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The Traumatic Growing of Age of EU Law's 'Cherished Child'? AG Emiliou's Opinion on Covid-19 Related Mobility Restrictions in the Nordic Info Case (C128/22)

By Leon Züllig

Fortunately, for most of us, the Covid-19 pandemic seems like a distant memory from a gloomy but thankfully bygone time. An especially traumatizing part of these memories certainly are the [unprecedented restrictions of freedom of movement](#) during the first wave of the pandemic. Whereas the balancing of fundamental rights against the effective combatting of threats is a standard judicial exercise in the fight against crime and terrorism, its application to a situation of a global pandemic is uncharted territory for the Court. In this context, Covid-related cases dealing with [travel](#) and [labour](#) law have recently made their way to Luxembourg and even long before that the Court has been seized with the [legality of measures to control epidemic diseases](#) - concerning cows though, not humans.

[The Nordic Info Case](#) is, as AG Emiliou points out right at the beginning of his opinion published on 8 September 2023, different. It is the first time, the Court is called upon to assess the legality of precautionary measures that 'shook, by their very nature and severity, one of the main foundations, and indeed, achievements, of the EU [...]' (para. 4). The travel restrictions that stand in the centre of the case, 'weigh heavily on the heart of the EU lawyer' since they severely impacted the mobile Union citizen - the 'cherished child' of EU law (para. 128.). These measures were no trifle but sometimes traumatizing, when the executives' margin of discretion in the emergency situation of pandemic at least preliminarily side-lined individual rights for example of unmarried partners, impeded funeral visits and the like.

The underlying legal questions concern the provisions on restrictions of freedom of movement under the [Free Movement Directive](#) in general and border control measures under the [Schengen Borders Code](#) (SBC) in particular, are highly topical and may, so the thesis of this blogpost, have repercussions that go beyond the case at hand.

Being a surprisingly emotional piece of EU jurisprudence, AG Emiliou's opinion has the potential to re-traumatize. But as some of us might have learned watching the arte series '[In Therapy](#)' during lockdown: One best gets over a trauma by treating it – so let's see whether AG Emiliou has potential to be a good legal therapist.

Facts of the Case

The applicant Nordic Info BV is a tour operator established in Belgium that organises and sells trips to Nordic Countries, specially to Sweden. In order to control the spread of Covid-19, in March 2020 the Belgian Government introduced travel restrictions. Those 'urgent measures' initially provided for a general ban of all 'non-essential' travel from and to Belgium. Subsequently, exceptions were introduced regarding travel from and to EU+ countries (EU, Schengen Area, UK), which were regulated by means of a classification of countries in red (high risk – travel ban), orange (moderate risk – travel warning) and green (low risk – no restrictions). This classification was based on epidemiological criteria and frequently updated. In July 2020, Sweden was first classified 'red', then 'orange'. Remember: Sweden initially pursued a [unique 'hands-off' approach](#) that was [criticized by scientists](#) for its high infection rates and death tolls. As a reaction, Nordic Info cancelled all scheduled trips to Sweden for the 2020 summer season. It subsequently filed a civil liability action before the Brussels Court of First Instance and sought damages amounting to nearly half a million Euros.

Nordic Info essentially claimed that the adaption of the travel restrictions was unlawful since they first violated the right to free movement under the Citizenship Directive and second entailed the reintroduction of border controls in breach of the SBC. The Belgian Court stayed its proceedings and referred the case to the Court of Justice.

Compatibility of the Belgian measures with the Citizenship Directive

As noted by the AG, the procedural peculiarity of the case consists in the fact that it is not an individual challenging the limitation of its mobility, but an affected company bringing a civil liability claim against a Member State. Nordic Info is therefore not invoking its own freedom to provide cross-border services under Article 56 TFEU but relies on the freedom of movement of its clients (para. 32).

Starting from this point of departure, the AG outlines in paras 33-35 the applicable legal framework *ratione materiae*, from its primary law basis in Article 20, 21 TFEU and Article 45 of the Charter to the right of exit and entry in Art. 4 and 5 of the Citizenship Directive. Subsequently, AG Emiliou delves in great detail into the *ratione loci* of this legal framework. This is due to the fact that Nordic Info not only organizes travels to Sweden, but also to the Non-EU but Schengen-, EFTA- and EEA-Member States Iceland and Norway. However, as fascinating this deep dive into the intricacies of territorial fragmentation within the European mobility regime might be, I only refer interested readers to paras 36-47 and to [this blogpost](#).

Subsequently, AG Emiliou touches the (luckily) rarely relevant emergency derogation clause of Article 347 TFEU, a norm that allegedly has never been interpreted by the Court before (para. 53). This observation is at least imprecise, since the Court indeed has, although briefly, elaborated upon the nearly identical preceding norm Article 297 EC Treaty in [Kadi](#) (paras 302-303), where it conditioned derogating measures to compliance with the EU's core values enshrined in Article 6(1) EU, today's Article 2 TEU. This however is only a minor issue since, as we shall see, the norm will not be decisive for AG's reasoning.

AG Emiliou then proceeds to materially assess the lawfulness of the restriction of the right to freedom of movement under the Citizenship Directive's general derogation provision Article 27(1) and the concrete public health derogation for diseases with epidemic potential under Article 29.

First, the AG highlights that those provisions cover the right to exit just as the right of entry and that they not only allow for 'individual' but also for 'general' restrictions. This clarifies the partially imprecise wording of the Directive and is based on a convincing teleological and systematic interpretation of the relevant provisions (paras 58-73).

Second, AG Emiliou assess the measures' compliance with Article 27(1) and 29(1) of the Citizenship Directive, entailing (1) implementation in response to a serious, genuine and relevant threat to 'public health', (2) compliance with the principles of legal certainty, (3) equal treatment and (4) proportionality.

On the basis of the available scientific assessment of Covid during the first wave and combined with the precautionary principle as well as Member States' central role and discretion in the field of public health, AG Emiliou considers the first requirement to be met (paras 76-86). The second and third requirement are equally met, since the Belgian measures were formulated with sufficient clarity and applied without considerations of nationality (paras 87-90).

The core issue of the first question is proportionality. The AG again stresses, that the precautionary principle and the Member States' broad margin of discretion imply judicial

self-restraint. The standard of review can therefore only be '[...] whether authorities could *reasonably* take the view that the contested measures were appropriate, necessary [...] and proportionate *sensu stricto*.' (para 94).

The requirement of appropriateness seems to be met. However, this comes with the caveat that the AG deduces from a detailed assessment of scientific literature (paras 99-101), that the actual contribution of travel restrictions to the containing of pandemics is not as clear-cut as portrayed by the Commission and the intervening governments. Therefore, there remains a need for further clarification. This relates to the question of a potential incoherency between external and internal mobility restrictions: In the absence of information on restrictions within Belgium in the case files, the AG assigns the assessment of this point to the National Court. This point is interesting, since it pinpoints the relapse of many Member States into the logic of national regulatory containers in designing their Covid strategies.

The ensuing assessment of strict proportionality in paras 120 et. seq. constitutes the heart piece of the first question. AG Emiliou stresses, that the measures at stake not only limited the freedom of movement under the Citizenship Directive but indirectly a series of rights under the Charter, namely Article. 7, 14, 15, 16 and 45. Therefore, the standard of review under Article 27(1) of the Citizenship Directive must be interpreted in accordance with the standard of Article 52(1) of the Charter and include the assessment of strict proportionality (paras 120-122). This is, as pointed out in para. 123, not just a detail but paves the way to the balancing exercise that, in the words of AG Saugmandsgaard Øe in [Tele2 Sverige and Others](#), 'opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in' – a debate that AG Emiliou emphasises, is particularly necessary in relation to the unprecedented measures taken during the pandemic (para. 123.).

Well then – make yourself comfortable on AG Emiliou's couch.

The AG stresses that dealing with the pandemic constituted 'one of the greatest challenges that public authorities have had to face in recent history' and that the balancing of interests in that situation was particularly difficult (paras 124-126). Moreover, rubbing balm on the maltreated soul of EU lawyers, he recalls that the disadvantages for individuals 'weigh heavily on the heart of the EU lawyer since those measures had the greatest impact on the 'cherished child' of EU law, namely the mobile Union citizen': The very mobility fostered by the EU, that enables the establishment of a cross-border 'lifestyle' through work, friendships, family ties and so on, all of a sudden was seen as a threat and curtailed accordingly (para. 128).

Nonetheless, the AG concludes, considering the flexibility of the measures, the differentiation between high risk and low risk countries, the exceptions for people traveling for 'essential' purposes like 'imperative family reasons' and the fact that the case at hand 'only' deals with travel for tourism purposes to high risk countries, the Belgian measures complied with the strict proportionality test (paras 129-133) and therefore, in the eyes of AG Emiliou, were compatible the Citizenship Directive. A conclusion that, I dare to assume, most people would agree with – although maybe through clenched teeth.

Compatibility of the Belgian Measures with the Schengen Borders Code

AG Emiliou then proceeds to assess the compatibility of the Belgian enforcement measures at its borders to other Schengen States with the SBC.

He first points out that the criteria of intensity and frequency of the measures *in casu* point towards them constituting a mere 'exercise of police powers' in the meaning of Article 23(a) SBC and not 'border controls' under Article 22 SBC – a 'classic' issue in the Court's related case-law (see [here](#), paras 33-57 and case-law cited there). Nonetheless, AG Emiliou again seizes the opportunity for clarification and assesses the criteria for the temporary reintroduction of border controls under Articles 25 et seq. SBC. Surprisingly, as opposed to Article 27(1) of the Citizenship Directive, the SBC only lists threats for public health as a negative entry condition for third country nationals on external borders, but not among the permitted reasons to temporarily reinstate internal border controls. This is, as AG Emiliou emphasises, no case of sloppy drafting, but due to an intervention of the Parliament during the drafting of the Regulation (paras 149-150). Nonetheless, serious threats to public health may simultaneously constitute a serious threat to public policy or internal security and may therefore be subsumed under Article 25(1) SBC (paras 151-154). With the envisaged inclusion of threats to public health into a [new Article 25\(1\)b\) SBC](#), this point might soon lose its relevance and is definitely one of the less [problematic points](#) of the current [reform process](#).

A noteworthy aspect is here, that AG Emiliou explicitly draws a parallel between the severe impacts on EU law's 'cherished child' that 'weigh heavily on the heart of the EU lawyer' mentioned in paras 120-133 and border checks as such. Even beyond substantive travel restrictions as imposed during Covid, border checks bring 'in themselves, certain disadvantages' that impact all persons for which unhindered movement across borders is crucial, like cross-border workers that get stuck in long queues leading to considerable delays or the movement of goods (para. 160). Despite that, AG Emiliou clarifies, concluding his excursus, that temporary internal border controls in response to a pandemic may be compatible with Article 25(1) SBC.

Conclusion

All in all, AG Emiliou's opinion is a detailed, well balanced and insightful piece of jurisprudence, that matches the significance of the underlying unprecedented restriction of fundamental rights in Europe.

Although the findings of the opinion as such might not come as a surprise, it addresses a series of tricky legal questions under the Citizenship Directive. Moreover, and probably even more importantly, it contributes to the clarification of the legal framework of the highly topical issue of national border control measures. This issue, I dare to assume, will continue to occupy European courtrooms, especially considering the [latest expansion of national border controls](#) to curb migration that seem to openly disregard the [NW judgment](#), demonstrating the [difficulties in enforcing the SBC](#).

It is right here, at the intersection with migration-related border control measures, where AG Emiliou's opinion and the expected judgment of the Court, might have an impact that goes beyond the case at hand. The fact that the AG felt the urge to explicitly stress the far-reaching general impact of border-control measures on the cross-border lives of Union citizens and the circulation of goods and services, fills a gap left by the Court in the [NW judgment](#) (also [discussed on this blog](#), [here](#) and [elsewhere](#)). There, the Austrian National Court had explicitly raised the question of the nexus between border control measures under the SBC, Article 21(1) TFEU, Article 45(1) of the Charter and the Citizenship Directive. The Court however evaded this topic and rather narrowly focused on the SBC – a lost opportunity for a [more constitutional reading](#) of the relationship between national border controls and their impact on Union citizens and companies. The Court's forthcoming judgment therefore constitutes an opportunity to flesh out its jurisprudence in this field, that might impact the politically delicate but highly relevant area of national border control measures in general.

Yet undiscovered potential also lies within the procedural context of the case: Although Nordic Info will most likely lose, the proceeding demonstrates the potential of civil liability actions to legally challenge border controls in the context of freedom of business under Article 16 of the Charter. It remains to be seen whether more companies dare to challenge national border controls and their [consequences](#) like stuck commuters, disturbed supply chains or delayed cross-border train connections.

Whereas the area without internal frontiers and Union citizens' freedom of movement might turn out from this case with a 'basic immunity' against future public health related restrictions, it remains to be seen whether there will also be a cross-immunization in the field of migration-control related measures. All in all, the 'cherished child of EU Law' may be about to take a significant step towards its coming of age – if the Court holds its hand.