Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach

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On 13 May, the European Commission presented a package of guidelines and recommendations to help Member States gradually lift travel restrictions and allow tourism businesses to reopen. With this initiative, the Commission aimed to play a pro-active role in ensuring an orderly and coordinated exit strategy after months of lockdown in virtually all EU Member States. However, few weeks later, it seems that every Member State applies its own rules and timetable for lifting the travel restrictions, leading to a non-transparent patchwork of rules and regulations.

It appears that the exit of the confinement period will be as chaotic as its start, when every Member State gradually introduced new restrictions without any serious coordination. This may be partially explained on the basis of the EU's limited competences in the area of public health and the Member States' right to trigger the public health exception to the right of free movement of persons. However, it is well known that exceptions to core principles of EU law are to be interpreted restrictively and it should not be forgotten that the proper functioning of the EU internal market and the right to freely move and reside in the entire territory of the EU without any discrimination on grounds of nationality are cornerstones of the EU legal order. From this perspective, the Member States' unilateral actions are increasingly untenable.

Chaos at the border

The lack of coordination of Member States' decisions leads to chaos at the internal borders of the EU. A good illustration was the adoption of a Belgian Ministerial Decree allowing Belgian citizens to visit their family members as well as shops in neighbouring countries from 30 May onwards. However, French legislation does not allow for this kind of travel until 15 June. As a result, Belgian travellers were stopped at the border and had to return back home without seeing their relatives. Whereas Belgian nationals could visit the Netherlands, mayors of the Dutch border regions also complained about the sudden influx of Belgian visitors. The Dutch decision to open pubs and restaurants at a time when these were still closed in Belgium somewhat predictably attracted thirsty Belgian nationals, leading to issues with social distancing. In this respect, the lack of coordination at the Benelux level stands in stark contrast to the approach of the Baltic States, which already formed a common 'travel bubble' in mid-May in order to ensure an area of free movement at regional level at a time when the Schengen area was temporarily paralyzed.

With a gradually improving health situation in Europe and in anticipation of the summer holidays, all Member States are gradually lifting the imposed travel restrictions. However, once again, the lack of coordination at EU level leads to paradoxical situations. Almost every day, one or another Member State communicates a list of 'safe countries', from which visitors will be allowed to travel without any restrictions. For instance, Greece announced that travellers from 29 countries will be able to enter the country from 15 June onwards. Remarkably, the list includes non-European countries such as China, Japan and Israel as well as neighbouring countries from the Western Balkan region but only a selection of EU Member States. In a later statement, the Greek authorities clarified that travellers from the non-selected countries are also welcome but for them additional requirements such as a compulsory COVID19-test and quarantine measures apply. Cyprus classified countries in different categories leading to the gradual lifting of travel restrictions with varying conditions such as approved labora-

tory tests taking place 72 hours prior to departure. Travellers from non-selected countries will be transferred to their homes and are required to stay in self-isolation for 14 days. Croatia limited its list of 'safe countries' to 10 EU Member States from which travellers are only required to register their contact data for epidemiological reasons. Citizens from other EU Member States have to prove a particular reason for entering the country and need to comply with certain administrative formalities. Lithuania based its distinction on the infection rate per 100,000 inhabitants during the last 14 days. Travellers coming from EU countries where this figure is below 15 can enter the territory without restrictions. For countries where the rate is between 15 and 25, entrance to Lithuania is subject to a 14-day self-isolation period. Travellers from Member States where there are more than 25 registered cases per 100,000 inhabitants cannot enter Lithuania with the exception of Lithuanian citizens returning from these countries. Other Member States, such as Italy and Germany, do not work with selection criteria and open their borders to travellers from all EU Member States, the UK and the associated Schengen countries.

Objective epidemiological requirements?

Without entering into a detailed analysis of the precise requirements in every EU Member State, the great diversity of approaches is striking. Some countries are on the 'safe list' for certain destinations and on the 'black list' for others. Nevertheless, all Member States invoke epidemiological reasons as a justification for their national measures. It is, therefore, difficult to understand the entirely different outcomes taking into account that the epidemiological situation in a given area may, in principle, be regarded as an objective reason. A key explanation for the identified differences is that each Member State seems to apply a different methodology for estimating the public health risk. Greece, for instance, based its approach on information from the EU's Aviation Safety Agency (EASA) which publishes a list of airports with a high risk of transmitting COVID-19. Others, such as Lithuania, refer to the information which is made available by the European Centre for Disease Prevention and Control (ECPC). Other Member States simply refer to the advice of their national health authorities.

Apart from epidemiological motivations, it seems that other considerations are taken into account as well. Most Member States reveal a preference for opening their borders to neighbouring countries, even if the number of corona transmissions may be relatively high. This looks a bit like the Eurovision song contest where neighbouring countries are treated favourably irrespective the quality of their performance. For instance, Greece included Northern Macedonia on its list of safe countries but this seemed premature taking into account that a peak of infections was reported in the past days, leading to a new lockdown of the capital Skopje and several other cities. Moreover, by including third countries, Greece anticipated on the end of the common approach with respect to restrictions on non-essential travel to the EU, to which the Member States voluntary agreed upon recommendation of the Commission.

Some tendencies of reciprocity can also be observed. For instance, the French Prime Minister Philippe openly declared that France will impose quarantine measures to nationals of countries that have a similar requirement or request the presentation of negative COVID-19 tests. Arguably, this approach based on reciprocity contradicts the principle of non-discrimination, which implies that restrictions to free movement of persons are to be exclusively based on objective requirements of public health protection. This means that similar conditions must apply to all areas of the Union with a similar epidemiological situation. Moreover, the same measures must apply to all EU citizens and to all residents of a certain Member State regardless of their nationality. To give a concrete example, a Belgian national living in Germany cannot be refused to enter Lithuania, if the latter allows travellers coming from Germany but still closes its borders for travellers from Belgium. Finally, the measures should respect the principle of proportionality. Registration and testing requirements are in any event less far-reaching than a blunt closure of the borders.

Lessons learnt

The paradoxical outcomes of a situation where all Member States unilaterally decide on the gradual lifting of the temporary travel restrictions on the basis of different criteria and at a different pace become increasingly obvious. The result is a rather chaotic situation which is very confusing for ordinary citizens. Even more, it fundamentally affects the right of every EU citizen to freely move and reside within the territory of the EU without being discriminated on grounds of nationality. Of course, this right is not unconditional and objectives of public health protection may constitute an overriding reason of general interest allowing for certain restrictions in extraordinary circumstances such as the current corona crisis. However, also in such a context, the travel restrictions must satisfy the well-known test of necessity and proportionality. It seems that the hasty decisions and communications of several EU Member States fail to pass this test.

Moreover, the bunch of national measures appears to be largely ineffective and almost automatically leads to calls for a more coordinated European response. It is, in this respect, nothing more than logical that the Justice and Home Affairs Council meeting of Friday 5 June discussed how restrictions on free movement and internal border controls can be lifted in a more coordinated, non-discriminatory and proportionate way. The ambition is to remove all internal border restrictions and border checks by the end of June. With respect to the external borders, a further extension of the ban on non-essential travel to the EU is also on the agenda.

Whereas the importance of a gradual return to an area without internal frontiers – which is part of the EU's DNA – can hardly be underestimated, it is important to draw some long-term lessons from the recent period. The swift and uncoordinated re-introduction of travel restrictions as well as the chaotic exit of the lockdown period call for a genuine reflection about the division of competences in the EU. Perhaps it is time to think about a stronger role for the European Commission in areas where it traditionally has a rather limited role, such as health care and home affairs, as suggested by Commissioner Ylva Johansson. At the least, one could expect a more European reflex from national authorities when they are confronted with new crisis situations in the future.

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