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**So long and see you in the next pandemic? The Court's one-and-done approach on permissible reasons to restrict freedom of movement for public health reasons in the Nordic Info case (C-128/22) of 5 December 2023**

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To what extent were covid-19 measures such as closed borders, quarantines, and obligatory testing permitted under EU law? The judgment in the case [Nordic Info BV](#) published on December 5 2023 sheds some light on the complicated relationship between the freedom of movement, the [EU's "cherished child"](#), and the fight to limit the spread of a deadly pandemic.

In the spring of 2020, when the covid-19 swept through Europe, most governments imposed lockdowns as a measure of last resort. Belgium, where the tour operator Nordic Info BV, was based, closed its national borders to non-essential travel of non-nationals and non-residents. This rule was gradually relaxed in summer 2020 to allow travel to low-risk areas (i.e. those labelled as green or orange [on the ECDC's famous map](#)). However, some areas swiftly received a red label, including Sweden, where Nordic Info was forced to cancel its summer trips. Consequently, the company sued the Belgian government for damages incurred.

The AG's opinion has already been [analysed on the ELB](#), aptly calling the AG a legal therapist dealing with an extremely unusual legal situation. The focus of this blogpost will instead be the judgment; specifically, the Court's evaluation of the permissible restrictions on EU citizens' freedom of movement in the name of protecting public health during a pandemic. As already explained by my colleague in his [blogpost](#), while the Citizens' Rights Directive (Directive 2004/38/EC of 29 April 2004, CRD) explicitly allows for it, the Schengen Borders Code (Regulation (EU) 2016/399 of 9 March 2016, SBC) is silent on the issue.

[Previous case law](#) hinted at the option of considering health threats as a threat to internal security and public policy, which is corroborated in this decision.

## Two questions posed by the referring Court

*First question:* Is it compatible with CRD to impose (i) a general ban on non-essential travel for citizens and residents seeking *to* travel to a red zone, and (ii) entry restrictions (quarantine and testing) for non-citizens and non-residents travelling *from* a red zone

*Second question:* Whether (police) control of the restrictions amounted to (i) border checks and (ii) reintroduction of border controls.

## First question

The Court starts by explaining (in para 52 and 53) that while the CRD provides exemptions for epidemics in its articles 27 and 29, a fortiori the same applies to pandemics (unlike an epidemic, a pandemic is [not contained to a small population](#)). Moreover, the measures had a non-economic objective, i.e. to prevent the spread and were part of a comprehensive set of measures designed to protect the population (para 54). The Court also confirms that measures such as an obligation to undergo screening tests and to observe quarantine are restrictive on freedom of movement (para 59).

Further, the Court states that the CRD mentions restrictive measures in the form of an individual decision, but following AG's reasoning the Court confirms that the safeguards of Article 30 and 32 also apply to restrictive measures of a general nature (para 67).

The principle of proportionality is given a special place in the Court's reasoning. Unlike earlier public health case law, which used a two-step proportionality test, the Court brings back the final step, i.e. proportionality *sensu stricto*, saying that measures to protect public health must be balanced against fundamental rights, and the disadvantages should not be disproportionate to the aims pursued (para 92). It also connects the test to precautionary principle, confirming that the test serves as a valid tool for Member States to act before the risks to the population materialise. Moreover, the Court mentions scientific evidence in relation to supporting Member States' claims to the proportionality of their actions. The claims should be assessed in the light of scientific data commonly accepted *at the time of the incidents of the proceedings* (i.e. summer 2020), including the infection and mortality trends, relying on [epidemiological data collected by ECDC](#) (para 85 and 90). Finally, the Court adopts a holistic view of the measures put in place by Belgium; it states in several places that the proportionality of the measures should be viewed as a

part of a package of measures such as quarantines, masking and social distancing obligations (cf. para 86, 90, 91), which helped reinstate the free movement and thus contributed to proportionality of the measures.

In sum, the Court's opinion is that Article 27 and 29 CRD do not preclude legislation of general application, which (i) prohibits EU citizens from engaging in non-essential travels to high-risk zones, and (ii) require non-nationals wishing to enter to undergo tests and quarantine, provided that national legislation complies with conditions and safeguards of art. 30-32 CRD, the CFR, especially proportionality and non-discrimination.

## Second question

### a) Border checks

Many Member States, including Belgium, introduced [border controls in the first wave](#) to limit the spread of the virus, though the severity and the duration of the measures varied.

First, the Court turns to the issue of whether such controls amounted to border checks or a measure having an equivalent effect thereto. It begins its analysis by explaining that the nature of the controls was to check compliance with the border crossing ban (para 106). Moreover, they were carried out temporarily and only in specific places such as airports, major international train stations as well as on roads during working hours (para 107). Further, their objective was to prevent the spread of the pandemic (para 113, 114) even if they were mostly carried out in border areas (para 116). The decision whether Belgium's action amounted to border checks or measures having an equivalent effect is left up to the referring Brussels court (para 109). However, given the specific nature of the controls, the Court strongly suggests in para 115 that they were unlikely to have amounted to either.

Next, the Court has to deal with the fact that the SBC does not expressly provide for derogations for public health reasons. The reasoning uses multiple negatives in the same paragraph-long sentence (para 118), which makes it difficult to understand the Court's argument. It states in that paragraph, following the Commission's reasoning in [Guidelines for border management measures from 16 March 2020](#), that the lack of an explicit provision does not mean such measures are not possible. However, the measures must not amount to a general prohibition without consideration of the persons' conduct and other circumstances (para 118, 119).

However, the referring Court will need to verify that those checks were distinct from systematic checks at external borders (para 121), keeping in mind that Member States enjoy some "measure of discretion" justified by the precautionary principle (para 122).

## b) Border controls

Next, the Court turned to the reintroduction of border controls. Referencing para 154 of the AG's opinion as well as [Josemans \(C-137/09, para 65\)](#) in paras 125 and 126, the Court states that health threats can constitute a serious threat to internal security and public policy. It opens the door for a broad understanding of public policy to include the existence of a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", and internal security to cover a "threat to the functioning of institutions and essential public services and the survival of the population" (para 126). By its nature, a disease like covid-19, capable of spreading quickly, causing death, and overwhelming healthcare services, threatens the "fundamental interests of society" such as provision of healthcare and protecting the most vulnerable. Such a situation may be classified as a serious threat to public policy and/or internal security within the meaning of Article 25(1) (para 127).

In sum, the Court's opinion is that Article 22, 23 and 25 of the SBC do not preclude legislation, which on PH grounds to fight the covid-19 pandemic prohibit the crossing of internal borders, insofar it does not amount to border checks but only the exercise of police powers. Reintroduction of border controls is likewise permissible, since a pandemic disease falls within the internal security/public policy clause.

### **Main takeaways: restricting free movement to fight a pandemic disease**

#### **1. The covid-19 pandemic was a justifiable reason to restrict freedom of movement under secondary law.**

Under the CRD, a public health emergency such as the covid-19 pandemic can be invoked as the reason for restricting movement. Following the Court's interpretation of the public policy and internal security clause, at least in this case it was a permissible exception from free movement under the SBC as well - something that had not been clear until [now](#). However, its applicability in other public health emergencies remains unclear.

The Court states in para 52 and 53 that the provisions of Article 29(1) of the CRD allow for restrictions in the case of a disease with an epidemic or pandemic potential, respectively, but they must be declared by the WHO as such. In the case of covid-19, the [WHO delayed the declaration](#) despite the [experts' earlier advice](#). While the requirement aims to ensure legal certainty, the period before a disease is deemed epidemic or pandemic may lead to a legal vacuum in which the restrictive measures are necessary to protect public health, but cannot yet be imposed.

Essentially, despite free movement's position of the "cherished child" (point 128 of the AG's opinion) within the EU's legal system, the judgment is surprisingly gentle in its evaluation of Member State measures. Measures such as quarantines and testing are seen as short-term pain, which is permissible, as long as it leads to a longer-term gain, i.e. restoring free movement (cf. inter alia para 96 and 97, also second sentence of para 120). Considering that in the past, the Court had taken [a restrictive approach](#) to limiting movement in the name of protecting public health, its decision in Nordic Info is surprising. We can speculate that, similarly to the legislator, the Court considers covid-19 as a one-off disruption and that giving Member States wide discretion (dare we say *carte blanche*?) in this case is unlikely to have an impact on future policy or case law.

## 2. Measures must follow the precautionary and proportionality principles.

When adopting restrictive measures, the Member States must comply with the provisions of the CRD and SBC, as well as follow the principles of precaution and proportionality. In public health law, precaution allows a Member State to act to [protect its population before the risks materialise](#), i.e. in this case to impose border controls and prohibit certain travel.

Interestingly, while [previous case law](#) suggested a [two-step proportionality test in public health cases](#), this judgment applies the classic three-step test. Following the AG's reasoning, the Court brings back the third step to ensure that the disadvantages are weighed against the aims pursued (para 93). We can speculate that the Court wanted to address the wide-reaching consequences of the pandemic on the society beyond what the AG called the "efficiency" focused aspects (cf. point 123 of the [opinion](#)) of the first two steps previously used. As the AG points out, the third step serves to gauge what kind of burden is acceptable in a democratic society. However, the judgment also suggests that the referring court might find it difficult to establish proportionality considering that all the measures are essentially precautionary ones (cf. para 97 referring to "significant probability" of the measure's necessity).

## 3. Scientific evidence plays a role as well

While scientific evidence already played an important role in permitting Member States to restrict movement (cf. [Geraets-Smit \(C-157/99\)](#) and [Vitamins \(C-41/02\)](#)), the covid-19 pandemic has been characterised by the absence of clear and unambiguous scientific information. Considering that the virus was a new one (initially often called "the novel coronavirus"), the speed of scientific progress on understanding its [contagion mechanisms, how it affected the human body and how to fight it](#), was [remarkable](#). On the other hand, there were significant disagreements between scientists since the very beginning, resulting in gradual adoption of measures such as [masking requirements](#). Nor was it entirely clear how and to what extent [vaccination](#) could prevent the virus's spread.

If Member States can rely on scientific evidence to justify the restrictions they impose, what happens when the evidence is missing or inconclusive?

This judgment answers some questions, and brings new ones. It tells us that the proportionality test should take into account *the evidence that was known at the time the measures were adopted*. However, that only applies when the evidence is clear. If evidence is uncertain, the Court states that precautionary principle is a legitimate means of addressing the risks (para 90). Nonetheless, even precautionary measures need to have [some level of scientific risk understanding of what is at stake](#), which the Court did not address.

## Conclusions

Despite the EU law's relatively restricted power to regulate public health matters (cf. article 168 TFEU), its competence over [freedom of movement](#) was [emphasized by the Commission](#) as one of the [priority actions in the pandemic](#). Instruments such as certification mechanisms (cf. [Regulation 953/2021](#)), [border management guidelines](#) as well as its coordination (e.g. [ECDC](#)) and economic support all aimed to restore free movement as soon as the pandemic situation would permit it. The Court largely followed the Commission's approach, validating that Member States can impose restrictions on free movement, insofar they comply with the criteria outline above, with the ultimate aim of re-opening.

An important question remains unanswered, however. The Court states (in para. 98) that the restrictions are compatible with EU law if Member States adopt them "on public health grounds connected with *combating the COVID-19 pandemic*" (emphasis added by the author). To what extent will this judgment be useful in the case of a future public health emergency (a pandemic or otherwise)? Namely, scientists are already warning that covid-19 was [not the last pandemic](#), with [animal-to-human transmission of viruses](#), and [climate change playing a large potential role](#). Whether the Court will follow a similar approach in the next public health emergency is therefore impossible to say.