country of origin. This was also concluded to be disproportionate in the EFTA case³⁷⁷: groups with the same risk profile should be subject to similar measures. Thus, in their testing and quarantine measures, Norway failed to meet the requirements of non-discrimination. Furthermore, following Article 40(1)(c) IHR 2005, it can be concluded that in order to consider a national quarantine measure proportionate, they must be provided free of charge. In the light of this, the obligations by Norway to quarantine in a dedicated quarantine hotel³⁷⁸ may not be considered proportionate.

Denmark, on the other hand, applied measures on quarantine and testing more in line with the recommendations of the WHO, the ECDC and, as concluded in the case OVG NRW Ibiza, based on the regional epidemiological situation of the traveller’s origin. It was also recommended by the Nordic Council that, instead of applying blanket policies, approaches should be tailored to protect the complex social and economic links that exist in border areas. The sudden border closures threaten the integration achieved in the border communities of the Nordic Region and might further affect the dynamics of these Nordic communities or European society in general.³⁷⁹

Nevertheless, cross-border collaboration continued in spite of the challenging situation. Various measures were taken to improve the situation in the border regions, by providing exceptions to the travel restrictions, as also advised by the Council Recommendation. For a more resilient future,

³⁷⁷ See Section 3.4.1.

³⁷⁸ “People staying at a quarantine hotel must pay a set charge of NOK 500 per night for private individuals and NOK 500 per night for employers.” Norwegian Government, ‘The coronavirus situation: Questions and answers about entry to Norway’ <https://www.regjeringen.no/en/topics/koronavirus-covid-19/Questions-and-answers-coronavirus-situation-in-Norway/the-coronavirus-situation-questions-and-answers-aboutentering-norway/id2703365/?expand=factbox2784931>.

³⁷⁹ Nordic Council, ‘Closed borders and divided communities: Status report and lessons from COVID-19 in cross-border areas’ 2021.



strengthening cross-border cooperation and trust between national authorities is now more important than ever, as stated in the Nordic Council report:

“Violating freedom of movement sets a dangerous precedent in a region that is meant to be the world’s most integrated. Failing to guarantee this basic principle will have direct consequences, namely in disintegrating existing social and business ties in border regions.”³⁸⁰

4.2.4 Border between Finland and Estonia: a comparison between the Nordic and Baltic approach

Although this case study on Nordic countries focused on the travel restrictions between the border areas of Finland, Sweden, Norway and Denmark, it is interesting to evaluate whether the facilitation of measures has been stronger in the Nordic cooperation than with a Baltic neighbour. Therefore, this section will briefly analyse the measures taken at the Finnish and Estonian border.

Finland and Estonia have a long-lasting and close relationship. In form of bilateral cooperation, the countries work together in various sectors, ensuring the free movement of people and goods. Alongside strong trade and economic relations, the countries share a common cultural background. Finland and Estonia are separated by the *Gulf of Finland* (Baltic sea), therefore travel between the two countries mostly occurs by ship. Annually, there are around 9 million border crossings between the Finnish and Estonian borders. Estimates suggest that around 8 800 Finns live in Estonia while 80 000 Estonians live in Finland.³⁸¹

Estonian approach: Exceptions for neighbouring countries Latvia, Lithuania and Finland

Estonia applied similar rules for Finland and its other neighbouring countries of Latvia and Lithuania. Citizens of Finland, Latvia, Lithuania and holders of a residence permit or right of residence of these countries were permitted to enter Estonia with no obligation to self-isolate if the person held a negative COVID-19 test conducted 72 hours prior to crossing the Estonian border. However, this exception only applied if the person had not been travelled outside Baltic States or Finland within the previous two weeks. Furthermore, if an individual arrived from Latvia, Lithuania or Finland to Estonia to work, study, to receive healthcare or for unavoidable family event or transit, they were not subject to the testing or self-isolation requirements.³⁸²

Finnish approach on Estonia: No exceptions

Travellers from Estonia were subject to internal border controls in Finland. From 23 February 2021 onwards, entry required a negative COVID-19 test conducted 72 hours before the travel took place.

³⁸⁰ Nordic Council, ‘Closed borders and divided communities: Status report and lessons from COVID-19 in cross-border areas’ 2021.

³⁸¹ Embassy of Finland in Tallin, ‘Bilateral relations’ <https://finlandabroad.fi/web/est/kahtdenvaliset-suhteet>.

³⁸² Information provided by Kristi Joamets, PhD Department of Law, School of Business and Governance, Tallinn University of Technology.



Ship passengers were also asked to test upon their arrival in Finland at the coronavirus testing points set up in the terminals.³⁸³

As discussed above, Finland provided exceptions for border regions with Sweden and Norway, however similar exceptions were not provided for Estonia. Return to Finland was permitted overall for Finnish citizens and their family members as well as those resident in Finland. Therefore, Finnish persons living in Estonia, or Estonians residing in Finland, were permitted to cross the border to Finland. Those not falling to these categories were required to present a valid reason for their travel, for example, health personnel or those working in a field essential for the functioning of society were permitted.³⁸⁴

Thus, during the time period covered in this case study, the Finnish-Estonian border did not enjoy special exceptions on entry restrictions, testing or quarantine obligations, but followed the same travel restrictions as imposed on other Schengen Area countries. In comparison, Estonia has been more lenient on those arriving from Finland, providing exceptions for self-isolation and testing requirements.

The stricter approach of Finland has had a negative impact on travellers from Estonia. According to the Estonian Prime Minister, the cross-border restrictions have been challenging since the beginning of 2021, affecting labour migration and separating family members from each other. In her view, the restrictions are neither proportionate nor justified in light of the Council Recommendations or the Schengen Borders Code. The Prime Minister called for a solution, also in the light of the long-lasting good relations between the two countries, which were being publicly questioned.³⁸⁵

Although this case study focuses on the time period of 1 January 2021 - 31 March 2021, it is worth noting that the situation between Finland and Estonia deteriorated when, on 3 June 2021, Finland decided to permit work-related travel from the EU and Schengen Area countries. However, this relaxation of the measures only applied to air traffic. For other means of travel, entry on the basis of employment was still limited to what was necessary and essential for the functioning of the society. Exceptions were provided for the border communities of Finland and Norway.³⁸⁶ As previously mentioned, travel between Finland and Estonia primarily relies on travel by ship. Therefore, those travelling from Estonia continued to be in an unfortunate situation subject specifically to more-restrictive measures. For these reasons, seven Estonian MEPs called for action from the European Commission against Finland for the excessive restriction on the principle of free movement.³⁸⁷

³⁸³ Helsingin kaupunki, 'Satamatarkastukset' https://www.hel.fi/uutiset/fi/sosiaali-ja-terveysvirasto/satamatarkastukset_27_1?&pd.

³⁸⁴ Finnish border guard, 'Rajaliikenne' <https://web.archive.org/web/20210223153844/https://raja.fi/rajaliikenne-ohjeet-korona>.

³⁸⁵ Estonian Government Communications Office, 'Prime Minister Kaja Kallas at a meeting with the Finnish Ambassador: travel restrictions are disproportionate' <https://valitsus.ee/uudised/peaminister-kaja-kallas-kohtumisel-soome-suursaadikuga-reisipiirangud-ei-ole>.

³⁸⁶ Finnish government, 'Maahantulon rajoituksia jatketaan 27.6 asti' <https://valtioneuvosto.fi/-/1410869/maahantulon-rajoituksia-jatketaan-27.6.-asti>.

³⁸⁷ YLE, 'Virolaismepit ovat kannelleet EU-komissiolle Suomen maahantulorajoituksista: "Suomen toimet eivät ole enää kohtuullisia tai oikeutettuja"' <https://yle.fi/uutiset/3-11975143>.



Therefore, facilitation of movement during the COVID-19 crisis has mostly been focused on the time period of this case study from the Finnish perspective on the land border regions of Finland and Sweden and Finland and Norway. It can be concluded that although the Finnish travel measures can be seen as restrictive, the unique position of the Nordic border regions have been considered as providing exceptions to the travel restrictions. By comparison, their Baltic neighbouring country of Estonia has not enjoyed exceptions and was (also practically) subject to more restrictive approach.

4.3 The German-Czech-Austrian Border: Closed Borders & Waiting Lines

Another example of a border region where border controls were reinstated causing considerable effects to the cross-border regions to which they applied was the Germany-Czech-Austrian border region. This case study focuses primarily on the situation in this border region border in early 2021. More specifically, both Germany and Austria reinstated border controls with the Czech Republic during this time.³⁸⁸ While Germany reinstated border controls until 14 April, Austria did so until the end of May 2021, with each of the Member States making no mention of authorised border crossing points.³⁸⁹ In fact, Austria and Germany had reinstated border controls with the Czech Republic since January and February of 2021, respectively.³⁹⁰

Germany's reinstatement of border controls with Austria and the Czech Republic followed the regions being designated as virus variants of concern (VOC) areas (*Virusvarianten-Gebieten*). As a general rule, Germany maintains a travel warning for all tourist travel from areas considered as risk areas by the German federal government.³⁹¹ The German Health Ministry, together with the foreign office and Ministry for the Interior, establish those areas that must be designated as VOC areas depending on the frequency of 'new and dangerous' mutations of the virus.³⁹² The *Robert Koch Institut* subsequently keeps track of a list of current VOC areas.³⁹³ Austria and the Czech Republic remained VOC areas until the end of March 2021 (as well as being considered a risk area and high-risk area, respectively).³⁹⁴

The designation of a VOC area can be said to follow on from an area being designated as a risk area and is paired with a ban on carriage (*Beförderungsverbot*) and a travel warning for those regions.³⁹⁵

³⁸⁸ 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.

³⁸⁹ European Commission, List of border crossing points after reintroduction of internal border control pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, Version 11 March 2021 and Version of 6 April 2021.

³⁹⁰ European Commission, Member States' notifications of the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 18 et seq. of the Schengen Borders Code.

³⁹¹ See for example, Auswärtiges Amt, 'Reisewarnungen anlässlich der COVID-19-Pandemie', https://www.auswaertiges-amt.de/de/ReiseUndSicherheit/covid-19/2296762#content_0.

³⁹² Bundesministerium für Gesundheit, 'Coronavirus-Schutzverordnung – CoronaSchV', <https://www.bundesgesundheitsministerium.de/service/gesetze-und-verordnungen/guv-19-lp/coronaschv.html>.

³⁹³ See Robert Koch Institut, 'Informationen zur Ausweisung internationaler Risikogebiete durch das Auswärtige Amt, BMG und BMI', https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Risikogebiete_neu.html.

³⁹⁴ See Robert Koch Institut, 'Information on the designation of international risk areas', https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Transport/Archiv_Risikogebiete/Risikogebiete_2021-03-26_en.pdf?blob=publicationFile.

³⁹⁵ For more detailed information on the designation of virus mutation areas see the case study on the Euregio Meuse-Rhine in Section 4.1 of this report. See also § 1 Verordnung zum Schutz vor einreisebedingten Infektionsgefahren in Bezug auf neuartige Mutationen des Coronavirus SARS-CoV-2 nach Feststellung einer epidemischen Lage von nationaler Tragweite durch den Deutschen Bundestag (Coronavirus-Schutzverordnung – CoronaSchV).



Exemptions to the restricted access for persons travelling from VOC areas exist for German citizens, residents, persons transiting through Germany via airports, certain personnel involved in the transport of goods, health personnel, persons travelling for urgent humanitarian grounds (e.g. family visits concerning death and birth, medical treatment, danger to life) and persons traveling on behalf of international agencies (e.g. EURATOM, UN).³⁹⁶ Although individuals within these categories may therefore travel from a VOC area, the exceptional reason for their travel must be credible and must be substantiated when entering the country. This restricted entry from VOC areas applied until 12 May 2021.³⁹⁷ Before that date, exceptions (i.e. no testing requirements) could apply to certain persons travelling from high-risk areas into Germany (e.g. in the case of frontier workers staying in Germany for less than 72 hours).³⁹⁸ Nevertheless, no such exception applied in the event that a region was considered a VOC area (i.e. a negative test was always required).³⁹⁹ This means that persons in cross-border regions between Germany and Austria (Tirol region) and the Czech Republic always needed of a negative COVID-19 test at the time those regions were considered VOC areas – even when only staying in Germany for a relatively short period of time.

This testing requirement was likely to have considerable effects on mobility in cross-border regions, since tests would have to be repeated frequently (due to the requirement for them not to be older than 48 hours).⁴⁰⁰ Furthermore, the costs connected to the tests must be taken into account. Indeed, the practice appeared to be problematic in light of the amended Council Recommendation, which indicated that persons living in border regions should not be required to undergo a test or quarantine/self-isolation.⁴⁰¹ In the event that a testing requirement is introduced, the frequency thereof should be proportionate. Considering that the test is not allowed to be over 48 hours old, persons traveling in the German border regions with Austria and the Czech Republic would have to present several tests a week (in case of, for example, cross-border workers). In light of proportionality, such a requirement is to be considered highly questionable.

Looking more specifically at the reinstated border controls with Austria raises a question over the fulfilment of procedural requirements under the Schengen Borders Code and the need for notification. Indeed, it may be recalled that all plans to reintroduce border controls should be notified to the

³⁹⁶ § 1(2)(1-7) Coronavirus-Schutzverordnung – CoronaSchV. Bundesministerium des Innern, für Bau und Heimat, ‚Welche Ausnahmen vom Beförderungsverbot und den Einreisebeschränkungen- aus Virusvarianten-Gebieten gibt es?‘, <https://www.bmi.bund.de/SharedDocs/faqs/DE/themen/bevoelkerungsschutz/coronavirus/reisebeschraenkungen-grenzkontrollen/II-reisebeschraenkungen-uer-einreise-aus-virusvarianten-gebieten/welche-ausnahmen-vom-befoerungsverbot-und-den-einreisebeschraenkungen-aus-virusvarianten-gebieten-gibt-es.html>.

³⁹⁷ Bundesregierung.de, ‚Einreisebeschränkungen aus Virusvarianten-Gebieten verlängert‘,

<https://www.bundesregierung.de/breg-de/themen/coronavirus/coronavirus-schutzverordnung-1846822>.

³⁹⁸ §4(2) Verordnung zum Schutz vor einreisebedingten Infektionsgefahren in Bezug auf das Coronavirus SARS-CoV-2 nach Feststellung einer epidemischen Lage von nationaler Tragweite durch den Deutschen Bundestag (Corona-Einreiseverordnung – CoronaEinreiseV) – v. 13. Januar 2021.

³⁹⁹ §4(3) Corona-Einreiseverordnung – CoronaEinreiseV – v. 13. Januar 2021.

⁴⁰⁰ See § 3(1) Corona-Einreiseverordnung – CoronaEinreiseV – v. 13. Januar 2021.

⁴⁰¹ Point 19b Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L337/3) as amended by Council Recommendation (EU) 2021/119 of 1 February 2021 amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 361).



European Commission and the other Member States.⁴⁰² Contrary to the border controls reinstated at the German-Czech border, the Austrian border controls appear not to have been communicated to the Commission.⁴⁰³ Meanwhile, when Germany notified its intention to impose border controls on the air border with Austria, no mention was made of closing land borders. In contrast, several news outlets reported Germany closing the border and reinstating border controls with Austria in February 2021.⁴⁰⁴

This closure of borders was considered particularly problematic, since it affected one of the busiest truck routes between Germany and Austria's Tirol region.⁴⁰⁵ Truck drivers were still allowed to cross the border with a negative test not older than 48 hours and facilities were set up to ensure testing could also take place at the border crossing. Nevertheless, when these restrictions were first instated, the renewed controls led to traffic congestions on an important trade route. At EU and national levels, concerns were raised over the effect of the measure on the free movement of goods.⁴⁰⁶ Concerns were also voiced over the German-Czech border, where over 20 000 cross-border workers were significantly affected by the new border controls.⁴⁰⁷

Apart from reinstating border controls, Germany has adopted a different approach to limiting the spread of the COVID-19 virus in border regions. On 19 March 2021, the German Chancellor and leaders of the *Bundesländer* reached a decision over the distribution of 580 000 additional Biotech/Pfizer vaccines allotted to Germany. More specifically, an agreement was reached to distribute the additional doses of the vaccine to German border regions to limit the spread of the virus.⁴⁰⁸ The German-Czech border region is mentioned as a region benefitting from additional vaccines due to the high incidence rate in the Czech Republic (seven-day incidence rate of 700 per 100 000 inhabitants). Therefore, the Bundesländer of Bavaria, Saxony and Thuringia would receive 100 000, 100 000 and 30 000 additional vaccine doses respectively.

In Austria, the Austrian-Czech border could only be crossed via designated crossing points.⁴⁰⁹ The country maintained several requirements concerning testing, registrations and quarantine for

⁴⁰² See Articles 27(1) 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), [2016] OJ L 77/1.

⁴⁰³ See, for example, number 270 European Commission, Member States' notifications of the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 18 et seq. of the Schengen Borders Code.

⁴⁰⁴ See for example Euronews, 'EU concerned as Germany partially closes border with Austria and Czech Republic', <https://www.euronews.com/2021/02/16/eu-concerned-as-germany-partially-closes-border-with-austria-and-czech-republic>; DW, 'Coronavirus: Germany mostly shuts Czech, Austria land borders', <https://www.dw.com/en/coronavirus-germany-mostly-shuts-czech-austria-land-borders/a-56564442>.

⁴⁰⁵ Euronews, 'EU concerned as Germany partially closes border with Austria and Czech Republic', <https://www.euronews.com/2021/02/16/eu-concerned-as-germany-partially-closes-border-with-austria-and-czech-republic>;

⁴⁰⁶ See for example, European Parliament, Parliamentary questions – Question for written answer E-000971/2021 to the Commission – Rule 138 Kosma Zlotowski, https://www.europarl.europa.eu/doceo/document/E-9-2021-000971_EN.html; *Kamerstukken II* 2020/21, Aanhangsel van de Handelingen, 1807 at: <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2021D08415&did=2021D08415>.

⁴⁰⁷ DW, 'Coronavirus: Germany mostly shuts Czech, Austria land borders', <https://www.dw.com/en/coronavirus-germany-mostly-shuts-czech-austria-land-borders/a-56564442>.

⁴⁰⁸ Telefonschaltkonferenz der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 19. März 2021 – Beschluss, p. 3.

⁴⁰⁹ See, for example, § 1(1) Verordnung des Bundesministers für Inneres über die vorübergehende Wiedereinführung von Grenzkontrollen an den Binnengrenzen zu bestimmten Nachbarstaaten.



travellers.⁴¹⁰ Nevertheless, these only applied for travellers from outside the EU. Within the EU, travel into Austria was allowed without having to fulfil the aforementioned criteria, if a Member State was marked as safe. Looking at the situation late March 2021, the Vatican City was the only country within the EU that was marked as safe.⁴¹¹ This meant that EU citizens travelling to Austria from all other Member States had to fulfil the testing requirement, meaning they must present a negative COVID-19 test and undergo a ten-day quarantine (finishing with a further COVID-19 test).⁴¹² As a result, the costs for both the test as well as the quarantine were carried by the traveller. Those traveling for professional reasons could also enter Austria upon presentation of a negative COVID-19 test.⁴¹³ Not being able to present a COVID-19 test could incur heavy cost, as a ten-day quarantine was required in that case.

In the event of cross-border commuters, Austria allowed movements for professional, educational and family purposes as long as a negative COVID-19 test could be presented (not older than seven days) along with an electronic registration (Pre-Travel Clearance), to be renewed every seven days.⁴¹⁴ If a test result could not be presented, the cross-border commuter was required to take a test within 24 hours of travelling into Austria. Following these rules, cross-border movements between Austria and the Czech Republic were possible as long as the opened border crossings were used and the necessary requirements (test and registration) were fulfilled.

While the German regulations required persons from high-risk areas to undergo a new test every 48 hours - including in the case of cross-border commuters - the example of Austria shows that a longer period of time was applied between tests (seven days). In the light of the provisions of the amended Council Recommendation (EU) 2020/1475 this lower frequency of testing may be considered more appropriate. Nevertheless, the lower testing frequency maintained by Austria did not alter the fact that cross-border movements could be restricted in light of the restricted border crossings. Indeed, some cross-border workers may have had to take considerable detours to reach their places of work or study or their families.

The Czech Republic can then be considered to have been particularly affected by the German and Austrian measures to reinstate border controls. Nevertheless, the country also took its own measures to limit cross-border movements (although no measures were taken targeted at specific countries). In early 2021, the Czech Republic followed a classification of countries according to the level of risk of transmission. Both Germany and Austria were, for example, considered countries with a high risk of transmission in March 2021.⁴¹⁵ From 19 March onwards, all persons travelling to the Czech Republic after having spent more than 12 hours in a country designated as a high-risk area had to fulfil several

⁴¹⁰ §2, §2a and §3 Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung, Fassung vom 26.03.2021.

⁴¹¹ Anlage A Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung, Fassung vom 26.03.2021.

⁴¹² §4(2) Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung, Fassung vom 26.03.2021.

⁴¹³ §4(3) Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung, Fassung vom 26.03.2021.

⁴¹⁴ §6a(1) Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung, Fassung vom 26.03.2021; Österreichische Botschaft Prag, 'Einreise nach Österreich aus der Tschechischen Republik & Pendlerbestimmungen für Österreich', <https://www.bmeia.gv.at/oeb-prag/>.

⁴¹⁵ Notification of the Ministry of Health issuing a list of countries, or their parts, with a low, medium and high risk of COVID-19 transmission, Prague, 19 March 2021 (Ref. no.: MZDR 20599/2020-64/MIN/KAN, at: <https://koronavirus.mzcr.cz/wp-content/uploads/2021/03/Notification-of-the-Ministry-of-Health-issuing-a-list-of-countries-or-their-parts-with-a-low-medium-and-high-risk-of-COVID-19-transmission-from-22nd-March.pdf>).



steps to enter the country's territory. In particular, persons had to complete an electronic Passenger Locator Form and submit it to a regional Public Health Office, have evidence of a negative PCR test no more than 72 hours old, present a certificate of having filled in the Passenger Locator Form and submit to another PCR test within five days of having arrived in the Czech Republic at their own expense.⁴¹⁶ Furthermore, persons travelling from these areas had to await the negative test result of the second test in self-isolation. The 12-hour requirement meant that – where cross-border movements were possible with Germany and Austria – cross-border workers could be exempt from undergoing additional measures. Indeed, cross-border workers, pupils and students crossing borders for work or studies purposes were especially exempted.⁴¹⁷

At the time when the present report was concluded (July 2021), no border controls are maintained between Germany, Austria and the Czech Republic, meaning that the majority of obstacles they created have been removed. Nevertheless, travel in the border regions is not completely unrestricted. In the case of travel to Austria, it is possible for EU/EEA countries.⁴¹⁸ However, in order to access Austria from one of these countries a person needs to provide evidence of a low epidemiological risk (*Nachweis einer geringen epidemiologischen Gefahr*).⁴¹⁹ In general, such evidence consists of a negative test result, proof of vaccination or proof of having recovered from COVID-19.⁴²⁰ For cross-border commuters traversing the border for the purposes of work, school or study or family purposes, they must also provide a test result, which must not be more than seven days old.⁴²¹ As far as the Czech Republic is concerned, both Germany and Austria were considered countries with a low risk of transmission in late June 2021.⁴²² This means that no obligations exist for entry into the Czech Republic.⁴²³ By contrast, persons travelling into Germany need to generally fulfil three requirements regarding registration, quarantine and providing proof either of vaccination, a negative test result or having recovered from COVID-19.⁴²⁴ The latter elements are particularly necessary if persons have

⁴¹⁶ Article I(3)(a-d) Protective Measure, Prague, 15 March 2021 (Ref. no.: MZDR 20599/2020-63/MIN/KAN), at: https://koronavirus.mzcr.cz/wp-content/uploads/2021/03/Protective_measure_against_SARS-CoV-2_from_March_19th_2021_20210315.pdf.

⁴¹⁷ Article I(5)(f) Protective Measure, Prague, 15 March 2021 (Ref. no.: MZDR 20599/2020-63/MIN/KAN), at: https://koronavirus.mzcr.cz/wp-content/uploads/2021/03/Protective_measure_against_SARS-CoV-2_from_March_19th_2021_20210315.pdf.

⁴¹⁸ Oesterreich.gv.at, 'Entry into Austria and pre-travel clearance', https://www.oesterreich.gv.at/en/themen/coronavirus_in_oesterreich/pre-travel-clearance.html.

⁴¹⁹ § 5 Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung 2021, Fassung vom 02.07.2021.

⁴²⁰ § 2(1) Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung 2021, Fassung vom 02.07.2021.

⁴²¹ § 2(3) Gesamte Rechtsvorschrift für COVID-19-Einreiseverordnung 2021, Fassung vom 02.07.2021.

⁴²² Ministry of Health, Notification of the Ministry of Health issuing a list of countries, or their parts, with a low, medium and high risk of COVID-19 transmission, Ref. no.: MZDR 20599/2020-90/MIN/KAN, Prague, 25 June 2021, at <https://www.mvcr.cz/mvcren/file/notification-of-moh-list-of-the-countries-with-low-risk-of-covid19.aspx>.

⁴²³ Although it may be noted that it was not necessary for cross-border workers to present additional documentation related to COVID-19 when moving cross-border for work or study purposes. In this case, some documentary evidence was to be provided attesting to the study or work activities. See Ministry of the Interior of the Czech Republic, <https://www.mvcr.cz/mvcren/article/cross-border-workers-so-called-pendlers.aspx>. Furthermore, in the event that a country's categorization changes to medium risk, persons must provide a negative PCR test unless they can provide proof of their vaccination or of having recovered from COVID-19; see Ministry of the Interior of the Czech Republic, 'Coronavirus – Information of MoI, <https://www.mvcr.cz/mvcren/article/coronavirus-information-of-moi.aspx>. Nevertheless, this again does not apply to cross-border workers.

⁴²⁴ See § 3-5 Verordnung zum Schutz vor einreisebedingten Infektionsgefahren in Bezug auf das Coronavirus SARS-CoV-2 nach Feststellung einer epidemischen Lage von Nationaler Tragweite durch den Deutschen Bundestag (Coronavirus-Einreiseverordnung – CoronaEinreiseV) – V. 12 Mai 2021.



stayed in a high risk area or VOC area. Since Austria and the Czech Republic are no longer considered risk areas, cross-border movements can be held to be free. Indeed, persons in cross-border regions do not have to fulfil all of the aforementioned criteria since *Grenzpendler* or *Grenzgänger* are exempt from the quarantine and registration requirements.⁴²⁵ A negative test, proof of vaccination or proof of recovering from COVID-19 is thus only necessary in the event that a person is travelling from a high risk or VOC area. This therefore means that – should either Austria or the Czech Republic be considered as high-risk area or virus mutation area in the future – the obstacle to mobility described above will become relevant once again.

4.4 The Portuguese-Spanish Border: Reintroduction of Border Controls

Another example of a border region where internal border controls were reintroduced in early 2021 is the Portuguese-Spanish border. Both countries maintained internal border controls from early March until 1 May 2021.⁴²⁶ Nevertheless, this is not the first time both Member States have maintained internal border controls, since these were in place several times earlier during the COVID-19 pandemic.⁴²⁷

For Spain, border crossings were permitted during the reinstatement of border controls, but only to a limited extent. In particular, Spanish citizens, their spouses/partners and children are allowed to enter Spain, as could persons with habitual residence in Spain, students, diplomatic and consular personnel, persons having to cross the border in case of force majeure and persons who needed to be in Spain for work purposes (with documentary proof).⁴²⁸ This latter category also included frontier workers. According to the Ordinance setting the exact conditions for the border controls, these restrictions were still necessary. Although the epidemiological situation had then improved in both countries (enabling some relaxations), it was still considered necessary to restrict mobility within national territory as a preventive measure.⁴²⁹ Spain therefore liaised with the Portuguese authorities before reaching the conclusion to reinstate border controls several times during early 2021.

Also in early 2021, Portugal maintained strict rules that affected freedom of movement. Portuguese citizens were prohibited from leaving the national territory except for certain essential travel (inter alia work, residence outside Portugal, limited family reunions, medical emergencies).⁴³⁰ In relation to

⁴²⁵ § 6(6)(7) Coronavirus-Einreiseverordnung – CoronaEinreiseV – V. 12 Mai 2021.

⁴²⁶ 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.

⁴²⁷ Whereas Spain had introduced border controls three times prior with Portugal and six times prior for all Member States, Portugal reinstated border controls with Spain 8 times prior to the March reinstatement of borders. The March reinstatement was subsequently continued up until the end of April.; see European Commission, Member States' notifications of the temporary reintroduction of border controls at internal borders pursuant to Article 25 and 18 et seq. of the Schengen Borders Code.

⁴²⁸ Article 1(2)(a-f) Orden INT/361/2021, de 15 de abril, por la que se mantienen los controles en la frontera interior terrestre con Portugal, restablecidos con motivo de la situación de crisis sanitaria ocasionada por la COVID-19, BOE núm. 92, de 17 de abril de 2021.

⁴²⁹ Preamble Orden INT/361/2021.

⁴³⁰ See for example Article 4(1)(2)(a-j) Decreto n° 3-D/2021 de 29 de janeiro – Regulamenta o estado de emergência decretado pelo Presidente da República extended by Decreto n° 3-F/2021 de 26 de fevereiro – regulamenta o estado de emergência decretado pelo Presidente da República.

border crossings, all crossings by road were generally prohibited and border controls were reinstated.⁴³¹ Exemptions applied for the international transport of goods, cross-border workers (with documentary evidence of their employment relationship), transport of emergency vehicles, Portuguese residents/nationals, foreign nationals/citizens resident elsewhere, essential travel such as work (with documentation) and exceptionally family reunions with a spouse/first-degree relative, humanitarian purposes or medical emergencies, cargo or mail carriers and international transport of goods.⁴³² As was the case for Spain, Portugal also decided to extend border controls to guarantee the reduction of COVID-19 cases.⁴³³

Although Member States are required to communicate a list of border crossing points following the reinstatement of borders, neither Spain nor Portugal had communicated such a list by early 2021.⁴³⁴ Nevertheless, it appeared that Portugal did maintain set border crossing points.⁴³⁵ Over the course of the period in which Portugal maintained reinstated its border controls with Spain, crossing points were added to the list to better serve interests of citizens on both sides of the border.⁴³⁶ More specifically, Portugal provides for various categories of border crossing points:⁴³⁷

- (1) Those open permanently;
- (2) Those open on working days from 6:00 to 20:00;
- (3) Those open on working days from 6:00 to 9:00 and 17:00 to 20:00;
- (4) Those open on working days from 7:00 to 9:00 and 17:00 to 19:00;
- (5) Those open on Wednesdays and Saturdays from 10:00 to 12:00.

As of May 2021, the border controls between the two countries were no longer in place, meaning that border crossings were no longer restricted to essential travel. Instead, the requirement of essentiality of travel changed from a requirement to a mere recommendation.⁴³⁸ As of July 2021, persons entering Spain or Portugal by land must adhere to certain COVID-19 related measures. In Spain, persons entering by land must generally provide a vaccination certificate, diagnostic certificate (i.e. negative test result) or certificate of recovery.⁴³⁹ Nevertheless, this requirement does not apply to either cross-border workers or persons residing in border areas within a radius of 30 km of their place of residence.⁴⁴⁰ When it comes to Portugal, there are no entry restrictions for persons arriving by road.⁴⁴¹

⁴³¹ Article 5(1) Decreto n° 3-D/2021 extended by Decreto n° 3-F/2021.

⁴³² Article 5(3)(6) Decreto n° 3-D/2021 extended by Decreto n° 3-F/2021.

⁴³³ Preamble Decreto n° 3-D/2021 extended by Decreto n° 3-F/2021.

⁴³⁴ European Commission, List of border crossing points following reintroduction of internal border control pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, Version 11 March 2021 and Version 6 April 2021.

⁴³⁵ See for example Despacho n° 3516-A/2021 – Determina os pontos de passagem autorizados na fronteira terrestre.

⁴³⁶ See for example Preamble Despacho n° 2207-B/2021 – Determina os pontos de passagem autorizados na fronteira terrestre.

⁴³⁷ For more information on the exact locations of the border crossing points, see Despacho n° 3516-A/2021.

⁴³⁸ Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 'Control Fronterizo Terrestre España-Portugal', <http://www.exteriores.gob.es/Consulados/LISBOA/es/Consulado/Paginas/Articulos/NUEVAS-RESTRICCIONES-MOVILIDAD.aspx>.

⁴³⁹ Article 5(a-c) Resolución de 4 de junio de 2021, de la Dirección General de Salud Pública, relativa a los controles sanitarios a realizar en los puntos de entrada de España, BOE Núm. 134 de 5 de junio de 2021.

⁴⁴⁰ Article 14(b)(c) Resolución de 4 de junio de 2021, de la Dirección General de Salud Pública, relativa a los controles sanitarios a realizar en los puntos de

⁴⁴¹ See Visit Portugal, 'COVID-19 | Measures', <https://www.visitportugal.com/en/node/421175>.



This means that cross-border movement between Spain and Portugal will no longer face obstacles related to border closings. Nevertheless, as mentioned earlier in this report, the Schengen Borders Code maintains strict procedural requirements for Member States who reintroduce border controls.⁴⁴² In particular, Member States must state the reasons for the proposed reintroduction and demonstrate that the events that constitute a serious threat to public policy or internal security, the scope of the reintroduction, the names of the border crossing points, the date and duration of the reintroduction and, where appropriate, the measures to be taken by other Member States. Notifications found for the Spanish reintroduction of the border controls in early 2021 indicate that the controls were reintroduced in light of the epidemiological situation.⁴⁴³ While the Spanish notification does include reference to the start and end dates of the border controls and the scope of the reintroduction, it does not provide exact locations of the border crossing points. When it comes to information on the reasons for which the COVID-19 is held to constitute a serious threat to public policy or internal security, the notification appears to focus primarily on the state of alarm applicable in Spain at that time. Subsequent notifications provided for prolongation of the border controls referred to the expectation that mobility restricting measures would still be needed for several weeks and the considerable impact such measures were held to have.⁴⁴⁴ These considerations appear to be somewhat restricted, considering the Schengen Borders Code requirement that all relevant data detailing events that constitute a serious threat to public policy or internal security must be provided to substantiate a border control, among others. Indeed, one may wonder whether the arguments provided in the Spanish notification were sufficient to justify the considerable restrictions created by the reinstated border controls.

Viewed from the perspective of cross-border mobility, the closure of borders and reinstatement of border controls has been particularly detrimental. Indeed, small cross-border communities in particular were reported to be paying a heavy price for the closure of borders between Spain and Portugal.⁴⁴⁵ More specifically, the restricted availability of border crossing points (only eight were open permanently and seven on a limited basis) was reported to be problematic, since cross-border workers were forced to take long detours (for example, tens of kilometres in the case of the cross-border region between Vila Nova de Cerveira and Tomiño). Apart from increasing travel time, the closure of borders also led to additional expenses and waiting times at the border crossings that were open. For this

⁴⁴² Article 27 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), [2016] OJ L 77/1.

⁴⁴³ Temporary reintroduction of border controls at the Spanish internal borders in accordance with Article 28 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Document Number 5785/21, 1 February 2021.

⁴⁴⁴ Prolongation of the temporary reintroduction of border controls at the Spanish internal borders in accordance with Article 28 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 6128/21, 11 February 2021 and Prolongation of the temporary reintroduction of border controls at the Spanish internal borders in accordance with Article 28 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 6327/21, 26 February 2021.

⁴⁴⁵ See for example, F. Soares, 'Trabajadores y pequeñas localidades pagan el cierre de frontera entre España y Portugal', <https://es.euronews.com/2021/02/26/trabajadores-y-pequeñas-localidades-pagan-el-cierre-de-frontera-entre-espana-y-portugal> and Faro de Vigo, 'Hay 6.000 trabajadores obligados a utilizar un embudo para cruzar la frontera', <https://www.farodevigo.es/fotos/comarcas/2021/03/02/trabajadores-obligados-embudos-raia-ponte-da-amizade-portugal-transfronterizos-36874981.html>.



reason, the mayors of 26 Portuguese and Spanish municipalities protested against the closure of the border, seeking support from the European Commission.⁴⁴⁶

On several occasions, the European Grouping of Territorial Cooperation (EGTC) Rio Minho had, for example, brought the issue of the border closure to the fore at national and European levels.⁴⁴⁷ The EGTC Rio Minho had furthermore made mention of the possibility of undertaking action to demand financial compensation, indicating that the region's commerce and hospitality sectors had suffered a loss in turnover of over 90 million euro and hundreds of effective working hours during the first wave of the COVID-19 crisis between March - June 2020 as a result of the closure of borders.⁴⁴⁸ Ultimately, the EGTC Rio Minho has (since 2 March 2021) opened a register for claims directly related to the closure of borders.⁴⁴⁹ At the same time, the EGTC Rio Minho also proposed the creation of a cross-border citizen card (*cartão de cidadão*), thus taking away the need to check various kinds of documentation.⁴⁵⁰ In particular, the card would allow for quick and flexible identification at police and health surveillance posts, thus avoiding situations where persons on both sides of the border were forced to pass through a single point, leading to long hours in waiting time.⁴⁵¹ As of June 2021, the card was taken up as part of the post-COVID-19 recovery strategy of the EGTC Rio Minho, with the aim of avoiding severe hindrances in the event of future border closures.⁴⁵²

4.5 Hungary and surrounding border regions⁴⁵³

Hungary's geographic location and the 'variable geometry' of the Schengen Area rules and EU legislation on border management make the country an interesting case study for examining the impact of the measures restricting cross-border travel. Hungary has external Schengen borders with Ukraine and Serbia, temporary external Schengen borders with Romania and Croatia and internal Schengen borders with Austria, Slovakia and Slovenia. As a result, Hungary is surrounded by different types of borders.

⁴⁴⁶ Ibid.

⁴⁴⁷ See for example, AECT Rio Minho, 'AECT irá notificar a Comissão Europeia sobre a situação de desamparo dos trabalhadores transfronteiriços do minho devido ao encerramento da fronteira', <http://smartminho.eu/o-aect-ira-notificar-a-comissao-europeia-sobre-a-situacao-de-desamparo-dos-trabalhadores-transfronteiricos-do-minho-devido-ao-encerramento-da-fronteira/?lang=pt-pt>.

⁴⁴⁸ AECT Rio Minho, 'O primeiro confinamento e o encerramento da fronteira com Portugal causaram uma perda de faturação de mais de 92 milhões de euros no comércio e hotelaria no Minho', <http://smartminho.eu/o-primeiro-confinamento-e-o-encerramento-da-fronteira-com-portugal-causaram-uma-perda-de-faturacao-de-mais-de-92-milhoes-de-euros-no-comercio-e-hotelaria-no-minho/?lang=pt-pt>.

⁴⁴⁹ AECT Rio Minho, 'AECT Rio Minho permite um registo de pessoas afetadas pelo encerramento da fronteira com Portugal para pedido de indemnizações', <http://smartminho.eu/o-aect-rio-minho-permite-um-registo-de-pessoas-afetadas-pelo-encerramento-da-fronteira-com-portugal-para-pedido-de-indemnizacoes/?lang=pt-pt>.

⁴⁵⁰ AECT Rio Minho, 'O primeiro confinamento e o encerramento da fronteira com Portugal causaram uma perda de faturação de mais de 92 milhões de euros no comércio e hotelaria no Minho', <http://smartminho.eu/o-primeiro-confinamento-e-o-encerramento-da-fronteira-com-portugal-causaram-uma-perda-de-faturacao-de-mais-de-92-milhoes-de-euros-no-comercio-e-hotelaria-no-minho/?lang=pt-pt>.

⁴⁵¹ AECT Rio Minho, 'O AECT Rio Minho exorta a Junta a executar o acordó de activação do 'Cartão transfronteiriço antes do encerramento de Portugal', <http://smartminho.eu/o-aect-rio-minho-exorta-a-junta-a-ativar-o-cartao-transfronteirico/?lang=pt-pt>.

⁴⁵² AECT Rio Minho, 'Plano estratégico defende a criação de um Cartão de Cidadão Transfronteiriço', <http://smartminho.eu/plano-estrategico-defende-a-criacao-de-um-cartao-de-cidadao-transfronteirico/?lang=pt-pt>.

⁴⁵³ Case study drafted in cooperation with Vivien Vadasi, Legal adviser at Menedék — Hungarian Association for Migrants.



One of the first measures adopted by the Hungarian Government against the coronavirus pandemic was the closure of borders.⁴⁵⁴ In the first piece of legislation detailing the measures against the coronavirus pandemic⁴⁵⁵, the Government decided to reintroduce border controls on Hungary's (land) borders with Austria and Slovenia from 12 March 2020. Moreover, rail, bus and air passenger traffic with Italy, China, Iran and South Korea was suspended; with the exception of Hungarian nationals and EEA nationals holding permanent residence cards issued by Hungary, passengers from these countries were denied entry to Hungary. The initial measures were soon amended to introduce an entry ban for foreign passengers (except for permanent resident EEA nationals) arriving from all over the world⁴⁵⁶ and to introduce the possibility of exceptions for foreigners in duly justified exceptional cases.⁴⁵⁷ These measures were followed by the reintroduction of border controls with Slovakia on 22 March 2020.

The Government soon introduced measures⁴⁵⁸ that entitled the police to allow exceptions from the entry ban for nationals of the neighbouring countries and for other foreigners for the purposes of transiting through Hungary (exceptions were also granted for military convoys). These measures were followed by exceptions granted via legislation⁴⁵⁹ for business travel for representatives of related undertakings from Austria, the Czech Republic, Germany, Poland, Slovakia and South Korea who are nationals of these countries. These foreigners were also not subject to the quarantine measures.

In May 2020, further exceptions were introduced, this time with a special focus on border regions/neighbouring countries:

- The entry and stay of agricultural workers in Hungary who are nationals of one of the neighbouring countries or Hungarian nationals⁴⁶⁰ was facilitated.⁴⁶¹ They needed to meet specific requirements: the agricultural workers were allowed to cross the border in a group at specific border crossing points, if they could justify their specific situation with a certificate from their employers. In Hungary, they were only allowed to move between their homes and their place of work.
- The entry from Austria – Austrian or Hungarian nationals (and EEA nationals holding permanent residence cards issued by Hungary) were allowed without restriction if they presented negative test results for COVID-19.⁴⁶²
- Slovak nationals were allowed entry into Hungary without any restrictions for stays up to 24 hours.

⁴⁵⁴ 'Prime Minister Orbán announced that Hungary's borders are closed to passenger traffic due to the coronavirus pandemic, in the future only Hungarian nationals will be allowed to enter Hungary', see: <https://koronavirus.gov.hu/cikkek/orban-lezarjak-magyarorszag-hatarait-szemelyforgalom-elott-betiltjak-rendezyenyeket> (in Hungarian)

⁴⁵⁵ Government Decree No. 41/2020. (III. 11.) Korm.

⁴⁵⁶ Government Decree No. 46/2020. (III. 16.)

⁴⁵⁷ Government Decree No. 45/2020. (III. 14.)

⁴⁵⁸ Government Decree No. 81/2020. (IV. 1.)

⁴⁵⁹ see Government Decree No. 174/2020. (IV. 30.) amending Government Decree 81/2020. (IV. 1.)

⁴⁶⁰ Hungarian legislation on naturalisation provides for a simplified naturalisation process for those whose ascendants were Hungarian nationals: they do not need to have domicile in Hungary.

⁴⁶¹ Government Decree No. 185/2020. (V. 6.)

⁴⁶² Government Decree No. 216/2020. (V. 21.)



Following the decrease of the number of persons infected with the coronavirus, the Government began easing the restrictions, resulting in the reintroduced border controls being lifted by Hungary on 9 June 2020.⁴⁶³ The ‘state of danger’ due to the coronavirus pandemic was terminated as from 18 June 2020 but the travel restrictions for foreigners remained.⁴⁶⁴ Hungarian nationals, EU/EEA nationals, Swiss nationals and members of their families were exempted from the travel restrictions; in addition, the Minister for Foreign affairs and Trade and the Minister of Interior could grant further exemptions – as they did for the nationals of Serbia. The Ministers also granted exemptions for Ukrainian nationals for entry for not longer than 24 hours and within 30 km from the border.⁴⁶⁵ In addition, the rules for agricultural workers from neighbouring countries continued to apply (i.e. Ukrainian agricultural workers could enter Hungary for more than 24 hours and could travel further than 30 km from the border). Thus, facilitated measures were applicable in all border regions of nationality.

Between 15 July 2020 - 1 September 2020, the color-coding ‘traffic light’ system was also in force in Hungary as the country applied their own risk assessment.⁴⁶⁶ Hungary’s neighbours, Austria, Croatia, Slovakia and Slovenia were on the green list, Romania and Serbia were on the yellow list and Ukraine was on the red list. There were no restrictions of movements from the countries on the green list, while passengers arriving from the countries on the yellow list were subject to health checks and 14 days in quarantine (this could be lifted on the condition of two negative PCR test results taken within five days with the first and the second test conducted 48 hours apart). Entry from the countries on the red list was banned in general, although the police could issue permissions to enter in duly justified exceptional cases. In addition, the preferential rules for Ukrainian nationals continued to be applicable: Ukrainian nationals could enter Hungary for a period of no longer than 24 hours and within 30 km from the border.

As from 1 September 2020, border controls were reintroduced at Hungary’s internal Schengen borders⁴⁶⁷ when the second wave of the pandemic reached Hungary. This resulted in the adoption of entry rules⁴⁶⁸ by the Government that differentiated between Hungarian nationals and foreigners, and – as a general rule – banned non-essential travel to Hungary for the latter. In general, the rules did not differentiate between EU nationals and other foreigners, but they were applicable to all foreigners, irrespective of their nationality.

Nevertheless, the legislation provided for a wide range of exceptions from the entry ban and from quarantine obligations for military convoys, the travel of representatives of related undertakings from specific countries⁴⁶⁹, cross-border commuters, transit passengers, visitors for sporting or cultural events and people travelling for ‘business or economic’ reasons. Not all of these exceptions are relevant for cross-border regions, but the following are:

⁴⁶³ This measure was implemented by unilateral declaration of Hungary.

⁴⁶⁴ defined by Government Decree No. 291/2020. (VI. 17.)

⁴⁶⁵ Decree of the Minister for Foreign Affairs and Trade No. 9/2020. (VI. 17.)

⁴⁶⁶ Government Decree No. 341/2020. (VII. 12.)

⁴⁶⁷ Government Decree 407/2020. (VIII. 30.) – the period of reintroduction of border controls was prolonged by 7 April 2021.

⁴⁶⁸ Government Decree No. 408/2020. (VIII. 30.)

⁴⁶⁹ Defined by the Minister of Interior



- Representatives of related undertakings: the Minister of Interior is responsible for listing the countries from which the representatives of related undertakings may enter Hungary to meet their business partners. The Minister of Interior declared that all countries of the world shall be on that list, so neighbouring countries are included.
- Cross-border commuters from neighbouring countries were permitted to enter for a period not longer than 24 hours and within 30 km from the border.
- People travelling for 'business or economic' reasons: the rules initially adopted by the Government were vague and allowed wide exemptions from the general entry ban and quarantine obligations. Amendments to the legislation adopted in February 2021⁴⁷⁰ narrowed down the list of countries whose nationals (and those who are entitled reside there for more than 90 days) may enter Hungary without restrictions for business or economic reasons. These countries include all neighbouring countries.
- Hungary also applied temporary preferential treatment for Czech, Polish and Slovak nationals seeking to enter Hungary from September 2020 - 1 November 2021.⁴⁷¹

On 24 June 2021, Hungary abolished restrictions on border crossings from Croatia, Austria, Romania, Serbia, Slovakia and Slovenia. Travellers from these countries were permitted to enter Hungary freely via the land borders. Restrictions for air travel remained unchanged, and travellers from Ukraine continued to be subject to entry restrictions.

Before assessing proportionality, it has to be noted that Hungary has been in a state of emergency for years, first as a result of the global financial crisis and then due to the threat of the migrant crisis. On the basis of the pandemic emergency, Acts were adopted allowing the government to issue decrees independently of parliament. Later, the pandemic emergency was revoked and, during the second wave of the crisis, a state of danger was announced providing more (unlimited) emergency powers to Prime Minister Viktor Orbán. The emergency legislation has been used for purposes other than simply introducing travel restrictions, for instance for restricting fundamental rights by cancelling elections, banning public gatherings and preventing legal gender recognition.⁴⁷² Therefore, there is a fear that the Hungarian government is taking advantage of the coronavirus pandemic to reinforce its authoritarian tendencies.⁴⁷³ It is important to note that, as set out in Section 3, restrictions on free movement may be justified on certain grounds under EU law. However, in order to determine whether a measure is appropriate, the Court of Justice examines whether the public health justification matches the case facts, to ensure Member States do not have other motivations (unrelated to public health) for restricting free movement. In the light of the above-mentioned concerns, it is important to take this into account when assessing the proportionality of travel restrictions in Hungary and deciding whether they are supported by scientific evidence.

⁴⁷⁰ Government Decree No. 88/2021. (II. 27.) and Decree of the Minister of Foreign Affairs and Trade No. 4/2021. (III. 1.)

⁴⁷¹ Government Decree 419/2020 of 1 October 2020 and Government Decree 450/2020 of 5 October 2020.

⁴⁷² Kovács K., 'Hungary and the Pandemic: A Pretext for Expanding Power' *Verfassungsblog* 11 March 2021, <https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/>

⁴⁷³ Bán M., 'Democracy in times of crisis: The state of emergency in Hungary' *Asses Institute Centre for International & European Law*, <https://www.asser.nl/about-the-institute/news-asser-today/blog-post-democracy-in-times-of-crisis-the-state-of-emergency-in-hungary/>



Based on the ECDC map (following the Council Recommendation) of 30 June 2021, Hungary and its surrounding regions were designated with the same risk classification (green). At that moment, Hungary itself did not follow the classification of ECDC risk areas but applied its own risk assessment.⁴⁷⁴ Although risk areas on the Schengen countries bordering Hungary were not determined, Hungary applied similar quarantine and testing measures to all air travellers. Following the reasoning of the ECDC and the WHO, as presented in Section 3, mandating or urging travellers from risk areas to undergo quarantine or requiring a test before or upon arrival can be proportionate in light of the public health threat when they are arriving from a region with higher numbers of COVID-19 cases. In particular, quarantine may be proportionate if also applied to local residents and if it can be expedited by a COVID-19 test. This was the case in Hungary; the quarantine and testing measures were applied to all travellers and the quarantine period could be shortened with additional tests. However, as the travel restrictions failed to consider the 'risk profile' of the person arriving, it could be concluded that these measures went beyond what is necessary, particularly when travellers were entering from countries of the same level of risk (green) as held by the ECDC.

4.6 Experiences from the Grande Région

This case study will take slightly different approach to the others presented in this report. The *Grande Région* (the Greater Region) is an area facilitating cross-border cooperation between the territories of Lorraine in the French region Grand Est, Wallonia, Saarland and Rhineland-Palatinate in Germany, the Federation Wallonia-Brussels and *Ostbelgien* in Belgium as well as the Grand Duchy of Luxembourg. The area covers over 11.6 million inhabitants and has approximately 260 000 cross-border commuters per day – the largest number of such commuters in Europe.⁴⁷⁵ This case study of the *Grande Région* provides an example of good practice, where Member States have sought to cooperate and coordinate measures during the COVID-19 crisis.

The COVID-19 crisis initially led to sudden border closures, affecting the residents of the border regions as well as their professional and family life. Research done by the UniGR-CBS (a thematic cross-border network within the university grouping University of the Grande Région) reveals that, next to the border closures, the pandemic has also led to increased evidence of social, cultural, economic, health and mobility boundaries beyond national borders, raising urgent questions over social inequalities.⁴⁷⁶

Example of such border closure in the *Grande Région* can be seen in Germany, where border closures took effect on 16 March 2020. It was estimated that in one month alone, 170 000 employees from the neighbouring regions were prevented from entering German territory. Cross-border workers who could justify their travel on professional reasons and had a certificate of their employer to this effect

⁴⁷⁴ European Union, Re-open EU: Hungary. Accessed via https://europa.eu/youreurope/citizens/travel/travel-and-covid/hungary/index_en.htm

⁴⁷⁵ Grande Région, *The Greater Region at a Glance*, <http://www.granderegion.net/en/The-Greater-Region-at-a-Glance>.

⁴⁷⁶ Christian Wille, Rebekka Kanesu UniGR-CBS, *Bordering in pandemic times – Insights into the COVID-19 Lockdown 4/2020*, https://ubt.opus.hbz-nrw.de/opus45-ubtr/frontdoor/deliver/index/docid/1428/file/UniGR-CBS_Borders+in+Perspective_thematic+issue_Vol.+4.pdf



were permitted to cross the border. Workers entering France had to provide an international travel document in addition to this certificate.⁴⁷⁷

The coordination and the facilitation of the mobility measures for the *Grande Région* are particularly important. Luxembourg, for example, is heavily reliant on workers from its border regions in terms of healthcare provision – almost 70 percent of Luxembourg’s healthcare personnel are commuters.⁴⁷⁸ In July 2020, Luxembourg provided a number of exceptions for frontier workers, who were exempt from two-week quarantine if they entered the country daily for compelling professional or medical reasons. Those who spent less than 72 hours in Luxembourg were also exempt.⁴⁷⁹ As the effect of the COVID-19 measures were seen as strongly impacting cross-border regions, similar exceptions were provided in Rhineland-Palatinate and Saarland in October 2020 to allow the residents of those border regions to continue their professional and private activities.⁴⁸⁰

Despite the national response of border closures, the authorities in the *Grande Région* have been willing to work together since the onset of the crisis, understanding the region's unique characteristics and the significance of coordinating measures for its border regions:

“In our Grande Région, where we live in Europe on a daily basis, border closures do not only have symbolic value, but cause profound upheavals in the lives of our citizens. This health crisis has demonstrated, more than ever, how important cross-border cooperation is. Coordination with our neighbours is crucial to get out of containment.”⁴⁸¹

Next to the coordination of measures, solidarity was also considered important theme – the neighbouring regions transferred emergency patients and provided support to each other by providing medical equipment.⁴⁸²

To provide accessible information to the citizens of the border regions, interactive maps were published early in the crisis that allowed the COVID-19 situation to be visualised geographically.⁴⁸³ A task force *Corona de la Grande Région* was established, providing information on the current measures

⁴⁷⁷ Rachid Belkacem, Isabelle Pigeron-Piroth et Estelle Evrard, *Travail frontalier et fermeture des frontières: l'exemple de la Grande Région SaarLorLux*, 12/12/2020, https://orbilu.uni.lu/bitstream/10993/43501/1/BorderObs_COVID_PigeronEvrardBelkacem_040620_FINAL_sec.pdf

⁴⁷⁸ Christian Wille, Rebekka Kanesu UniGR-CBS, *Bordering in pandemic times – Insights into the COVID-19 Lockdown 4/2020*, https://ubt.opus.hbz-nrw.de/opus45-ubtr/frontdoor/deliver/index/docId/1428/file/UniGR-CBS_Borders+in+Perspective_thematic+issue_Vol.+4.pdf, p.12

⁴⁷⁹ Grande Région, *Règlementations sur la quarantaine en Grande Région*, <http://www.granderegion.net/Actualites/2020/Reglementations-sur-la-quarantaine-en-Grande-Region>

⁴⁸⁰ Grande Région, *La Rhénanie-Palatinat et la Sarre instaurent des exceptions aux règles de quarantaine pour la Grande Région*, <http://www.granderegion.net/Actualites/2020/La-Rhenanie-Palatinat-et-la-Sarre-instaurent-des-exceptions-aux-regles-de-quarantaine-pour-la-Grande-Region>

⁴⁸¹ Corinne Cahen, The Minister of Family, Integration and the Grande Région of the Grand Duchy of Luxembourg, <http://www.granderegion.net/Actualites/2020/La-Grande-Region-Ensemble-contre-le-coronavirus>

⁴⁸² Grande Région, *La Grande Région – Ensemble contre le coronavirus*, <http://www.granderegion.net/Actualites/2020/La-Grande-Region-Ensemble-contre-le-coronavirus>

⁴⁸³ Système d'Information Géographique de la Grande Région (SIG-GR), https://www.sig-gr.eu/fr/actualites/2020/cartes_interactives_COVID-19.html



and travel restrictions, also by means of an interactive map.⁴⁸⁴ In addition, a website section was set up to provide information to cross-border commuters on the regulations in force from the Luxembourg and French governments.⁴⁸⁵ Furthermore, *Frontaliers Grand Est* informed the public of all Grand Est border countries via a digital platform. It aimed to provide information on cross-border employees' rights and responsibilities during the crisis, as well as information for students and the impact of the crisis on mobility by updating the platform on a regular basis. Questions came from, and were answered, from all the bordering countries of Germany, Belgium, Luxembourg and Switzerland, as well as foreign residents working in France.⁴⁸⁶

Throughout the COVID-19 crisis, the respective national authorities of the *Grande Région* met regularly to discuss and agree on coordinating activities. Between the areas of Saar, Rhineland Palatinate, Baden-Württemberg and the Grand Est Region, a bilingual pact on mutual assistance was agreed on 20 November 2020. On the basis of lessons learnt from the first wave of the crisis, facilitation of cooperation between competent health authorities was set as a core principle of the agreement. The pact confirms the regions' commitment to ensuring free mobility, particularly between France and Germany, as well as the adoption of proportional preventive measures suitable to current and future crisis circumstances, taking into account the economic and social interdependencies of border areas.⁴⁸⁷

With a look to the prevention of future pandemics, the authorities of the *Grande Région* adopted a memorandum on 11 December 2020. This lays down a coordinated action plan for pandemic situations. In the view of the authorities, the virus does not know borders and, as opposed to national crisis management and border closures, the crisis showed that the neighbouring countries in the *Grande Région* should work together even more closely in the future and establish mutual trust. Quarantine measures, vaccination strategies, communication and information exchange techniques and cross-border patient care are among the topics covered in the memorandum.⁴⁸⁸

On 18 February 2021, a Summit was held between the executives of the *Grande Région*. The Summit focused on reinforced action to prevent the spread of COVID-19 variants within the *Grande Région*. The executives wished to prevent a situation where new border restrictions would have to be reintroduced. To this end, the areas voluntarily committed to allow cross-border commuters and residents to be tested. At the end of the Summit, a declaration of intent was signed, providing

⁴⁸⁴ Grande Région, <http://www.granderegion.net/COVID-19>

⁴⁸⁵ Grande Région, <http://www.granderegion.net/Actualites/2020/FAQ-Covid-19>

⁴⁸⁶ Frontaliers Grand Est, *Rapport d'activités frontaliers Grand Est – Crise COVID-19*, https://www.frontaliers-grandest.eu/uploads/publications/dossier_Covid19_FrontaliersGrandEst.pdf, 1/07/2020, p. 11 et seq.

⁴⁸⁷ Grande Région, *Un pacte d'assistance mutuelle renforce la coopération en temps de crise sanitaire*, <http://www.granderegion.net/Actualites/2020/Un-pacte-d-assistance-mutuelle-renforce-la-cooperation-en-temps-de-crise-sanitaire>, Grande Région, *Renforcement de la coopération transfrontalière sur fond de Pandémie Covid-19 (Communiqué de presse)*, 11/12/2020, <http://www.granderegion.net/Actualites/2020/Renforcement-de-la-cooperation-transfrontaliere-sur-fond-de-Pandemie-Covid-19>

⁴⁸⁸ Grande Région, *Renforcement de la coopération transfrontalière sur fond de Pandémie Covid-19 (Communiqué de presse)*, <http://www.granderegion.net/Actualites/2020/Renforcement-de-la-cooperation-transfrontaliere-sur-fond-de-Pandemie-Covid-19>



commitments that the executives of the *Grande Région* will adhere in coordination with the relevant national and regional authorities.⁴⁸⁹

In the declaration of intent, the partners agreed that the common challenges in the region can only be met through coordinated and united action and by joint management of the pandemic. Therefore, action should be taken in forms of cross-border cooperation, and in view of promoting and maintaining the free movement of cross-border workers, agreements should be made on a simple, clear and reciprocal basis. On a more practical level, a common policy of screening and tracing should be applied at the scale of the whole *Grande Région*. On a voluntary basis, residents of border regions could be tested by rapid screening test when coming from area of very high incidence (dark red) as defined by the ECDC. The partners also agreed to continue to strengthen and promote cooperation based on the mutual assistance pact concluded in November 2020 and to follow obligations under European and international law and the coordinated approach set in the Council Recommendation of October 2020.⁴⁹⁰

As an example of good practice in the *Grande Région*, the following section presents agreements on taxation and social security that were concluded in order to avoid detrimental outcomes of the coronavirus measures on the cross-border workers in the region.

4.6.1 Teleworking: Agreements on Social Security and Taxation

As the COVID-19 crisis and various measures led to cross-border workers in the *Grande Région* to having to telework, agreements on social security and tax matters were agreed upon early on the crisis. Working from home can lead to the change of competent social security system and have an impact on where the employee is subject to taxation. Soon during the first wave in March 2020, France, Belgium and Germany informed Luxembourg that they would not apply their standard taxation rules on cross-border commuters.

To avoid the situation where teleworking leads to disadvantageous change of taxation, Germany and Luxembourg agreed on a pragmatic approach. On the basis of temporary regulations, working days of cross-border workers from their home were considered as working days in Luxembourg and did not count towards maximum of 19 days foreseen in double tax agreement.⁴⁹¹ Similar agreements were made between Belgium and Luxembourg, where they chose to derogate from the original limit of 24 days after which cross-border workers would be taxed in Belgium.⁴⁹² A comparable limit of 29 days

⁴⁸⁹ Grande Région, *Renforcement de la coopération en matière de prévention et dépistage en Grande Région*, <http://www.granderegion.net/Actualites/2021/Renforcement-de-la-cooperation-en-matiere-de-prevention-et-depistage-en-Grande-Region>

⁴⁹⁰ *Ibid.*

⁴⁹¹ Die Grenzgaenger, *Corona: Tage im Home-Office zählen nicht*, <https://www.diegrenzgaenger.lu/arbeits/eil-corona-tage-im-home-office-zaehlen-nicht/>.

⁴⁹² Les Frontaliers, *Pandémie: télétravail illimité pour les frontaliers belges*, <https://www.lesfrontaliers.lu/emploi/pandemie-teletravail-illimite-pour-les-frontaliers-belges/>.



between France and Luxembourg was also decided not to be taken in account, as in their view the situation constituted a case of *force majeure*.⁴⁹³

As teleworking may also affect the applicable social security legislation, exceptions were provided by Luxembourg and its neighbouring countries. Despite the Communication from the Commission on March 2020 defining guidelines on the exercise of the free movement of workers during COVID-19 outbreak⁴⁹⁴ and urging to use the exception in Regulation 883/2004 for maintaining the social security coverage of the workers concerned⁴⁹⁵, the countries of the *Grande Région* have taken their own specific measures.⁴⁹⁶

Belgium decided that, exceptionally, periods of work carried out by cross-border workers on Belgian territory due to the COVID-19 crisis would not be taken in consideration for social security purposes and have no impact on the applicable social security legislation.⁴⁹⁷ As for taxation, the French and German authorities considered the pandemic as constituting a case of *force majeure*, where teleworking should not lead to change in the cross-border workers' affiliation of their usual social security system.⁴⁹⁸

In December 2020, it was announced that the agreement had been extended to apply to cross-border workers until 30 June 2021, meaning that a cross-border worker who performs their work from home continued to be affiliated to the Luxembourg social security system until this date.⁴⁹⁹

⁴⁹³ Les Frontaliers, *Accord signé: télétravail illimité pour les frontaliers français*, <https://www.lesfrontaliers.lu/emploi/accord-signé-teletravail-illimite-pour-les-frontaliers-francais/>.

⁴⁹⁴ European Commission Communication 2020/C 102 I/03 C/2020/2051 of 30 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:percent3A52020XC0330:percent2803:percent29>, point 8. The exception to the 25 percent rule should be asked for by the employer.

⁴⁹⁵ Article 16(1) of Regulation 883/2004

⁴⁹⁶ Task Force Frontaliers de la Grande Région 2.0, *Le télétravail des travailleurs frontaliers dans la Grande Région (DE, FR, LUX, BE)*, https://www.tf-grenzaenger.eu/fileadmin/user_upload/Veroeffentlichungen/Teletravail_dans_la_Grande_region_avril2020.pdf, 1/04/2020, p. 30 et seq.

⁴⁹⁷ *Ibid.*, p. 30.

⁴⁹⁸ *Ibid.*, p. 31.

⁴⁹⁹ Chrystelle Thevenot, *Télétravail: les frontaliers seront encore assurés jusqu'au 30 juin 2021*, 14/12/2020, <https://www.lesfrontaliers.lu/sante/teletravail-les-frontaliers-seront-encore-assures-jusquau-30-juin-2021/>, https://ubt.opus.hbz-nrw.de/opus45-ubtr/frontdoor/deliver/index/docId/1428/file/UniGR-CBS_Borders+in+Perspective_thematic+issue_Vol.+4.pdf p. 12.



5. Conclusion

The aim of this contribution was to analyse the effects of travel measures taken in light of the COVID-19 pandemic on free movement, specifically where it concerned cross-border regions. The report provides an in-depth examination of the principle of proportionality as well as case studies on several cross-border regions were conducted.

Cross-border regions in times of COVID-19

The case studies show clearly the huge impact that COVID-19 has had and continues to have. Due to the specificities of border regions and the great importance and routine nature of cross-border mobility within daily life, the lack of coordination of national COVID-19 measures and travel restrictions impacted border regions to a much greater extent. Clearly, border closures challenged the cross-border society in these regions and, while in most cases essential workers were still allowed to cross the border, major obstacles were experienced. Entry restrictions and travel advice also affected cross-border mobility and thus the border regions. In the report, several measures were distinguished: travel advice, quarantine, testing and administrative obligations. Leaving aside administrative obligations, all of these measures impacted mobility. Even where testing can be deemed to be proportionate, e.g. in the case of Netherlands and Germany, the impact on daily life cannot be underestimated. In this respect, sufficient exemptions, particularly including adequate time-based exemptions are worth recommending.

The Council Recommendation can be seen as an important turning point, seeking coordination and safeguarding common principles of EU law. It should also be encouraged to consider the perspective of the cross-border regions in this respect, even in times where measures were principally steered nationally from the Member State capital cities that are further removed from the border regions. The national steering also overruled local structures, worsening established cross-border cooperation mechanisms. Local governments were left with no space to take into account the specific situation in their border regions. Examples were given in the EMR and Nordic case studies. Nevertheless, despite these challenges in border regions, cross-border cooperation has also been sought and new structures established during the COVID-19 pandemic. Although the importance of cooperation rapidly became evident, the level of success could be different.

Yet it is important to take into consideration the fact that all inhabitants living on the border in border regions are not only national citizens but also have EU citizenship, whether they are economically active or not and disregarding the perceived necessity of travel. Here, it is important to note that the citizens in border regions enjoy personal and professional life and rights in multiple countries. It can therefore be recommended to have a more bottom-up, rather than top-down, approach where the interests of the citizen are paramount. By doing so, the balance struck between the right of free movement and the protection of public health should not only concern economic or social costs but also the more personal scope of the free movement rights that are often exercised at the border. To conclude, information is crucial to help and unburden persons living in cross-border regions. Rules,



regulations and travel restrictions and their applicable exceptions changed at a rapid pace, too often resulting in undesirable confusion and frustration that accurate communication could at least partially have avoided.

Balance between free movement rights and travel measures

In the report, the balance between free movement rights on one hand and the need for travel measures to protect public health on the other has been studied. Precautionary measures are justified to reduce the risk of spreading the COVID-19 virus. Yet, these measures should be proportionate, non-discriminatory, be aimed at an appropriate level of protection while not being able to guarantee zero risk. In light of proportionality, the main question is whether there are less restrictive alternatives available to achieve an equivalent level of protection. It is clear that blanket measures are not proportionate, nor are border closures. Also, from a scientific point of view, the effectiveness of travel measures is greatly dependent on the regional differences. Indeed, restricting mobility from high-risk areas is useful in order to prevent the import of viruses when the local epidemiological risk is low. Nevertheless, this effect diminishes rapidly when differences become smaller until close to zero for comparable regions. Given that the proportionality principle requires that the gain in the protection of public health outweighs the negative consequences of restricting free mobility, it is important that Member States look at both the epidemiological situation at local level abroad and reflect on their own epidemiological situation. The latter in particular often appeared to be neglected by many Member States, at least in some of those included in the case studies. Nevertheless, the Council Recommendation urges Member States to do so, and rightfully so, as some of the case law and leading documents discussed show. Therefore, it can be argued that entry restrictions are only proportionate if travellers come from a region that has a greater epidemiological risk.

Another aspect is the efficiency and targeting of the studied entry restrictions. While establishing a common map and criteria for risk assessment, not all Member States in the case studies brought their risk classification for entry restrictions in line with these criteria. Even though proportionality and the Council Recommendation require that measures are targeted to the risk of an area and should make a distinction between different risk assessments, a decidedly 'all or nothing' approach could be identified. In this respect, in the absence of an exemption, both quarantine and a requirement for testing could apply. It is therefore important to point out that the accumulation of entry restrictions could effectively be equivalent to a travel ban. Finally, it is important to monitor that travel restrictions are being used solely to serve public health and are not being imposed for other (political) reasons, e.g. using emergency legislation to justify restrictions of fundamental rights on other areas or relaxation of other measures. To this extent, it is also important to be very careful of 'certified mobility', in which the right to free mobility is limited only to those who are classified as 'essential' or – under the EU Digital COVID-19 Certificate – the holder of a Certificate. The right to free movement requires a permanent balance being made between this right and the need for certain criteria in light of public health. The temporary nature and the exemption of all requirements for green areas should therefore be monitored.



Improvements on a coordinated approach

As mentioned, the Council Recommendation was an important turning point in the aspect of free movement in times of COVID-19. Yet the national implementation still showed different impacts on mobility. Definitions or principles that were imprecisely described were interpreted differently by Member States. Furthermore, the non-binding nature led to a lack of commitment in some Member States, potentially harming the proportionality. Here, it is positive to observe an increasing level of compliance with the Council Recommendation over time. Nevertheless, the importance of reflection on the local situation should be reinforced. While coordination has been sought on entry restrictions, the issuance of travel advice remained unaffected. Given the (in)direct consequences of negative travel advice and the possible confusion that could arise from disparities between travel advice and entry restrictions - and the exemptions thereof - it is worth recommending a greater level of coherence. In this regard, the issuance of travel advice could, to a greater extent, be made on the basis of the ECDC epidemiological maps. Last, the issuance of more detailed data on (Euro)regional level should be promoted, enabling policies to assess the local and cross-border situation at a regional level. While introduction of the Council Recommendation data on the common criteria is provided with the ECDC on regional level, the concept and level of detail of 'regional level' is different per Member State. It is therefore worth recommending coordinating the issuance of data on a common level, for example following the NUTS classification.

To conclude, the COVID-19 pandemic has shown the huge importance of cross-border cooperation, not only on a European level but also on a smaller multilateral or bilateral level. Following the recommendations of the OECD,⁵⁰⁰ it is important to have adequate multilevel governance structures, facilitating a coordinated response and dialogue at all levels and borders. Of course, the importance of mutual trust between authorities and Member States, as well as the trust in overarching institutions, should be stressed. It is therefore important to acknowledge the role of the already-existing (local) structures and prevent that another crisis overrules their functioning. In light of the EU actions on a European Health Union, including the HERA, it is therefore important to keep in mind these existing structures and leave sufficient space for regional specificities.

⁵⁰⁰ OECD, *The Territorial Impact of COVID-19: managing the crisis across levels of government*, <https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-and-recovery-across-levels-of-government-a2c6abaf/>, 10 May 2020.



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