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COVID-19 and Labour Law: Free Movement of Healthcare Personnel within the EU

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Abstract

Despite the Union's limited competences in the field of healthcare, the European Union has promptly tried to contrast the negative effects resulting from the disorderly reaction of the Member States to the COVID-19 pandemic, to begin with those most likely to impinge on the proper functioning of the internal market. This report examines the Guidelines elaborated by the Commission in the aftermath of the sanitary crisis with particular regard to the free movement of healthcare personnel.

Keywords: Covid-19; EU law; Internal market; Healthcare personnel.

The competences of the European Union in the field of healthcare are diverse in nature but substantially limited. The management and organization of the healthcare system fall within the responsibilities of the Member States[1], and outside the specific areas indicated in the treaties, the Union cannot uniformize/harmonize domestic laws and regulations.[2]

Common safety concerns in public health matters can only be addressed by coordinating and complementing the action of the Member States. In particular, the Union is called upon to encourage the complementarity of national health services in cross-border areas and concrete cooperation between the Member States[3]. To that effect, the Commission can establish guidelines and indicators, as well as organize the exchange of best practices. In addition, the European Parliament and the Council can adopt of legislative measures to monitor, detect and combat major cross-border health threats like the current COVID-19 pandemic[4]. EU action, however, does not supersede national autonomy in the protection of health.

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1 Art. 168(7) TFEU.
2 Cf. Arts 2(5), 6(a) and 168 (4) TFEU. Most notably the European Parliament and the Council, following the ordinary legislative procedure, can adopt: a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; b) measures in the veterinary and phytosanitary fields; c) measures setting high standards of quality and safety for medicinal products and devices for medical use.
3 Art. 168(2) TFEU.
4 Art. 168(5) TFEU.

The identification, assessment and communication of current and emerging threats to human health from communicable diseases is entrusted to the European Centre for Disease Prevention and Control (ECDC), which operates in close liason with the Member States[5]. In order to fight against health scourges, the EU also relies on the Health Security Committee, with the task of supporting the exchange of information and ensuring coordination activities[6], as well as on the EU Civil Protection Mechanism, aimed at guaranteeing the adequacy of the response in the immediate aftermath of a disaster.[7] This mechanism can be activated via the Early Warning and Response System of the European Union (EWRS) whenever the emergency surpasses the capabilities of the individual Member States concerned.[8] Assistance and expertise can be mobilized by the Emergency Response Coordination Centre (ERCC), which provides a 24/7 service. Most notably, Emergency medical teams (EMTs) can be deployed inside and outside Europe with a view to support and sustain the healthcare personnel operating in the affected countries[9].

It is within this legal and operational framework that the Commission has adopted a number of guidelines aimed at safeguarding the internal market. Indeed, as a reaction to COVID19 Member States have by and large reintroduced checks at their borders, which not only represents a restriction to the supply of medical equipment, but also limits the free movement rights of healthcare personnel. Hence, on 16 March 2020, the Commission has released *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, where it insists on the need to permit and facilitate the crossing of frontier workers[10]. Checks should be substantiated (e.g. supported by ECDC recommendations), duly motivated and non-discriminatory; medical and para-medical personnel involved in the controls should be adequately trained and equipped.

More detailed guidelines to facilitate cross-border movement of healthcare workers, including when this implies using a Member State only as a transit country, can be found in the *Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, of 23 March[11], and in *Communication concerning the exercise of the free movement of workers during COVID-19 outbreak,* of 30 March[12]. Whilst the former generally urges the competent national authorities to set up safe passage corridors in each necessary direction (green lanes), the latter clarifies the categories of (employed and self-employed) workers with critical occupations and the practical arrangements to be put in place.

[5] Regulation (EC) No 851/2004.
[6] Decision No 1082/2013/EU. See also: https://ec.europa.eu/health/preparedness_response/risk_management/hsc_en.
[7] https://ec.europa.eu/echo/what/civil-protection/mechanism_en.
[8] https://www.ecdc.europa.eu/en/early-warning-and-response-system-ewrs.
[9] Medical teams are part of the European Medical Corps (EMC), which gathers all medical response capacities committed by the Member States to the EU Civil Protection Pool. See further https://ec.europa.eu/echo/what-we-do/civil-protection/european-medical-corps_en. The EU covers 75% of transportation costs, as well as 75% operating costs if deployed inside the EU.
[10] C(2020) 1753 final.
[11] C(2020) 1897 final.
[12] C(2020) 2051 final.

With particular regard to the healthcare sector – above and beyond doctors and nurses (health professionals) – the communication mentions: paramedical professionals; personal care workers in health services, including care workers for children, persons with disabilities and the elderly; scientists in health-related industries; workers in pharmaceutical and medical devices industry; workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including their installation and maintenance. These categories of workers should benefit from dedicated lanes at the border. Since crossing operations, including checks and screenings, should take no longer than 15 minutes, Member States are invited to allow workers to remain in their vehicles during the relevant operations, limit temperature measurement to three times a day and contemplate the issuance of specific stickers to secure burden-free and fast procedures for those needing to enter the territory of the Member State of employment. Nonetheless, should fever be present the border authorities are entitled to discontinue the journey, making sure that the individual has access to appropriate health care on a non-discriminatory basis with respect to the nationals of the Member State of employment.

The contribution of healthcare workers in the fight against COVID-19 has more recently been addressed in the *Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare* of 6 April 2020[13]. Besides the supply of medical equipment, the ongoing sanitary crisis calls for mutual support in terms of healthcare facilities, medical personnel and clinical management of patients, as well as proper arrangements for cross-border patient assistance.

Cooperation between the hospitals indicated by the Member States as reference centers for COVID-19 is of the utmost importance, especially in relation to intensive care places[14]. If fully exploited, existing cross-border bi-lateral and regional agreements and contact points are considered capable of optimizing the available resources[15]. More generally, without endangering their own health systems, Member States are invited to collaborate in a spirit of solidarity by sending appropriately qualified medical personnel to overstretched healthcare facilities located in other Member States[16]. The Commission will coordinate the requests for assistance and the signaled availabilities through the Health Security Committee and the Early Warning and Response System (EWRS), and co-fund the emergency transport of patients and medical teams across borders through the EU Civil Protection Mechanism[17].

One of the major challenges in terms of cross-border medical assistance is the recognition of Health Professional Qualifications. Strategical workers in the fight against COVID19, such as doctors (with basic medical training and with specializations in respiratory medicine, immunology or communicable diseases) and general care nurses, are subject to an automatic

[13] C(2020) 2153 final.
[14] Hospital treatment, for instance, has been offered to Italian and French patients from several German Länder (https://www.reuters.com/article/us-health-coronavirus-germany-italy/germany-treats-first-italians-as-coronavirus-care-crosses-borders-idUSKBN21B2GL).
[15] See further Study on Cross-Border Cooperation: Capitalising on existing initiatives for cooperation in cross-border regions.
[16] On 7 April 2020 a team of European doctors and nurses from Romania and Norway was effectively dispatched to Milan and Bergamo (Press release IP/20/613).
[17] The costs related to cross-border healthcare assistance could be supported by the Emergency Support Instrument (see Proposal for a Council Regulation activating ESI) and further resources could be sought through the European Solidarity Fund.

recognition procedure pursuant to Directive 2005/36/EC (as amended in 2013). In this respect, the Commission reminds the Member States that the Directive does not prevent Member States from being more flexible when it comes to accepting incoming health professionals: administrative formalities could be removed (e.g. prior declaration, prior check for qualifications) and application procedures could be speeded up (e.g. shorter deadlines, fewer supporting documents, more relaxed stance towards compensation measures).

Besides those aspects pertaining to prior authorization and reimbursement mechanisms, which the competent national authorities shall manage in accordance with Regulation 883/2004/EC, the transfer of patients discharges on the medical staff involved the responsibility to ensure continuity of care through the sharing of patient summaries, medical records and prescriptions issued in another Member State pursuant to Directive 2001/24/EU[18]. In addition, as previously mentioned, an effective response to the sanitary crisis also rests on the sharing of knowledge. In this regard, healthcare professionals are invited to use the Clinical Management Support System, which was launched on 24 March in order to ensure a timely exchange of experience between clinicians from across the EU (and EEA) concerning severe cases[19].

It follows from the above that despite the Union's limited competences in the field of healthcare, the Commission has promptly tried to contrast the negative effects resulting from the disorderly reaction of the Member States to the COVID-19 pandemic, to begin with those most likely to impinge on the proper functioning of the internal market. With this in mind, further guidance on aspects relevant for the cross-border mobility of healthcare professionals will soon be made available and should be closely monitored.

[18] See https://ec.europa.eu/health/ehealth/electronic_crossborder_healthservices_en.
[19] More concretely, the CMSS enables clinicians working in a hospital treating complex COVID-19 cases to use the Web Conferencing system and be supported by a dedicated Helpdesk managed by DG SANTE.