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EU corona emergency law: Restrictions on the export of protective equipment, notably from the EU into third countries like Switzerland (Regulation 2020/402)

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Summary

In mid-March 2020, the European Commission adopted, against the background of the Corona pandemic, temporal common rules for the export of personal protective equipment out of the EU. Under the new system, the export of personal protective equipment, such as medical face masks, is subject to an authorisation requirement. In a first step, the new requirement applied to all third countries alike. However, in a second step the Commission exempted a number of countries and territories, among them also the four EFTA States. How did this come about and is such different treatment of different third States legally acceptable? And what about export restrictions inside the Union's internal market, between Member States?

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1. Introduction

In mid-March 2020, the European Commission adopted, as a matter of urgency and against the background of the Corona pandemic (more technically: the outbreak of the epidemiological crisis caused by the coronavirus SARS-CoV-2 and the disease associated with it, COVID-19), new and temporal common rules for the export of personal protective equipment (PPE) out of the EU. The reason for the new regime is an increased need for PPE and the concern for shortages that could develop in several EU Member States, in a situation where certain third countries that are traditional suppliers to the Union market had already officially decided to restrict exports of protective equipment and where others seemed to have taken similar actions on a more informal basis.

Under the new system, the export of PPE, such as medical face masks, is subject to an authorisation requirement. In a first step, the new requirement applied to all third countries alike. However, in a second step the Commission exempted a number of countries and territories, among them also the four EFTA States. How did this come about and is such different treatment of different third States legally acceptable? And what about export restrictions inside the Union's internal market, between Member States?

In order to address these issues, the present contribution begins with a brief recollection of the EU's general legal framework with respect to export restrictions (below 2.). It then turns to the adoption of the new emergency law and its legal and political context, in which Switzerland appears to have played a certain role (below 3. and 4). This is followed by a discussion of the question just raised: is different treatment of different third States legally acceptable (below 5.)? Finally, the contribution turns to the situation inside the EU and the Commission's attempts to address problems arising from unilateral Member State action in this respect (below 6.). The contribution ends with a brief conclusion (below 7.).

2. The general framework: Export restrictions under internal and external EU law

As is well known, EU law on the (free) movement of goods relates to both goods originating from EU Member States and those originating from third countries. For the former, EU law provides for free movement under the Articles 34 et seq. TFEU. For the latter, there are EU rules in relation to customs and other trade aspects. Further, EU law provides for the free movement of goods from third countries that were lawfully imported into the Union; such goods are assimilated to goods with an origin within the EU (Article 29 TFEU for the customs aspects; for other trade aspects see the decision of the Court of Justice of the European Union, CJEU, in the case of **Criel Donckerwolcke**). As will be seen further below, both regimes are relevant in the context of the questions raised in the introduction to this contribution in relation to export restrictions.

With respect to trade within the EU, Article 35 TFEU prohibits quantitative restrictions on exports and measures having an equivalent effect (MEEQR). Based on comparatively recent CJEU case law, the latter term also includes indistinctly applicable measures (CJEU decision in **Gysbrechts and Santurel**). However, there is the derogation under Article 36 TFEU, a provision that, at the time of the EEC, was modelled on the relevant law of the GATT (see below under 5.). Article 36 TFEU allows the Member States to derogate from the prohibition on export restrictions based on, among other things, the

protection of the health and life of humans, provided that there is no abuse of this derogation possibility (i.e. the measures taken do not amount to an arbitrary discrimination or a disguised restriction). Further, the measures taken in the interest of the protection of health must be proportionate, that is, appropriate and necessary (i.e. least onerous among other possible measures). Proportionality also requires that there be no discretionary conduct that is liable to negate the effectiveness of EU law. This means that the manner in which the measure is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance, and persons affected by the measure must have a legal remedy available to them (e.g. CJEU decision in **Hartlauer**, in the context of the freedom of establishment).

Finally, based on the Tedeschi principle, the rules of the TFEU only apply insofar as there is no more specific secondary EU law on a given matter covered by them (CJEU decision in **Tedeschi**, in relation to what was then Article 36 of the EEC Treaty and in relation to harmonising EEC law on health protection). Due to a lack of a specific legal basis provisions in the TFEU allowing for harmonising Union law on matters relating to quantitative restrictions to the free movement of goods or the derogation grounds applicable in this context, the usual legal basis in this context is Article 114 TFEU. It allows for joint legislative action by the European Parliament and the Council.

With respect to trade of the EU with third countries, different levels of EU rules may apply:

- First, there may be agreements entered into by the Union with third States, such as the **EEA Agreement** with Iceland, Liechtenstein and Norway or the **EU-Swiss Free Trade Agreement** (FTA). Both prohibit quantitative restrictions on exports, though under the reservation of the protection of, among other things, the health and life of humans (Articles 12 and 13 EEA; Articles 7 and 20 EU-Swiss FTA). However, whilst the EEA rules on the free movement of goods are identical to the EU rules also in their interpretation, the EU-Swiss rules are interpreted in a more limited manner. For example, in the context of imports, the Swiss Federal Tribunal has refused to interpret the prohibition of quantitative restrictions along the lines of the EU's Cassis de Dijon principle (**Physiogel**).
- Second, the Union in the framework of the Common Commercial Policy (CCP, Articles 206 and 207 TFEU) may adopt unilateral EU trade law. With respect to export, the instrument that is currently relevant is **Regulation 2015/479** on common rules for exports. This Regulation is the counterpiece to **Regulation 2015/478** on common rules for imports (applicable to imports from WTO countries; for state-trading countries there is another Regulation, and there is also a specific Regulation on textiles). These Regulations are CCP measures, adopted on the basis of Article 207(2) TFEU.

Regulation 2015/479 provides the legal basis for the new export rules, meaning that the relevant Regulation, to be discussed in the next part of the present contribution, is an example of unilateral EU trade law in the field of the CCP.

3. The new Implementing Regulation 2020/402

3.1. Adoption and legal context

Against the background of the Corona pandemic, the EU Commission in mid-March 2020 adopted **Implementing Regulation 2020/402** making the exportation of certain products subject to the production of an export authorisation. It has been in force since 15 March 2020 (see Article 3). Only a few days later, the Commission amended this measure by **Implementing Regulation 2020/426**. It has been in force since 21 March 2020 (see Article 2).

Implementing Regulation 2020/402 contains a list of products of personal protective equipment (PPE) to which the export restrictions apply, namely Annex I. According to a note added there, this Annex is in conformity with **Regulation 2016/425** on personal protective equipment. This latter Regulation is an internal market measure, adopted on the basis of Article 114 TFEU and against the background of health and safety concerns. It lays down requirements for the design and manufacture of PPE which is to be made available on the market, in order to ensure protection of the health and safety of users and establish rules on the free movement in the Union (Article 1). PPE shall only be made available on the market if, where properly maintained and used for its intended purpose, it complies with the Regulation and does not endanger the health or safety of persons, domestic animals or property (Article 4).

As was mentioned above, in terms of its legal basis Regulation 2020/402 has been adopted based on Regulation 2015/479, and in particular its Article 5. The premise on which this latter Regulation is based is stated in its preamble, namely:

> "[E]xports are almost completely liberalised in all the Member States. It is therefore possible to accept as a Union principle that exports to third countries are not subject to any quantitative restriction, subject to the exceptions provided for in this Regulation and without prejudice to such measures as Member States may take in conformity with the Treaty."

Against this background, Articles 5-7 of Regulation 2015/479 allow for the adoption of protective measures by the Commission, also in the case of urgency. Notably, Article 5(1) provides:

> "In order to prevent a critical situation from arising on account of a shortage of essential products, or to remedy such a situation, and where Union interests call for immediate intervention, the Commission, acting at the request of a Member State or on its own initiative, and taking account of the nature of the products and of the other particular features of the transactions in question, may make the export of a product subject to the production of an export authorisation, the granting of which shall be governed by such provisions and subject to such limits as the Commission shall lay down in accordance with the examination procedure referred to in Article 3(2), or, in cases of urgency, in accordance with Article 3(3)."

3.2. Main content and guidance from the Commission

In terms of its content, Article 1 of the Implementing Regulation 2020/402 limits the export of certain products outside the EU by introducing, on the Union level, the obligation to obtain an authorisation for the export of the products covered by the Regulation. The authorisation is to be granted by the competent authorities of the Member State where the exporter is established. Without the production of such export authorisation, the exportation is prohibited.

Article 2 sets out procedural rules in this respect; applications for export authorisations must be addressed to the competent authorities of the Member States. The Regulation sets a certain framework for their action, including notably the maximum period of time for processing applications (namely in principle no more than five working days), considerations to be taken into account in deciding on applications (though only "where appropriate") and the possibility for the Member States to make use of electronic documents for the purpose of processing the applications for export authorisation.

Article 3 contains the usual final provisions for a Regulation (entry into force, addressees), though with one particularity, namely a limited duration: Implementing Regulation 2020/402 is valid only for the duration of six weeks; it shall automatically cease to apply at the end of this six-week period (so-called sunset clause). As noted by the Commission in its **Guidance Note** on Implementing Regulation 2020/402, during this period the Member States will be consulted in the Safeguard Committee (provided for under Article 3 of Regulation 2015/479) to confirm the approach and decide on the need to take appropriate measures for a subsequent period.

In the Guidance Note, as published on 20 March 2020, the Commission provides practical guidelines for the application of Implementing Regulation 2020/402 by the Member States. For example, under the title, "5.1. Assessment of the application by the competent authorities", the Commission explains:

> "The system is not an export ban. However, all exports within the scope of application of the Regulation are subject to the production of an export authorisation.
>
> In deciding whether to grant an export authorisation, the Member States must fulfil the objective of the implementing act, i.e. ensure the adequacy of supply in the Union in order to meet the vital demand for PPE.
>
> In other words, export authorisations could be granted only where the shipment in question does not pose a threat to the availability of PPE on the market of the Member State in question or elsewhere in the Union for the purpose of meeting the objective of the Regulation.
>
> Within this overarching objective, the competent authorities enjoy a margin of discretion and exports of certain quantities of specific PPE products may be authorised under specific circumstances depending on the needs of Member States.
>
> Article 2(3) of the Implementing Regulation includes an illustrative list of considerations which are to be taken into account, where appropriate, in deciding whether an export authorisation could be issued. [...]"

With Implementing Regulation 2020/402, the EU has introduced a common legal framework with respect to the exportation of PPE gear that binds the Member States. The Member States in fact did take different, national approaches. For example, Germany blocked the exportation of PPE to Switzerland (see further below under 4.1.). From a legal perspective, this is a questionable course of action.

First and foremost, the CCP falls within the exclusive competence of the Union (Article 3(1)(e) TFEU). According to Article 2(1) TFEU, this means that "only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."
Second, the empowerment given by the Union to the Member States through Regulation 2015/479 relates to: 1) the application of the authorisation system within legal framework set by the Regulation, including a certain degree of discretion, and 2) the authorisation under Article 8 of the Regulation "to implement the emergency sharing system introducing an allocation obligation vis-à-vis third countries provided for in international commitments entered into before the entry into force of this Regulation." Conversely, it does not include the possibility for the Member States to adopt unilateral action beyond the framework indicated by the Implementing Regulation. Moreover, in exercising their powers, the Member States must act in a spirit of sincere cooperation in accordance with Art. 4(3) TEU and within the limits of proportionality.

As stated in the Commission note, an authorisation system is not the same as an export ban. It is therefore submitted that a general export ban is unlawful as far as the Union's external relations are concerned. However, the Commission in its Guidance Note refrains from such a statement. Instead, the Commission refers to the need to preserve the integrity of the single market (see below under 5.).

3.3. Differentiation between different third countries

Implementing Regulation 2020/426 has introduced two changes in Implementing Regulation 2020/402, namely:

- An additional consideration for the Member States to take into account when considering applications for export authorisations (namely to respond to the requests for assistance addressed to and handled by the Union Civil Protection Mechanism), by third countries or international organisations and to enable the provisions of emergency supplies in the context of humanitarian aid (Article 2(3) third indent) and
- An exemption from the obligation to obtain an export authorisation with respect to certain third countries (Article 1(3)) – this is the focus of the following remarks.

In its original version, Regulation 2020/402 did not distinguish between different groups of third countries; the same rules applied to all non-Member States. In the media, this was well captured in the headline "EU moves to limit exports of medical equipment outside the bloc" which highlighted the defensive nature of the measure towards all States not part of the common project (**politico** 15 March 2020).

However, this approach was changed through Implementing Regulation 2020/426, which provides for an exemption for a number of countries and territories, namely the EFTA States (Iceland, Liechtenstein, Norway and Switzerland), the AMS States (Andorra, Monaco and San Marino) and the Vatican City, the EU overseas countries and territories as well as the Faeroe Islands. According to the amending Regulation's preamble:

> "(2) The single market for medical and personal protective equipment is closely integrated beyond the boundaries of the Union, and so are its production value chains and distribution networks. This is particularly the case of the four member States of the European Free Trade Association. Consequently, subjecting exports of certain personal protection equipment to these countries to an export authorisation would be counterproductive, given the close integration of the production value chains and distribution networks, when such equipment is an essential product necessary to prevent the further spreading of the disease and safeguard the health of medical staff treating infected patients. It is therefore appropriate to exclude such countries from the scope of application of Implementing Regulation (EU) 2020/402.
>
> (3) It is likewise appropriate to exclude from the scope of application of Implementing Regulation (EU) 2020/402 the overseas countries and territories listed in Annex II of the Treaty, as well as the Faeroe Islands, Andorra, San Marino, and the Vatican City, since they have a particular dependency on the metropolitan supply chains of the Member States to which they are attached or on the supply chains of neighbouring Member States, respectively."

Accordingly, the changes brought about by the amending Regulation also include a new paragraph 3 which is added to Article 1 of Implementing Regulation 2020/402, with the following content:

> "Exports to Norway, Iceland, Liechtenstein, Switzerland, as well as the overseas countries and territories listed in Annex II of the Treaty and the Faeroe Islands, Andorra, San Marino and the Vatican City shall not be subject to the measures set out in paragraphs 1 and 2."

In this context, the preamble adds an element of adequacy (though there are no specific provisions on this matter in the Regulation):

> "(4) The authorities of the excluded countries and territories should offer adequate guarantees that they will control their own exports of the products concerned, so as to avoid undermining the objective pursued by Implementing Regulation (EU) 2020/402. The Commission should closely monitor this aspect."

Interestingly, the UK is not mentioned in the new Article 1(3) since it is not (yet) a third state for these purposes: Under Article 127(6) of the **Withdrawal Agreement**, references to a "Member State" in applicable Union law shall generally be understood as including the UK. Conversely, it has been **noted – and deplored** – that the exemption does not apply to the EU candidate States in the Western Balkans, in spite of their special relations with the EU well established by the stabilisation and association agreements.

4. Political background: the situation in relation to Switzerland and the EEA EFTA States

It would appear that the above-mentioned change in Regulation 2020/402 was linked, at least to some extent, to the situation of Switzerland. In early March 2020, protective equipment intended for Switzerland was stopped in Germany by the German authorities. The Swiss media reported that this was based on a German export ban on medical protective equipment such as protective goggles, respirators, protective gowns, protective suits and gloves. Germany was not the only country to take such measures: France had ordered the confiscation of all protective masks.

Faced with the German export ban, the Swiss Federal Government was worried and called the German Ambassador in to protest (e.g. **NZZ am Sonntag** 7 March 2020). In order to remedy the situation, the President of the Swiss Federation, Simonetta Sommaruga, contacted the President of the European Commission, Ursula von der Leyen, and Swiss Trade Minister Guy Parmelin talked to EU Commissioner Phil Hogan – successfully, as they stated on 20 March 2020:

Similar contacts were also made by government officials of the EEA EFTA States (i.e. Iceland, Liechtenstein and Norway), assisted by the EFTA Secretariat, also with the aim of removing the restrictions. In the **EEA Joint Committee**, the ambassador speaking for the three EEA EFTA States noted with appreciation that, under the revised rules, the EEA EFTA States are not subject to the authorisation system. At the same time, he emphasised that medical equipment is covered by the freedom of movement of goods provided for in the EEA Agreement. Measures introducing requirements of export authorisations are a restriction upon exports "from one part of the Internal Market to another part of the Internal Market." Particularly in the context of the Corona pandemic, the ambassador underlined the need to avoid any situations where there may be lack of clarity on the importance of the Internal Market, and of the fact that the EEA EFTA States are fully integrated in this market. (It is interesting to note that the EEA EFTA states simply speak of the "internal market"; the EU, for its part, would use the term **"extended internal market"**.)

In Switzerland, the change in Implementing Regulation 2020/402 led to, for some media rather unusually grateful, headlines such as "Brussels helps Switzerland against the EU Member States" (**Tages-Anzeiger** 20 March 2020). Further, according to the daily **Neue Zürcher Zeitung** (20 March 2020), these developments show that pragmatic solutions are possible in the Swiss-EU relations despite the dispute over the Institutional Agreement. The reference to the "**Institutional Agreement**" relates to a draft agreement on new institutional rules for certain economic agreements between Switzerland and the EU that have been stuck on the political level for more than a year (see **Christa Tobler**).

However, the Swiss media reported that even after the legal changes some Member States continued to block exports to Switzerland (e.g. **Watson** 24 March 2020), if only for a few days (**Tages-Anzeiger** 27 March 2020). Meanwhile, Switzerland has itself introduced an export authorisation requirement, whilst exempting the same countries as does the EU (including, explicitly, the UK) – though only under the condition of reciprocity (Article 10d of the **COVID-19 Regulation 2**, amendment of 25 March 2020).

On a broader note, namely in the context of the mutual recognition of conformity assessments in relation to medical devices, the Swiss business association **economiesuisse** states that:

> "[economiesuisse] would also very much welcome it if the EU would now extend this pragmatic position to the entire field of medical products and agree to the inclusion of the revised Medical Device Regulation into the bilateral Agreement on Technical Barriers to Trade (MRA). What is true for medical protective equipment is also true for the entire medical devices sector: the production and supply chains between Switzerland and the EU are highly integrated. An exclusion of Switzerland from the EU internal market for medical products would have negative consequences for all parties involved." (Translation by DeepL).

This relates to the fact that, through a political link that the EU Commission has made between the Institutional Agreement and the updating of already existing economic agreements, Switzerland risks losing the benefit of the existing **Mutual Recognition Agreement** in relation to medical devices (see again the above-mentioned **blog** by Christa Tobler).

It may be added that, within the EU, the Commission, in the context of the corona pandemic, recommends more flexible conformity assessment and market surveillance procedures for the importation of personal protective equipment and medical devices (**Commission Recommendation 2020/403**). On 25 March 2020, the Commission **announced** that work on a proposal to postpone the date of application for the **Medical Device Regulation 2017/745** for one year is ongoing.

5. Is it acceptable to treat different countries differently?

As a result of the above-mentioned amendment, Implementing Regulation 2020/402 divides the existing non-EU-States into two groups that are treated differently: on the one hand those third States to which the authorisation requirement for the export of PPE applies and on the other hand those (few) exempt from this requirement.

As seen above, the Commission's argument in this respect is that the countries falling under the exemption are in a different situation than the other countries in one of two respects, namely, for the EFTA countries, "the close integration of the production value chains and distribution networks, when such equipment is an essential product necessary to prevent the further spreading of the disease and safeguard the health of medical staff treating infected patients", and for the other States and territories benefiting from the exemption "a particular dependency on the metropolitan supply chains of the Member States to which they are attached or on the supply chains of neighbouring Member States."

By this account, Switzerland in the present context of health protection is in a situation that justifies the same treatment with, notably, the other three EFTA States. It is worth mentioning that the EU Commission judged differently in the economic context of its protection measures taken in 2018 against the USA steel duties (**Implementing Regulation 2018/1013**). In that framework, the Commission referred to "the close economic links between the EU and the European Economic Area (EEA) countries (Norway, Iceland, and Liechtenstein)", in order to exempt the three countries mentioned from the measures. According to the Commission, these exclusions "are compatible with both the EU's bilateral and multilateral Word Trade Organisation (WTO) obligations" (European Commission **Press release** 18 July 2018). The same exemption was, however, not applied to Switzerland, due to its not being an EEA member and, therefore, not fully integrated into the EU's internal market (compare in this respect also the CJEU decision in **Grimme**). These examples seem to indicate that the judgment on whether different situations are comparable or not may depend on factual as well as on political considerations.

But what about the legal perspective? Is there no legal obligation to treat different third States in the same manner?

In this respect, it must first of all be noted that, according to Article 5(3) of Regulation 2015/479, which is the basis for Implementing Regulation 2020/402, the restrictive measures "may be limited to exports to certain countries or to exports from certain regions of the Union."

Second and more generally, the CJEU has stated that there is no obligation to equal treatment either under EU law or under public international law, meaning that the EU's general principle of equal treatment is not applicable when it comes to the treatment of third States. In this context, it may be illustrative to quote from the CJEU decision in **Swiss International Air Lines**. Here, the Court stated the following in paragraphs 23 et seq:

> "External relations are conducted by means of a wide range of measures which are not confined to measures adopted with respect to all third countries, and may therefore also concern one or several third countries.

> The institutions and agencies of the Union have available to them, in the conduct of external relations, a broad discretion in policy decisions. As the United Kingdom, the Parliament and the Council have stated in the procedure before the Court, the conduct of external relations necessarily implies policy choices. The Union must, therefore, be in a position to choose its policies and to apply, according to the objectives that it pursues, a distinction between third countries, without being obliged to grant equal treatment to all third countries. The effect of the exercise of external policy prerogatives by the institutions and agencies of the Union may therefore be that the treatment of one third country differs from that of other third countries.
>
> In that regard, it must be stated that EU law imposes no express obligation on the Union to the effect that all third countries must be treated equally. As the Advocate General observed in point 65 of his Opinion, public international law contains no general principle of equal treatment of third countries. Accordingly, since an application of the principle of equal treatment of third countries would unilaterally restrict the Union's freedom of action internationally, it cannot be held that the Union could have accepted such a requirement unless the equal treatment of third countries was expressly laid down in the treaties.
>
> In accordance with the Court's settled case-law, there is in the FEU Treaty no general principle obliging the Union, in its external relations, to accord in all respects equal treatment to different third countries and traders do not in any event have the right to rely on the existence of such a principle […]."

This case law goes back to the Court's **Balkan-Import** decision of the 1970s, which led to the term "Balkan Principle". It has been confirmed in more recent case law (e.g. **CETA**).

In this situation, the last potential legal anchor to find an obligation to equal treatment would appear to be WTO law with its principles of National Treatment and Most Favoured Nation Treatment – matters, however, that are outside the field of expertise of the present author. Suffice it therefore to note that quantitative export restrictions are in principle prohibited under Article XI GATT, though under the reservation of exceptions, such as for temporary restrictions to prevent critical shortages (Article XI:2(a) GATT) and the protection of public health (Article XX(b) GATT). Policy-wise, export restrictions of EU countries on medical equipment have been attracting criticism in the trade community (e.g. **Chad P. Brown**).

6. What about export restrictions within the EU?

Implementing Regulation 2020/402 relates to export restrictions in the context of trade with third States. Interestingly, in the Commission's Guidance Note on this Regulation reference is also made to restrictions imposed by some Member States vis-à-vis other EU Member States, i.e. internally. On this, the Commission states:

> "The shortages in the supply of PPE in recent days have lead some Member States to take certain measures at national level. At the same time, preserving the integrity of the single

market is one of the objectives pursued by the Commission during the current crisis to enhance jointly the response to the challenge of health protection in the context of limited PPE supplies.

The Implementing Regulation was adopted with the understanding that Member States should revoke any restrictive national actions taken, formally or informally, concerning either exports to third countries or trade between the Member States within the Single Market, going beyond actions designed to ensure priority access to such material by those who need it most (e.g. hospitals, patients, healthcare workers, civil protection authorities)." [Emphasis added by the present author.]

Obviously, given its legal basis and context, Implementing Regulation 2020/402 itself is not able to address the intra-EU situation. Therefore, the Commission's statement that Member States should revoke any restrictive national actions taken, formally or informally, even concerning "trade between the Member States within the Single Market" cannot be based on that Regulation. At present, there appears to be no secondary Union law on the matter in question that would apply within the internal market. Contrary to Regulation 2015/479, which is the legal basis for Implementing Regulation 2020/402, Article 114 TFEU does not allow for urgent action by the Commission (see in particular paragraph 8). Further, with respect to combatting major cross-border health scourges, the Union only possesses the competence to adopt incentive measures, and then jointly by the European Parliament and the Council, not by the Commission (Article 168(5) TFEU).

In the absence of specific internal market legislation, the Treaty rules on export restrictions continue to apply (see above 2.). In this respect, **Devroe and Colpaert** note that the limits set by Article 36 TFEU must be respected.

As for the Commission, it seeks to assist Member States in the context of the internal market. In its Guidance Note on Implementing Regulation 2020/402 it refers to two additional guidance documents of a more general nature, namely 1) Guidance on national measures provided in Annex 2 to the **Communication** of 13 March 2020 on a Coordinated economic response to the COVID-19 outbreak, and 2) **Guidelines** of 16 March 2020 for border management measures to protect health and ensure the availability of goods and essential services.
In the second of these documents, the Commission notes, among other things, in point 4:

"Where Member States impose restrictions to the transport of goods and passengers on grounds of public health, it should be done only if those restrictions are:
1. Transparent, i.e. enshrined in public statements/documents;
2. Duly motivated, i.e. they need to spell out the reasons and the link to Covid-19. Justifications must be science-based and supported by World Health Organization (WHO) and European Centre for Disease Prevention (ECDC) recommendations;
3. Proportionate, i.e. not going beyond what is strictly necessary;
4. Relevant and mode-specific, i.e. restrictions on any of the different transport modes must be adapted to that mode; and
5. Non-discriminatory."

At the same time, and perhaps somewhat contradictory, the Commission in point 6 of the same document emphasises free movement:

> "Member States should preserve the free circulation of all goods. In particular, they should guarantee the supply chain of essential products such as medicines, medical equipment, essential and perishable food products and livestock. No restriction should be imposed on the circulation of goods in the Single Market, especially (but not limited to) essential, health-related and perishable goods, notably foodstuffs, unless duly justified. Member States should designate priority lanes for freight transport (e.g. via 'green lanes') and consider waiving existing weekend bans."

The broader framework of the Commission's thinking can be found in the first of the above guidance documents. Here, the Commission in part 3 refers to "Ensuring solidarity in the single market":

> "The Single Market is at the heart of the European Union. In times of crisis it is the solidarity instrument to ensure that essential goods necessary to mitigate health risks outbreak can reach all those in need. By making sure those goods are available across the EU, the Single Market contributes to the protection of our health. Unilateral national restrictions to the free movement of essential supplies to the healthcare systems create significant barriers and affect dramatically Member States' capacity to manage the COVID-19 outbreak. It is crucial that national measures pursue the primary objective of health protection in a spirit of European solidarity and cooperation."

In other words, here the Commission admonishes the Member States to apply Article 36 TFEU not simply with a view to their own, individual health concerns, but rather with a view to the EU as a whole, "in a spirit of European solidarity and cooperation" – though without any reference to for example Article 2 (listing solidarity as a fundamental Union value) or Article 4(3) TEU (stating the principle of sincere cooperation) or Article 222 TFEU (solidarity clause – presumably, the Corona pandemic can be qualified as a "natural disaster"). In practice, much will depend on the Member States' readiness to act in this spirit.

7. Conclusion

Crisis situations require rapid action, possibly also by the legislator. In view of an impending shortage of PPE, individual EU Member States took action even before the EU Commission acted at central level. These national measures affected both trade with third countries and trade between Member States within the internal market. In an acute crisis situation and as far as the internal market is concerned, the Commission cannot do much more than to invoke solidarity in the internal market. As far as external trade is concerned, the EU actually has exclusive regulatory competence in this area. Here too, however, the Commission's possibilities are limited. For example, the latent danger of infringement proceedings under Article 258 TFEU has little effect in the event of an acute crisis. The Commission has now introduced a system of export licences for PPE which binds the Member States, while leaving them a certain degree of discretion in applying the system. The new rules do not treat all third countries equally. As this paper has shown, EU law does not preclude such a differentiation, because under Union law there is no equal treatment requirement applicable to such cases.

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