

ashurst

# The impact of Covid-19

**FREE MOVEMENT OF PERSONS AND GOODS  
WITHIN THE EU SINGLE MARKET**

24 March 2020



## INTRODUCTION

Free movement of persons and of goods are central tenets of the European single market. However, maintaining the economic benefits of these cross-border movements whilst limiting the spread of Covid-19 poses serious challenges. In an attempt to coordinate the measures taken by individual EU Member States, the European Commission ("Commission") recently published [guidelines](#) for border management measures to protect health and ensure the availability of goods and essential services (the "Border Management Guidelines"). These guidelines were endorsed on 17 March 2020 by the heads of states and governments in a [meeting](#) of the European Council.

This briefing note sets out the legislative framework within which EU Member States are able to restrict movements of goods or persons within the EU as well as the EU guidelines on the use of those restrictions in the context of Covid-19.

## FREE MOVEMENT OF GOODS

Under EU rules on the free movement of goods, EU Member States are prohibited from imposing quantitative restrictions and all measures having equivalent effects on imports and exports between Member States. Prohibitions or restrictions on imports, exports or goods in transit may nevertheless be justified on various grounds including the protection of health and life of humans or for public security reasons under Article 36 of the TFEU and related case law.

### The protection of health and life of humans

These types of restrictions **typically concern the import or export of animals and animal products** due to concerns of infectious diseases carried by those animals. As of the time of publication, the [ECDC](#) has not found any evidence indicating a risk of Covid-19 infection from animals or animal products. Such restrictions are therefore unlikely at this stage.

In terms of free movement of inanimate goods, the risk of transmission of Covid-19 could, in theory, be linked to the virus living on the packaging of the transported goods or being carried by transport workers. Any trade restriction on this basis would need to be proportionate to the level of risk presented. The Member State is required to adopt the least restrictive measure possible to protect the health and life of humans. Onerous restrictions on trade in these goods is therefore unlikely in the absence of evidence of a significant risk.

### Public security

These types of restrictions are **permitted only in very limited circumstances**, principally for goods which are of fundamental importance for a country's existence.

Certain Member States have introduced quantitative restrictions, or measures having equivalent effects, on exports of medical equipment and supplies such as personal protective equipment. Measures of this kind have been criticised by the Commission. However, subject to the requirement for proportionality, it is possible that some form of restriction on exports of these goods may be justified on the grounds of public security.

### External trade

It is relevant to highlight that, in relation to external trade, the Commission has issued an [implementing regulation](#) **requiring businesses to obtain authorisations to export certain types of personal protective equipment to countries outside of the EU** (e.g. protective spectacles and visors, face shields, mouth and nose protection equipment, protective garments and gloves). This will initially remain in place for six weeks.

## Commission's Border Management Guidelines

The Commission's Guidelines reflect a commitment to the integrity of the single market, and the preservation of the free movement of goods to the fullest extent possible in the circumstances.

- The Commission urged the Member States to guarantee the unobstructed transport of goods between Member States, especially essential, health-related and perishable goods.
- It called on Member States to designate priority lanes for freight transport, via "Green Lanes", and to consider lifting restrictions on freight over weekends.
- It reminded the Member States that no additional certifications should be imposed on goods circulating within the single market.
- The Commission also asked Member States to allow transport workers to circulate across borders as needed and to ensure that their safety is not compromised.

## Commission's Communication on Green Lanes

Despite the above recommendations, certain Member States have adopted stringent border control measures, hampering the free flow of traffic on border crossings. In response, the Commission has issued a [communication](#) on the implementation of Green Lanes under the Border Management Guidelines (the "Communication").

- The Commission asked the Member States to designate all relevant internal border crossings on the [trans-European transport network](#) as Green Lane border crossings.
- It asked the Member States to ensure that all freight vehicles are able to pass through Green Lane border crossings in under 15 minutes. Member States should make the necessary adjustments, including opening additional Green Lane border crossings, to meet this target.
- It called on the Member States to treat all freight drivers and vehicles in a non-discriminatory manner, irrespective of origin, destination, driver nationality and types of goods transported.
- It urged Member States not to prioritise freight of certain types of goods at border crossings. The Commission did however indicate that it is prepared to explore whether prioritisation measures may be necessary going forward.

The Commission called on Member States to streamline border crossing procedures. Drivers should only be required to produce their identification, drivers licence and, if necessary, an employer certificate attesting to the fact that the bearer carries out international transport activities (provided at Annex 3 of the [Communication](#)).

The Commission has also set up a [platform](#) providing information on the relevant crisis transport measures adopted by the Member States. Regularly updated information on truck border crossing times can also be found using the [following](#).

## FREE MOVEMENT OF PERSONS

### General principles

Under EU rules on the free movement of persons, EU citizens have the right to move freely within the territory of the Member States, subject to certain limitations. However, Article 29(1) of Directive 2004/38 allows the Member States to **restrict free movement of persons from other Member States on the grounds of public health**.

This measure is **only justified in a narrow set of exceptional circumstances**, relating in particular to diseases with epidemic potential as defined by the relevant instruments of the WHO. Given that this mechanism is designed to deal with precisely the type of scenario the Member States are facing, it may be used widely across the EU in the coming weeks.

## Schengen Agreement

In addition to the rules on free movement, the Schengen Agreement allow EU citizens to pass through the internal borders between participating Member States without being subject to border checks when crossing. Member States are permitted to temporarily reinstate border controls at their internal borders for a limited period under Articles 25, 28 et seq of the Schengen Border Code. Since the outbreak, a number of participating Member States have introduced these temporary measures, including Austria, Germany, France and Spain. Whilst these measures do not constitute restrictions on trade, they are likely to contribute to delays at border crossings.

## Commission's Border Management Guidelines

In contrast to the Commission's position on the free movement of goods, its position on the free movement of persons is more nuanced. With **regard to the external border of the Schengen area**:

- The Guidelines aim to reinforce checks at external border crossing points, suggesting that Member States could implement health related measures such as entry screening.
- The Commission also reminded the Member States that they are entitled to refuse entry to non-resident third country nationals where they present relevant symptoms or have been particularly exposed to risk of infection. Any decision to refuse entry must be proportionate and non-discriminatory.

The Commission has also recommended, in a separate statement, that the Member States implement restrictions on non-essential travel to the EU for an initial 30 day period. This proposal was endorsed by the European Council.

With regard to the **internal borders of the Schengen area**:

- The Commission reminded the Member States that temporary border controls should be applied in a proportionate manner. Persons who are clearly sick should be provided with access to appropriate health care and not refused entry.
- It recommended that Member States permit and facilitate the crossing of frontier workers, in particular those working in the health care and food sectors as well as in other essential services.
- The Commission also reminded the Member States that they must not discriminate between their own nationals and EU-citizens residing on their territories. Member States are also prohibited from refusing entry to EU citizens or third-country residents who are returning home.

## Authors



**Donald Slater**  
Counsel, Brussels

T +32 2 626 1916  
[donald.slater@ashurst.com](mailto:donald.slater@ashurst.com)



**Denis Waelbroeck**  
Partner, Brussels

T +32 2 641 9963  
[denis.waelbroeck@ashurst.com](mailto:denis.waelbroeck@ashurst.com)



**Gil Even-Shoshan**  
Counsel, Brussels

T +32 2 626 1907  
[ges@ashurst.com](mailto:ges@ashurst.com)



**Nigel Parr**  
Partner, London

T +44 20 7859 1763  
[nigel.parr@ashurst.com](mailto:nigel.parr@ashurst.com)

## Other key contacts



**Gabriele Accardo**  
Counsel  
Milan  
+39 02 85423430  
[gabriele.accardo@ashurst.com](mailto:gabriele.accardo@ashurst.com)



**Rafael Baena**  
Partner  
Madrid  
+34 91 364 9895  
[rafael.baena@ashurst.com](mailto:rafael.baena@ashurst.com)



**Euan Burrows**  
Partner  
London  
+44 20 7859 2919  
[euan.burrows@ashurst.com](mailto:euan.burrows@ashurst.com)



**Michaël Cousin**  
Partner  
Paris  
+33 1 53 53 56 92  
[michael.cousin@ashurst.com](mailto:michael.cousin@ashurst.com)



**Neil Cuninghame**  
Partner  
London  
+44 20 7859 1147  
[neil.cuninghame@ashurst.com](mailto:neil.cuninghame@ashurst.com)



**Alexi Dimitriou**  
Counsel  
London  
+44 20 7859 1191  
[alexι.dimitriou@ashurst.com](mailto:alexι.dimitriou@ashurst.com)



**Denis Fosselard**  
Partner  
Brussels  
+32 2 641 9976  
[denis.fosselard@ashurst.com](mailto:denis.fosselard@ashurst.com)



**Charles Hammon**  
Counsel  
London  
T +44 20 7859 1662  
[charles.hammon@ashurst.com](mailto:charles.hammon@ashurst.com)



**Maria Held**  
Counsel  
Munich  
T +49 89 24 44 21 176  
[maria.held@ashurst.com](mailto:maria.held@ashurst.com)



**Michael Holzäuser**  
Partner  
Frankfurt  
+49 69 97 11 28 50  
[michael.holzhaeuser@ashurst.com](mailto:michael.holzhaeuser@ashurst.com)



**Christophe Lemaire**  
Partner  
Paris  
+33 1 53 53 54 62  
[christophe.lemaire@ashurst.com](mailto:christophe.lemaire@ashurst.com)



**Duncan Liddell**  
Partner  
London  
+44 20 7859 1648  
[duncan.liddell@ashurst.com](mailto:duncan.liddell@ashurst.com)



**Alexandre Vandecasteele**  
Partner  
Brussels  
+32 2 641 9962  
[alexandre.vandecasteele@ashurst.com](mailto:alexandre.vandecasteele@ashurst.com)



**Steven Vaz**  
Partner  
London  
+44 20 7859 2350  
[steven.vaz@ashurst.com](mailto:steven.vaz@ashurst.com)



**Annick Vroninks**  
Partner  
Brussels  
+32 2 641 9971  
[annick.vroninks@ashurst.com](mailto:annick.vroninks@ashurst.com)



**Ute Zinsmeister**  
Partner  
Munich  
+49 89 24 44 21 187  
[ute.zinsmeister@ashurst.com](mailto:ute.zinsmeister@ashurst.com)



ashurst

[www.ashurst.com](http://www.ashurst.com)