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Justifying Mobility Hindrance in the Name of Public Health and Its Tax Implication in the European Union

by

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Summary

This master thesis seeks to find an answer whether the restriction on freedom of movement of person can be justified on the ground of public health and also explaining what tax implication could happen for taxpayers in the context of pandemic relating to tax treaty interpretation. The right of freedom of movement of persons will be examined from the perspective of EU law. As for the derogation justified on the ground of public health, it will be analysed from the primary and secondary sources of law also from the judgement from The Court of Justice of European Union. The result suggests that restriction on the freedom of movement of person justified on ground of public health is allowed from the standpoint of EU law and it also gives discretion to member state, in the end it is in the hand of member state to justify whether the measure they took is proportional, by means of necessity and suitability. In this challenging situation, member states may appraise the level of suitability and necessary differently from one another. Furthermore, EU has recently proposed a Digital Green Certificate which appears to be a less restrictive measure compared to total ban of freedom of movement of person. With regards to tax implication for individual taxpayer and corporate taxpayer, in general many countries adopted special measure in the context of pandemic which would eliminate unwanted tax implication. Nevertheless, research need to be done regarding which countries providing a special COVID tax rules that is more lenient and which one is not in assessing actual tax implication on a case-by-case basis.

Keywords: *Freedom of movement of person, principle of proportionality, tax implication.*

Preface

First and foremost, I would like to thank Professor Cécile Brokelind as my supervisor in writing this thesis for her valuable guidance and support. Without her encouragement and dedicated involvement, this paper would not have accomplished. She consistently steered me in the right direction whenever I was lost in writing this thesis. I also would like to thank all the professors who taught me during this master degree program.

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Abbreviation list

COVID	Corona Virus Disease
CJEU	The Court of Justice of European Union
DGC	Digital Green Certificate
EU	European Union
OECD	Organisation for Economic Co-operation and Development
QR Code	Quick Response Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WHO	World Health Organization

1. Introduction

1.1 Topic

This paper will focus on the topic of free movement of individual taxpayer and exception of such, justified on the ground of public health. In addition to that, this paper will also assess whether mobility hindrance passed the proportionality test. This paper will also present tax implication in connection with mobility hindrance during corona virus disease ('COVID') in the European Union ('EU').

1.2 Background

Countries are able to make an agreement of economic integration based on degree of involvement they desire. There are many types of economic integration, such as free trade area, custom union, internal market, and economic union. The EU is an example of internal market, which has been completed as an internal market since 31 December 1992.[1] Internal market applies when participating countries create a free flow of production factors and custom union. The objective of creating internal market is to remove barriers of production factors and boost the economy and trade between member states. Based on Article 26 (2) TFEU, the internal market is defined as 'an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaty'.

Veld explained that there are macroeconomic benefits that member states receive within the creation of internal market.[2] One of them is increase of trade flows within the union as a result of elimination of tariffs. Furthermore, the opening-up of domestic economies increase competition, reduced mark-ups and lowered prices. The combined impact of increased trade flows and domestic economic have contributed to the rise of EU's growth domestic product by 8-9% in the long run. This number is actually higher than the estimated number retrieved by previous research. It is possibly justified seeing that the impact on capital accumulation found in macroeconomic models and also the competition effect. [3]

The right of freedom of movement of persons/workers is governed in Article 45 TFEU. This freedom allows workers to move from areas with high unemployment to areas of under-employment in hoping that it will change their quality of life.[4] Freedom of movement of persons promotes individual to a better opportunity. The law as it stands today and the Court

[1] European Parliament, *The Internal Market: General Principles* [website], https://www.europarl.europa.eu/factsheets/en/sheet/33/the-internal-market-general-principles (accessed 17 April 2021).
[2] J. Veld, 'The Economic Benefits of the EU Single Market in Goods and Services', *Journal of Policy Modeling*, Vol. 41, Issue. 5, 2019, p. 803-818.
[3] Ibid.
[4] E. Spaventa, 'The Free Movement of Workers in the Twenty-First Century', in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, p. 457.

of Justice of European Union ('CJEU') is guarding the effective implementation of this right in order to make sure that immigrants and their family are treated fairly in host member state. However, the right of freedom of movement of persons is not absolute. There are two exceptions laid out in Article 45 (3) and (4) TFEU. Those two exceptions are employment in the public service may be reserved to nationals of host member state and Article 45 (3) TFEU stated that there are limitations of free movement of persons that may be imposed on the grounds of public policy, public security and public health. This thesis will mainly focus on limitation on the grounds of public health.

Looking at the current situation at the time this thesis is written, COVID is clearly a challenge in an uncertain situation. The virus evolves and transmits rapidly which makes it a threat to the public health in a country. Countries around the world are creating measures to curb virus transmission. In the EU, member states are adopting measure in terms of temporary reintroduction of border control to curb the transmission of the virus. [5] According to The Schengen Borders Code Article 25 paragraph 2, this kind of measure must only be applied as a last resort and in line with principle of proportionality.

Measures taken by member states to close the border of their state creates an obstacle, especially for cross-border workers. People who live in one EU member state but work in a neighbouring member state, which commute back and forth daily or at least once a week, are counted for about 1.5 Million people in 2019 in the EU. [6] Now with the measures taken, they temporarily could not enjoy their right of movement for work. This situation is seen as a step back from the implementation of freedom of movement of workers because it hinders mobility of workers. Furthermore, there could be other implication by closing the border for cross border worker for example if staying in member state to do the job remotely could trigger tax obligations in that state.

At the time when this thesis is written, European Commission is proposing Digital Green Certificate ('DGC') as a solution to ensure that the freedom of movement of person is not curbed in this pandemic time. DGC will be used as an additional document to show that a person has been vaccinated against COVID, received negative test result, or have recovered from COVID. [7] The Commission see this solution to gradually restore the exercise of freedom of movement of person in the EU, also a chance to influence other countries doing the same. It also serves as a standardized format for member states which guarantees authenticity of document by using Quick Response ('QR')

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[5]European Commission, *Temporary Reintroduction of Border Control* [website], https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en (accessed 17 April 2021).

[6]European Commission, *Crossing Borders* [website], https://ec.europa.eu/eurostat/cache/digpub/eumove/bloc-2c.html?lang=en (accessed 17 April 2021).

[7] European Commission, *Coronavirus: Commission Proposes A Digital Green Certificate* [website], https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1181(accessed 17 April 2021).

codes. This measure is a proposed temporary measure that can be taken until World Health Organization ('WHO') announces the end of COVID pandemic as international health emergency.

It is without question that member states are trying to protect their citizen from the threat of the virus by creating restriction to movement of people. However, such restriction measure has to be justified legally and fit in the principle of proportionality. Derogation justified on the grounds of public policy, public security and public health have been interpreted restrictively by CJEU.

1.3 Aim

The purpose of this paper is to analyse whether mobility hindrance caused by Member States' measure can be justified on the ground of public health based on EU law perspective. In addition to that, this paper will also present tax implication in connection with mobility hindrance during COVID-19 time in the EU.

1.4 Methodology and Material

The method used in this thesis is a legal dogmatic method. This method interprets and analyses the source of law.[8] The right of freedom of movement of persons will be examined from the perspective of EU law. As for the derogation justified on the ground of public health, it will be analysed from the primary and secondary sources of law also from the judgement from CJEU. Furthermore, in order to justify the mobility hindrance, principle of proportionality will also be analysed as the general legal principle.

The materials that will be used in this thesis are relevant primary and secondary EU law, principle of EU law, CJEU case law, judgement of the court, books, soft law, and academic journal. Cases law that are presented will also be chosen based on the relevancy in public health derogation. In this case, the case law may not be entirely about free movement of person. Nevertheless, this paper will try to see the attitude of the court in judging the exceptional derogation of public health. Additional materials such as news article can be use and will be chosen carefully from legitimate source. All the relevant materials will be used in finding answer whether mobility hindrance in the context of pandemic can be justified in the name of public health and its tax implication.

1.5 Delimitation

This paper will only focus on free movement of persons, therefore the other three freedom, namely freedom of movement of goods, capital and establishment, will be disregarded.

[8] S. Douma, *Legal Research in International and EU Tax law*, Kluwer, Wolters Kluwer Business, 2014, p. 18-19.

1.6 Outline

Chapter two will explain about the concept of internal market, the history of internal market in the EU, freedom of movement of persons, and tax sovereignty. It is imperative to explain these concepts to be able to fully understand the idea and answer the research question of this thesis. Free movement of person will also be explained from the perspective of primary and secondary EU law.

Chapter three will focus in analysing whether mobility hindrance of free movement of person can be justified based on public health reason. Derogations provided in Article 45 (3) TFEU will be explained and also the concept of public health based on primary and secondary EU law. In this section, cases law that are relevant in trying to see how the CJEU judged this exceptional circumstance will be presented. Furthermore, this current situation of mobility hindrance will also be analysed whether it can fulfil the proportionality test.

Chapter four will explain about the concerns that arise as a result of mobility hindrance to an individual and an enterprise. It will be explained using the OECD Model and whether there will be a derogation from that.

Finally, conclusion will be explained in chapter five.

2. The Internal Market and Freedom of Movement of Persons

2.1 The Internal Market and Four Freedoms

The commencement of internal market in the EU can be traced back to 1958 when European Economic Community signed the Treaty of Rome with the intention to create a common market.[9] Then in July 1968, custom duties on goods flowing between member states were removed. In a response to the oil crisis and inflation at that time, the European Community decided to complete the commencement of the internal market in 1985.[10] Internal barriers and borders within the European Community was gradually removed. The internal market is officially completed on 31 December 1992. The internal market pledge freedom of movement of goods, capital, service and persons within member states.

The internal market is one of the greatest achievements of the EU. The EU is the leading trading blocs in the world as two-thirds of EU countries' trade is with other member states. It is also responsible for 21% of global economic output which makes it a huge domestic market to lean on in the event of trade disruption, which also provide the EU distinction on trade negotiations.[11] Indeed, the creation of the internal market has clearly give positive impact for the EU when it comes to improving efficiency, boosting economic growth, and promoting trade and competition.

The internal market pledge four freedoms, which are freedom of movement of goods, persons, services and capital within the EU. Four freedoms are fundamental in European internal market. TFEU prohibits member state and private organisation from hindering the four freedoms. Legislation is also used to eliminate differences in between member states' rules that might disrupt the internal market and set the common standards for all member states.[12]

2.2 Freedom of Movement of Persons

Freedom of movement of worker as labour is crucial and also the most complex and challenging of the EU's four freedoms. [13] Compared to goods,

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[9] A. Kaczorowska-Ireland, *European Union Law*, 4th edn., London, Routledge, 2016, p. 535.

[10] European Parliament, 'History: European Single Market', European Parliament Multimedia Centre, 2012, https://multimedia.europarl.europa.eu/en/history-european-single-market_V001-0021_ev (accessed 17 April 2021).

[11] J. Veld, supra note 2.

[12] E. Ballin et al., 'Variation and the Internal Market', *European Variations as a Key to Cooperation*. Research for Policy (Studies by the Netherlands Council for Government Policy), Springer, 2020, p. 55.

[13] A. Cuyvers, 'Free Movement of Persons in the EU', in E. Ugirashebuja et al., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Publisher, 2017, p. 354-364.

people are more complex because people get sick, need housing, lose jobs, have accident, marry and move to another country, commit crimes, et cetera. All of the above mentioned has consequence to law and political areas such as income tax, social security, healthcare, and immigration.[14]

The idea of freedom of movement of person is a citizen of the EU has the right to work and live in another EU country, in which he also has the right to get the same treatment as the citizen in that country without being discriminated. Freedom of movement of person was first laid out in the Treaty of Rome, and later established by the Treaty of Maastricht in 1992. In the beginning this freedom is limited only for workers and economically active person, but then it broadens the subject to worker's family and economically inactive persons such as student and pensioner.

Person/Worker has no explicit definition in the Treaty. As a consequence, CJEU defines the concept of worker by case law. In case C-66/85 Lawrie-Blum, CJEU defined the concept of worker as 'a person who performs services of some economic value for, and under the discretion of, another person, in return for which he receives remuneration.'[15] There are crucial components to the definition of worker, such as genuine and effective activity, economic nature of the activity, relationship of subordination, and remuneration received. Genuine and effective activity of the work done is sufficient even though the person doesn't work full time or the remuneration he receives is considered insufficient to support him. CJEU stated this on case C-139/85 Kempf, in which he is a part-time teacher and his salary is below the number considered sufficient to support his need, nevertheless he is still considered as a worker looking at his genuine and effective activity.[16] Regarding the second element, economic nature of the activity, it is important that the person doing the work is performing the job of an economic nature and forming part of the normal labour market. For the third criterion, it is important to differentiate between an independent service provider and a worker who is actually working under the subordination. The last one is remuneration which is salary in term of money or benefit in kind that the person receives directly or indirectly from the employer.

Other than the definition of worker from Case C-66/85 Lawrie-Blum, there are also other kinds of persons that are regarded as workers even though that persons do not satisfy the Lawrie-Blum criteria. Unemployed person and work-seeker are examples of them. Based on the judgement on case C-292/89 Antonissen, a person is still considered a worker in another member state where he seeks employment in, within the 6-month time frame from the beginning of employment seeking. [17] Furthermore, a person who works in member state but a resident in another member state could also retain their worker status. This case is presented in case C-212/05 Hartmann stating that 'a national of a member state who has transferred his residence to another member state while maintaining his employment in that state, can

[14] Ibid.
[15] Case C-66/85 *Lawrie-Blum v Land Baden- Württemberg* (1986) EU:C:1986:284.
[16] Case C-139/85 *R. H. Kempf v Staatssecretaris van Justitie* (1986) EU:C:1986:223.
[17] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* (1991) EU:C:1991:80.

claim the status of a migrant worker for the purpose of Regulation No 1612/68...'[18]

2.2.1 Primary Sources of EU Law in Freedom of Movement of Persons

Article 20 TFEU governs the citizenship of the Union stating that 'every person holding the nationality of a member state shall be the citizen of the Union'.[19] Being a citizen of the EU means that a person will have right, duties and political participation in the EU. Citizenship of the EU is in nature complementary, but not replacing national citizenship. Freedom of movement of person applies to all citizen of the Union.

Article 45 TFEU is also a legislative framework of freedom of movement of persons/workers. It is stated that freedom of movement of workers shall be secured within the Union and such freedom of movement shall entail the abolition of any discrimination based on nationality of workers of the member states as regards employment, remuneration and other condition of work and employment.[20] However, this freedom is not absolute because in Article 45 (3) TFEU, it is subject to limitations justified on grounds of public policy, public security and public health. There are also other exceptions such as exceptions introduced in secondary legislation implementing Article 45 and exceptions that are developed by CJEU. Exceptions based on case law of CJEU are dealing with national measure that are indirectly discriminative or a national measure that are non-discriminative but stirring the exercise of the free movement of person. [21] Such exceptions have to comply with proportionality principle. Article 45 TFEU has direct vertical and direct horizontal effect. CJEU first stated that this article has direct horizontal effect is in Case C-36/74. The case is about a rule in international sport association that was accused of being discriminative because of their nationality requirement.[22]

2.2.2 Secondary Sources of EU Law in Freedom of Movement of Persons

The legal source system in the EU is structured and divided into two; with the treaties being the primary sources of EU law and secondary sources as the body of law that rooted from principles and objective of the treaty. The secondary sources of EU law include regulations, directives, decisions, recommendations, and opinions. [23] Regulations, directives, and decisions are binding and have legal force. In the other hand, recommendations and opinions are not binding and therefore have no binding legal force. As mentioned above that the freedom of movement of person is not absolute

[18] Case C-212/05 *Gertraud Hartmann v Freistaat Bayern* (2007) EU:C:2007:437.
[19] Consolidated version of the Treaty on the Functioning of the European Union OJ C 115.
[20] Ibid.
[21] A. Kaczorowska-Ireland, supra note 6, p. 715.
[22] Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste International and Others* (1974) EU:C:1974:140.
[23] Types of EU Law, *European Commission* [website], https://ec.europa.eu/info/law/law-making-process/types-eu-law_en#primary-vs-secondary-law, (accessed 18 April 2021).

because the treaty clearly mentioned the limitation, the secondary legislation will govern the details on how the limitation should be exercised.

Secondary sources of EU law that governs freedom of movement of person are Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, and Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. The secondary source of EU law that is relevant when talking about the justifying restriction on ground of public health is the directive 2004/38/EC.

The purposes of Directive 2004/38/EC, as stated in Article 1 of the directive, are to regulate the exercise of the free movement and residence within the territory of member states and their family members, the right of permanent residence for union citizens and their family members, and limits the exercise of free movement of person on grounds of public policy, public security or public health. [24] Article 27 of the Directive laid out the general principles of the restrictions on the right of entry and the right of residence on grounds of public policy, public security, or public health. It is stated that member state could restrict the exercise of freedom of movement on person on grounds of public policy, public security or public health, as long as the measure does not serve economic ends.[25] Additionally, the measure taken must also comply with the proportionality principle. Restriction that wanted to be justified on the ground of public health shall be in condition that the disease has epidemic potential as defined by World Health Organization, other infectious disease or contagious parasitic disease.[26]

Other than the Directive 2004/38/EC, it is also relevant to put Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Border Code) to the framework of legislation of freedom of movement of person. It is connected closely to the internal market, and logically internal market will only work if there is no hindrance to movement of person. The code governs the movement of person across border. Indeed, it is relevant in a situation where cross border traffic is being hindered because of COVID. Article 1 of the border code stated that the regulation governs about border control of persons crossing the external border of the member states. Therefore, it is applicable in this COVID situation. Furthermore, Article 22 of the Regulation also governs about border checks at the internal border of the EU. It is stated that 'internal borders may be crossed at any point without a border checks on persons,

[24] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, Article 1.
[25] Ibid, Article 27 paragraph 1.
[26] Ibid, Article 29 paragraph 1.

irrespective of their nationality, being carried out'.[27] This article shows that border check is generally prohibited by the law and it must be justified in accordance with the legislative framework.

2.3 Tax Sovereignty of Member States

Stephen Krasner explained the concept of sovereignty from three different angles.[28] The first one is domestic sovereignty, a classic political concept which basically talks about the internal affair of a state. The second one is *westphalian* sovereignty, in which state respect other state by not intervening their internal affairs, promising other states' authority in its own territory. The last one is international legal authority where a state is acknowledged by other states by means of joining international organisations, signing bilateral and multilateral treaty.

Additionally, Peter Dietsch also accounts for sovereignty in fiscal matters. Domestic sovereignty in fiscal matters mean that the choice of a state as well as the level of redistribution of income and wealth.[29] Therefore, fiscal self-determination can be seen from 2 sides, from the side of the size of the public budget to gross domestic product and the redistribution of income. He also mentioned that fiscal sovereignty is closely connected with the *westphalian* sovereignty concept because it comprises state's ability to design and enforce tax legislation based on its need, along with the responsibility to respect and not to intervene other state's fiscal matters.

European Union is not a sovereign state yet consists of 27 sovereign states. Principle of conferral exists when it comes to division of competences between EU and its member states. The principle is laid down in Article 4(1) and 5(1) TEU stating that 'the Union shall act only within the limits of the competences conferred upon it by the member states in the treaties to attain the objectives set out there in'. EU has exclusive competences in the area of indirect taxation, but not in direct taxation. This means that direct tax matters are in the hand of member state. Member state has exclusive competence to regulate direct taxation matters. However, member state must still exercise its competence within the corridor of European Union law. For instance, in a condition where member state impose tax that is discriminatory for a worker, it may constitute a breach of EU law on freedom of movement of person.

Unlike indirect tax that has been harmonized in the EU, direct taxation is not harmonized in the EU. As a consequence, there may be disparities in direct tax policy between member state. The case law has showed that because of the disparities in direct tax, person that is moving to another member state to work or live may get either tax benefits or more tax burdens in regards of his moving activity. It happened to Mr. Schempp where the move of his former spouse lead to disadvantageous tax consequences for

[27] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, Article 22.

[28] S. Krasner, 'Pervasive Not Perverse: Semi-Sovereigns as the Global Norm', *Cornell International Law Journal*, vol.30, no.3, 1997, p. 659.

[29] P. Dietsch, 'Rethinking Sovereignty in International Fiscal Policy', *Review of International Studies*, vol.37, no.5, 2011, p. 2109.

him in his member state of residence. [30] The CJEU stated that the treaty does not guarantee such disadvantageous consequences not to happen due to disparities of tax legislation of member states. [31] Even though the disparities of national direct tax legislation and its consequences may curb movement of persons to another member state, nevertheless it is outside the scope of EU law since it evidences member states' tax sovereignty.

[30] Case C-403/03 *Egon Schempp v Finanzamt München V* (2005) EU:C:2005:446.
[31] Ibid, para. 45.

3. Justifying Mobility Hindrance in the Name of Public Health

3.1 Derogations Provided in Article 45 (3) TFEU

There are three derogations provided in Article 45 (3) TFEU, namely on the ground of public policy, public security and public health. Noted that this derogation also applies to worker's family who have the right to freedom of movement in the EU. EU allows member state to exercise the application of freedom of movement of person as long as it is still in the corridor of EU law. It is clearly stated in Article 27 of Directive 2004/38/EC.

CJEU established few principles in the exercise of these three derogations that can be seen from case laws. The first one is shown in Case C-41/74 where Ms. Duyn, a Dutch national, was refused to enter United Kingdom to work for this organization called 'Church of Scientology'. In its judgement, CJEU stated that the concept of public policy and in particular where it is used as a derogation from the exercise of freedom of movement of person must be interpreted strictly. [32] The second principle is shown in case C-352/85, where Netherlands government took measure that was challenged to be rather discriminatory, yet they said that the measure was based on the ground of public policy. CJEU declared that measures footing from an article of an exception from the four freedoms must not be disproportionate to the intended objective.[33] Furthermore, economic aims also cannot serve as constitute grounds of public policy. Lastly as mentioned above that EU allows member state to exercise the application of derogation of freedom of movement, member state must still do so within the limits as stated in the Treaty.

The two derogations, specifically public policy and public security, are usually interconnected. Wide range of activities can fall within the scope of violating public policy and threatening public security. Examples of such activities are terrorism attack, mass demonstration that vandalized public goods, joining criminal gang, et cetera. In judging the circumstances of measure taken on grounds of public policy or public security, few things need to take into account. It is only the personal conduct of a subject that is going to be regarded as determinate. It is also forbidden to take measure based on previous criminal convictions of the subject. CJEU stated in its judgement that even though a person has criminal conduct in the past, it does not make a person necessarily do it again and it cannot be used as a ground for taking measures in the name of public policy or public security.[34] Furthermore, it is also important to note that the subject present a genuine and sufficiently serious threat.

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[32] Case C-41/74 *Yvonne van Duyn v Home Office* (1974) EU:C:1974:133, para.18.
[33]Case C-352/85 *Bond Van Adverteerders and Others v Netherlands* (1988) EU:C:1988:196, para.36.
[34] Case C-30/77 *R v Pierre Bouchereau* (1977) EU:C:1977:172, para. 28-29.

3.2 The Concept of Public Health

Derogation on the ground of public health is regulated under Article 29 of Directive 2004/38/EC. Based on Article 29 paragraph 1, this derogation can only be justified under two circumstances. One is when there is a disease with epidemic potential as defined by World Health Organization and two is when there is other infectious disease or contagious parasitic disease. [35] Subsequently, it is important to see how World Health Organization defined epidemic.

World Health Organization defines epidemic as the occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. [36] Epidemic is closely connected to public health emergency because public health emergency can happen as a result of an epidemic or even pandemic which poses risks to the public health. An epidemic can become a pandemic when the disease's growth skyrockets day by day, occur for an uncertain period of time and spread across countries. Indeed, this condition is a threat for public health. Evidently, we have faced several pandemics before. The recent one that happened during 1981 until present is AIDS pandemic and epidemic. AIDS was responsible for 35 million lives since its outbreak.[37] The virus has spread across the world in the 20th century and there is still no cure but regular medical treatment which helps the patient to extend their life span.

Corona virus came to surface on December 2019 when a city in China reported that there were unknown pneumonia cases. Later on, World Health Organization declared public health emergency of international concern on 30th January 2020.[38] Then, the situation escalated until World Health Organization declared COVID as a global pandemic in March 2020. It is without no doubt that since then countries around the world are concern about the situation because it may harm public health. Many take restrictive measures to protect their citizen, including member states of the EU. When it comes to member state taking measure in such situation, measure must be in the corridor of EU law and be in line with principle of proportionality.

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[35] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, Article 29 (1).

[36] Wolrd Health Organization, *Definitions* [website], https://www.who.int/hac/about/definitions/en/ (accessed 17 April 2021).

[37] Columbia Mailman School of Public Health, *Epidemic, Endemic, Pandemic: What are the Differences?* [website], 19 February 2021, https://www.publichealth.columbia.edu/public-health-now/news/epidemic-endemic-pandemic-what-are-differences (accessed 17 April 2021).

[38] European Centre for Disease Prevention and Control, *Timeline of ECDC's Response to COVID-19* [website], https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-response (accessed 17 April 2021).

3.3 Judging the Exceptional Circumstances of Public Health

Measures that member states taken in response to tackle the COVID situation is causing mobility hindrance in the EU. Indeed, it is against what the constitution said because citizen of EU has the right to freedom of movement. Nevertheless, it is also mentioned that the right is not absolute because in some situations, member states are able to make measure derogating from the exercise of four freedom on the grounds of public policy, public security or public health. How can mobility hindrance for people in the EU be justified in the name of public health is going to be examed in this section.

Based on the primary source, article 45 (3) TFEU, it is clearly stated that the exercise of freedom of movement of person is subject to limitations on grounds of public policy, public security or public health. It means that the constitution allows limitation justified on the ground of public health. If member states take measure and justify it on this ground, in that case it is in line with EU constitution, bear in mind to also take a look of what the secondary source rules.

Meanwhile on the secondary source, article 29 paragraph 1 of Directive 2004/38/EC laid out the procedural rules regarding derogation based on public health. There are only 2 situations that can be accepted, only when there is a disease with epidemic potential that is defined by World Health Organization or other infectious parasitic disease. As mentioned in the previous chapter about the definitions of epidemic and pandemic, pandemic is indeed worse than epidemic due to its speed of transmission and the global area of infection. COVID has also been declared as a global pandemic by World Health Organization. Therefore, it is safe to say that COVID pandemic fit the situation laid out in Article 29 paragraph 1 of the Directive, which in fact worse than the situation laid out in the Directive. Consequently, member states are able to justify their national measures they took on the grounds of public health.

Other secondary source that is also relevant for the analysis is Regulation (EU) 2016/399 (The Schengen Border Code). It is relevant because member state is currently enforcing measure like reintroduction of border control and this matter is regulated in Schengen Border Code. Member states that are currently enforcing temporary reintroduction of border control in the context of COVID are Hungary, Austria, France, Iceland, Portugal, Finland, Norway, Spain, and Denmark. [39] Temporary reintroduction of border control is governed in chapter II, Article 25-35 of the Schengen Border Code. Article 25 of the Schengen Border Code explicitly allows member state to reintroduce border control when there is a serious threat to public policy or internal security. However, article 25-35 of the Schengen Border Code never mention ‘public health’ in its provision. The Schengen Border Code mentioned about public health in Article 2, namely the definition of a threat to public health as ‘any disease with epidemic potential as defined by

[39] European Commission, supra note 5.

the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States.'[40] It is interesting that Article 25 of the Schengen Border Code did not mention anything about reintroduction of border control in a threat of public health, meaning that it is generally unacceptable from the Schengen Border Code view. Despite that, the European Commission published the guidelines for border management measure in the context of COVID on 16th March 2020. In point 18 of the guidelines, it implies that reintroduction of border control in the context of contagious disease like COVID is permitted. The measure must also be proportionate and not discriminatory.

To sum up, member state taking national measure that may hinder the exercise of freedom of movement of person on the grounds of public health in the context of COVID is allowed from a legal framework perspective and also in line with EU law.

3.3.1 Difference in the Application of Derogations on Grounds of Public Health VS Public Policy and Public Security

After looking into how the CJEU use the application of derogations on grounds of public health versus public policy and public security, one can see the distinction in the application of such derogations.

The first distinction is being the personal conduct. It is regulated in Article 27 (2) of Directive 2004/38/EC that such measures must be based exclusively on the personal conduct of the individual concern. The case law that represent this matter is Case C-67/74. The case was about Mr. Bonsignore who shot his brother accidentally with an illegal gun that he possessed. At that time, German authority asked whether it is lawful that the person is going to be deported for the reason of general preventive nature, knowing that the person may not commit the same crime because even the first crime was accidental. [41] The judgment held that it is not possible to do deportation to a person based on general preventive nature. Later on, another case also clarified that when a person is known for joining an unlawful organisation in the past, it doesn't count as being personal conduct only because that person had joined such organisation, instead it is the present membership that counts. [42] Furthermore, CJEU also held that it is prohibited for member state to take measure based on automatic service. It is shown in Case C-408/03, where Belgian government has failed to fulfil obligations in the treaty because of their national provision about automatic deportation when a person cannot present supporting documents necessary in obtaining resident permit. CJEU held it is disproportionate when member state imposes automatic deportation based on that ground. [43]

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[40] Regulation (EU) 2016/399 of The European Parliament and of The Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 077, 23 March 2016, Article 2 point 21.
[41] Case C-67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* (1975) EU:C:1975:34, para. 4.
[42] Supra note 32.
[43] Case C-408/03 *Commission v Belgium* (2006) EU:C:2006:192, para. 68.

The second distinction is the application of derogations on grounds of public policy or public security may be taken on a case-by-case assessment. The case law that represent this matter is Case C-371/08. The case was about Mr. Ziebell that has done substantial amount of criminal crimes in his younger days such as illegal drug use, gang related robbery, thefts, money counterfeiting, et cetera. As a consequence, he had been in and out of jail in Germany during that time. Situation changed over time as he got older, got married and had kid. In 2007, Stuttgart Regional Administration ordered for his expulsion and required immediate enforcement on the ground that his action constitute serious disturbance of the social order and there is a high risk that he will re-offend the crimes. CJEU held that 'measures on grounds of public policy or public security may be taken only following a case-by-case assessment by the competent national authorities showing that the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat to a fundamental interest of society'.[44] In this case, a case-by-case assessment need to be done and taking into account other factors such as the age when the person commit the crimes, the duration of resident in member state territory, the consequence of his expulsion to his family members, et cetera. It is up to each member state to decide whether his existence will harm the public. The other case law is Joined Case C-331/16 and C-366/16. Mr. K had been decided that he was an undesirable immigrant because he was a member of Bosnian army unit by Netherlands authority. Additionally, Mr. HF was refused to obtain temporary residence permit on the ground that he had participated in war crimes. In the judgement, CJEU addressed that case-by-case assessment need to be done and taking into account factors such as the degree of involvement of the person concerned and the nature and gravity of the crimes that the person committed. [45]

Based on the explanation above, it is evident that measures taken on grounds of public policy and public security rely on the personal conduct of an individual, general preventive nature and automatic are prohibited, and lastly a case-by-case assessment is used. From the perspective of public health derogation in the context of COVID, none of them are applicable to the situation faced now. Mobility hindrance of person cannot be based on personal conduct of individual because there is no way that individual is checked one by one whether he has been in contact with another person that's tested positive for COVID. Neither the automatic application, for instance when a person showing symptoms like sneeze or cough that person will automatically be regarded to be COVID positive and deemed to be a threat to public because he can transmit the disease to people. In fact, even a person that does not show any symptoms can carry the virus and transmit it to other people. For this reason, the application of derogation on ground of public health appears to be more general in nature, not relying on personal

[44] Case C-371/08 *Nural Ziebell v Land Baden-Württemberg* (2011) EU:C:2011:809, para.82.
[45] Joined Cases C-331/16 and C-366/16 *K. v Staatssecretaris van Veiligheid en Justitie and H.F. v Belgische Staat* (2018) EU:C:2018:296, para. 52-55.

conduct of individual and also not going to be taken on case-by-case assessment.

3.3.2 Previous Case Law Justified on the Ground of Public Health

CJEU has judged many case laws in which the parties concerned justified measure they took on the ground of public health. This section will explain the previous case law and explain how the CJEU perceived justification in the name of public health.

The first case is Case C-1/00 about France that did not lift the ban of UK beef export even when EU has lifted the ban already. The Commission held that France had failed to fulfil its obligation under Community law by not lifting the ban. [46] France argued that they still could not lift the ban yet due to the absences of adequate guarantees on test, traceability and labelling issue over mad cow disease. The problem in this case was EU had already lifted the ban and expect member states to do so, with the ground that EU Scientific Steering Committee's expert had found that the incidence of the disease was continue to decline and there was no route for new infection yet French Food Safety Agency's experts were not on the same page with EU Scientific Steering Committee and argued that EU had to take into account precautionary principle. In the judgement, EU held France unlawful and French ban on UK beef export was illegal and if France did not want to lift the ban, they would have to pay fine. From this case, it can be learned that CJEU relied upon whether there is real ground for concern that a threat exist from a scientific point of view with the help of EU scientific experts and EU's scientific opinion is tough to challenge by scientific opinion of a national body.

The second case is Case C-120/78, popularly known as Cassis De Dijon, about Germany that established a national law which set a minimum alcohol content of alcoholic beverage of 25% on the grounds of protecting public health and consumer protection. Germany argued that the purpose of setting the minimum alcohol content is to avoid proliferation of alcoholic beverage because low alcohol products might easily encourage a tolerance towards alcohol compared to high alcoholic beverage, in a view that people will drink more alcohol if the alcohol rate of the beverage is low. [47] This argument was denied by CJEU because consumer can find wide range of beverage with different alcohol percentage in the national market and protection of consumer was not acceptable either because importer can label their products that show the origin of the product and alcohol percentage on the product, which is a more proportionate measure. CJEU held that this national law provision constituted a measure equivalent to quantitative restriction. From this case, it can be concluded that CJEU took into account whether there is other proportionate measure and weighing whether there is another way to reach the objective being pursued, in this

[46] Case C-1/00 *Commission of the European Communities v French Republic* (2001) EU:C:2001:687, para. 26.
[47] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) EU:C:1979:42, para. 10.

case proper labelling of the product by the importer was considered a more proportionate approach to protect public health.

Next case is Case C-40/82 that involved hindrance to the free movement of goods of fresh poultry meat. UK banned imports on poultry products into Northern Ireland on the ground that they need to preserve the health of poultry in its territory against the risk of Newcastle disease. UK used vaccination measure to fight the Newcastle disease, but Ireland did not take the same path on the ground that vaccination can mask the presence of contagious virus, they rather slaughtered contaminated birds in the event of outbreak. [48] UK argued that the measure they took was to protect the poultry industry which would be heavily affected by the outbreak of epizootic disease. In its judgement, CJEU held that UK has failed to fulfil its obligation under the treaty. Veterinary experts declared that the risk was actually low so that UK's measure went further than necessary to ensure such protection. From this case, it can be concluded that CJEU perceived UK's argument that the measure which was trying to be justified was not considered a component of seriously considered health policy and not necessary to protect the animal health. It can be seen that when the risk is relatively low, CJEU will not considered a measure as a component of seriously considered health policy.

The fourth case is Case C-54/85 about Mr. Mirepoix who imported onions to France market and that onions were treated with substance called maleic hydrazide, which is a chemical in the group of pesticide. France did not authorize the use of maleic hydrazide in foodstuffs, especially knowing that pesticide residue in foodstuffs can harm human health.[49] The use of pesticide namely maleic hydrazide was not regulated in the Directive, so it is in the hand of member state to decide the level of protection to human health as long as it is in line with the Treaty. However, the fact that pesticide residue is dangerous and can harm human health, animal health and environment is widely accepted and recognized at community level. In this case, CJEU heavily pointed out that France is permitted to take such measure but bearing in mind that if there is a new science discovery available through scientific research about that particular pesticide no longer being a threat to human health, France needs to revoke the measure.

The fifth case is Case C-41/02 about Netherland's measure that prohibit marketing of certain fortified foodstuffs. Netherland had two criteria that were cumulative stated in their measure; the nutrients added to the foodstuffs are not harmful to public health and meets an actual nutritional need. [50] It is known that vitamin and minerals are not generally harmful, but the excess intake could lead to harmful effects. CJEU stated that there is a wide discretion relating to the public health matters when there are scientific uncertainties in the current state of scientific research. However, since the nature of derogation on ground of public health must be interpreted strictly,

[48] Case C-40/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (1984) EU:C:1984:33, para. 6.
[49] Case C-54/85 *Ministère public v Xavier Mirepoix* (1986) EU:C:1986:123, para.2.
[50] Case C-41/02 *Commission of the European Communities v Kingdom of the Netherlands* (2004) EU:C:2004:762, para. 26.

it has to be based on international scientific research, detailed risk assessment, and it can only be justified only if the risk for public health can be weighted based on the latest scientific data available. Where there is a situation of scientific uncertainty, the precautionary principle can be used as a ground of member state taking protective measure as long as the risk assessment that had to be done was not based on hypothetical deliberation. In this case, Netherlands had failed to produce detailed scientific study that the excess intake of fortified foodstuffs will lead to risk for public health. Therefore, CJEU held that Netherlands had failed to fulfil its obligations from the Treaty.

The explanation of different case laws above led to conclude that CJEU clearly took the justification on the ground of public health strictly. CJEU demands that member state can demonstrate the real ground for concern that the threat is exist, weighing whether the measure taken is proportionate and there is no other measure that is less restrictive, only the seriously considered health policy that has a high risk can be accepted to justify, and rely heavily on recent scientific research and international scientific consensus, also precautionary principle can only be used when there is a scientific uncertainty in the subject which previously has to be proven by risk assessment.

3.3.3 Different Member States, Different Measures Taken

In Germany, currently it is only allowed to meet 5 people from two separate household. The chancellor wanting to adopt more restrictions but it was not agreed by the majority of the federal states. People also must use medical face mask in public areas and public transport. Germany's cabinet also has agreed to ease the restriction to people who are already vaccinated or have recovered from the virus.[51] Meanwhile, France being the most COVID infected country in the EU is heading into a third lockdown. Restriction being imposed are non-essential shops will be closed and there will be night curfew from 7pm to 6am.[52] The third lockdown is being imposed as a response to surging number of COVID patients in intensive care units in France. Belgium is also facing the same situation as the number of patients is surging again, after starting to improve the previous week. [53] Now, an appointment beforehand is required if people wanted to shop for non-essentials good, school is also closed, salon and other non-essential service are also closed. On the other hand, even when the number of infected citizens is similar to Belgium, Sweden is relatively easy when it comes to lockdown. Stores are still open, restaurants are still open as usual, and it is not necessary to wear medical face mask in public space nor public

[51] Reuters, 'Germany Looks to Loosening Lockdown as COVID-19 Cases Fall', 5 May 2021, https://www.reuters.com/world/europe/germany-looks-loosening-lockdown-covid-19-cases-fall-2021-05-05/, (accessed 4 May 2021).
[52] BBC News, 'COVID-19: France Enters Third National Lockdown Amid ICU Surge', 3 April 2021, https://www.bbc.com/news/world-europe-56622471, (accessed 4 May 2021).
[53] L. Walker, 'Coronavirus Situation in Hospitals in Belgium Becoming Worse Again', *The Brussels Times*, 27 April 2021, https://www.brusselstimes.com/news/belgium-all-news/168084/limburg-mayor-56-accused-of-jumping-vaccination-queue/, (accessed 4 May 2021).

transportation. The above is the description of how different member states impose restriction in the EU.

Based on previous judgement of case law, CJEU stated that it is up to member state to choose the level of protection of public health as long as it is proportionate. [54] It can be drawn that EU allows different member states take different measures as long as it is proportionate and can be justified on a scientific basis. Different measures being taken can also occur in a situation where reliable scientific data and research is still unavailable. This is happened in this situation where the start of the outbreak was a shock to the world, as it was a new virus. Unknown virus that spread rapidly around the world and no vaccine for it, epidemiologist must research the answer to such question like how could the virus transmit, how to protect ourselves from the virus, death rate, et cetera as the public demands explanation. Member state authority must have turned to their national public health body and their national epidemiologist because there was no international scientific consensus yet. It must also bear in mind that member state authority must decide to take actions in a limited period of time as the virus is keep spreading and more citizen's health is put in danger.

National circumstance also plays a role in this situation. Take an example of Sweden with its relatively easy measure with no lockdown ever since the outbreak began. Lars Jonung in his article explained how Sweden's approach is actually based on its constitution. [55] Swedish constitution guarantees personal freedom of movement under peace time condition and the independence of a public body. Neither the legislation nor the constitution allows Sweden to adopt such measures like lockdown. [56]

Different policies as a response to the pandemic can be seen as different ways to achieve the same goal. It is not necessary to have the same measure for it to be effective. [57] In the end, all the member state's goal is the same, which is to protect their public health from the virus. Even though from the free movement point of view it is a step back from the exercise of freedom of movement of person. It must be borne in mind that the situation being faced right now is between a choice of protecting public health and the exercise of free movement of person. The more the member state are trying to protect their public health, the more the exercise of free movement of person is jeopardized, and *vice versa*. To sum up, different measure that member states taken as a response to tackle the situation is not unlawful, as the EU law accommodates that. As Davies mentioned also that member

[54] Case C-41/02 *Commission of the European Communities v Kingdom of the Netherlands* (2004) EU:C:2004:762.

[55] L. Jonung, 'Sweden's Constitution Decides Its Exceptional COVID-19 Policy', *CEPR Column*, 18 June 2020, https://voxeu.org/article/sweden-s-constitution-decides-its-exceptional-covid-19-policy, (accessed 4 May 2021).

[56] H. Wenander, 'Sweden: Non-binding Rules Against the Pandemic – Formalism, Pragmatism and Some Legal Realism', *European Journal of Risk Regulation*, vol.12, 2021, p. 141.

[57] G. Davies, 'Does Evidence-Based EU Law Survive the COVID-19 Pandemic? Considering the Status in EU Law of Lockdown Measures Which Affect Free Movement', *Frontiers in Human Dynamics*, Vol. 2, October 2020, p. 4.

state's authority create policy that is tailored to local circumstances and attitudes which is why different measure can take place. [58]

3.4 Proportionality Test

Member states are able to take restrictive measure to the four freedoms justified on the ground of public health. However, to be in the corridor of EU law, the measure must be proportionate. Proportionate means that the measure is suitable and necessary to attain the objective sought. In assessing whether restrictive measure taken by member states in terms of travel bans or reintroduction of border control is proportionate, principle of precautionary will also be taken into account. Principle of precautionary is used when there is an uncertainty in the current state of scientific research. Uncertainty is relatable in this situation because the new virus is relatively new and there was not enough scientific research about it yet.

Assessing whether a measure is proportionate means ticking both the suitability and necessity test condition. However, assessing an exceptional situation like this can be perplexing. In a situation where virus outbreak happened rapidly, member state immediately takes action such as travel ban or lockdown to reduce the infection rate. It is straightforward to state that travel bans and lockdowns are suitable to tackle the situation since it will reduce the mobility of people which in the end connects to suppressing infection rate or flatten the curve. Then yes, it is proportionate. Regardless, it needs to be remembered that it cannot be that easy to judge such an exceptional situation.

At the time when member states' authority imposed restrictive measure, it has to be noted that they had to face a situation where reliable scientific data is limited while also taking into account public expectation to protect their citizen in the name of public health. Precautionary principle plays it role here. As stated in the judgement of previous case law that when there is great scientific uncertainty, such uncertainty affects the member state's discretion.[59] Furthermore, member state may take protective measure without having to wait until the risk is clearly visible or the situation gets worse. However, a proper application of precautionary principle needs to be based on detailed risk assessment by reliable scientific data, research or international scientific research. As explained above, there was no reliable and recent international scientific research yet, let alone international scientific consensus, suppose that member state may turn to their national public health body and their national epidemiologist regarding scientific research and results to prove that there is a real risk to public health if restriction is not imposed.

In deciding to impose measure to their country, it needs to be understood that member state's authority not only take into account public health matters, but also other matters such as economy, health care capacity, the attitude of the citizen towards the virus, et cetera. At some point, they need to sacrifice one to achieve one. Imposing strict lockdown is better for public health but it is not good for the economy. Sometimes creating a measure can

[58] Ibid, p.3.
[59] Case C-41/02, supra note 50, para. 51.

also be based on public pressure. In Netherlands, parents demanded that the school would be closed because they were afraid that their kids got infected from school.[60] This leads Netherlands to close school based on public attitude and public pressure. Another example is when member state imposed restriction and lockdowns because they think that they don't have enough health care capacity, as a precaution when the infection rate is high. This means that the authority takes into account public health and their health care capacity. That member state must think that it is necessary for them because it would be hard to handle patients when the health care workers and hospital equipment is not enough. The point is the degree of suitability and necessary will not be the same between member state. It clearly depends on national circumstances and preferences.

As restriction on the freedom of movement of person justified on ground of public health is allowed from the standpoint of EU law and it also gives discretion to member state, in the end it is in the hand of member state to justify whether the measure they took is proportional, by means of necessity and suitability. In this challenging situation, member states may appraise the level of suitability and necessary differently from one another. Member state may also be imposed to burden of proof when it comes to carrying detailed risk assessment because of the nature of precautionary principle they rely on. As a conclusion, scientific uncertainty which lead to the use of principle of precautionary, might influence the application of principle of proportionality by demanding lower degree of suitability and necessity.

3.5 EU Coordination: Is the Digital Green Certificate the Answer to A More Proportionate Measure?

As explained in section 3.3.3 that the divergence in policy by member states cannot be avoided due to national circumstances and how member state perceived the risk, one may question whether EU would like to take a step forward to coordinate measures in the EU territory. It appears that divergence in policy create drawbacks. There are two economic outcomes caused by the divergence in policy between member states. [61] The first one being the cross-border spill over effects. In their paper, Pacces and Weimer took an example where a Dutch citizen can travel freely to Belgium, which Belgium have a stricter measure than Netherlands, Belgium will bear the effects of Dutch risk management. The second one is disruption of supply chains. Due to its easy transmission of the virus, many factories need to be closed because when people working together in the same room, it could help the transmission of the virus if one of the workers is infected which will lead to a new cluster. This will definitely impact the supply chain when production is hampered while market demand is still high.

It is true that the matter of public health is in the hand of member states, bearing in mind that it must be within the corridor of EU law. Then one

[60] NL Times, 'Parents File Lawsuit Demanding Stricter COVID Measures At School', 2 December 2020, https://nltimes.nl/2020/12/02/parents-file-lawsuit-demanding-stricter-covid-measures-schools, (accessed 4 May 2021).
[61] A. Pacces and M.Weimer, 'From Diversity to Coordination: A European Approach to COVID-19', *European Journal Risk of Regulation*, Vol.11, 2020, p. 287.

might wonder the role of EU in situation like this. Based on Decision No.1082/2013/EU, EU role is being centre of rapid information exchange which communicate messages, strategies, challenge to coordinate risk based on robust evaluation of public health risk.[62] In fact, EU has European Centre for Disease Prevention and Control which assessess and communicates current emerging threat to human health posed by infectious disease by working together with member states' national health body. Hereinafter, the focus of public health policy must be about lifting restriction as an exit strategy in the EU. To reduce the spill over effects caused by the divergence of national measures, it might be crucial for EU to decide a coordinated exit strategy. The Commission has the competence in the EU to promote the general interest of the Union and take appropriate initiatives towards that based on Article 17 TEU. Therefore, it is the task of The Commission if EU decide to take a coordinated approach exit strategy.

On March 2021, The Commission proposed a Digital Green Certificate to facilitate the exercise of free movement of person in the EU. It shows that The Commission already took the initiative towards a coordinated exit strategy. Restriction on the free movement of person of EU will gradually be lifted as member states starts to implement DGC. The Commission promised that there will not be discrimination towards a person that has been vaccinated or not, as long as that person tested negative for the virus, he can travel to another member states.

Digital Green Certificate appears to be a less restrictive measure compared to total ban of freedom of movement of person in this time. It is also a temporary measure that will be revoked when World Health Organization declare the end of the crisis. This attitude is in line with the principle in previous case law that when a threat to public health is no longer exist, measures related to that must be suspended. Coordinated approach might be a solution for the EU to reduce the spill-over effects from the divergence of member states' measure. Accordingly, Digital Green Certificate might positively be the answer towards a more coordinated way for EU to effectively fight this situation together.

[62] Decision No.1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No. 2119/98/EC, para. 22.

4. Tax Concern and Implication during COVID times

COVID pandemic has impacted the way we live to some extent. With government taking measure to restrict the movement of people in order to flatten the curve, companies and workers are facing difficulties to do their operation as they used to in pre-pandemic. Factories and companies are forced to close their operation for the fear of making new COVID cluster. As a consequence, business operation changes and people work remotely from home. Not only that, some worker may face a situation where they are stranded in a country because borders are closed, flight delays, and other restrictive measure that forced them to stay in a host country. This section will explain tax concerns that become apparent in COVID pandemic for individual and corporation.

4.1 Tax Concerns Associated to Employment Income

Firstly, cross-border worker and people who work remotely from another country (teleworkers) will likely be impacted when it comes to employment income. Travel restriction made them work in a country where they are not posted, which eventually will lead to a concern whether this activity will trigger tax obligations. This is due to the fact that international tax regime for employment income is heavily depend on physical presence of individuals. It can be seen from Article 15 OECD Model that in principal, salary shall be taxed only in that contracting state, unless the employment is done in another contracting state. Furthermore, it is stated in Article 15 (2) OECD Model that if employment is performed in another contracting state, it can only be taxable in the first contracting state if the person is not present in another contracting state for more than 183 days in the fiscal year concerned, remuneration is paid by a non-resident in another contracting state, and is not borne by a permanent establishment in the other state. Therefore, according to Article 15 OECD Model, for example Mr. A who usually travel to Country B for work and now has to work from home (Country A) during fiscal year 2020, his remuneration shall be taxable in Country A where he performs the work. The distinction can be seen that in pre-pandemic situation, his remuneration would be taxable in Country B where he performs his work, and in pandemic situation it shifts to Country A. Based on this principal rule, it will create burdensome tax implications such as different tax compliance by employee and employers.

Exceptional circumstances should be treated with exceptional rules. If standard rules still applied in exceptional circumstances like this, it will create compliance burden either by employee or employers. A number of countries has created exceptional rule to tackle the situation. Belgium for instance concluded mutual agreements regarding tax impact on cross border workers and employers with neighbouring countries such as Germany,

France, Luxembourg and Netherlands. [63] In the context of COVID, the new rule will derogate from the principal rule from the Treaty by not considering the state of residence where the person continues to perform his employment. Therefore, there will be no change in allocation of taxing rights, as it stays in the hand of state of employment.

Some countries perceived this pandemic as a force majeure circumstances, where standard rule has to be derogated. [64] Principal rules from the treaty need to be interpreted differently from how it used to be. Creating a legal fiction is the way to derogate from the principal rule. For instance in this situation, the time and place that the worker perform his employment from home is fictionized to be in the state of initial employment, when in fact he is working from his state of residence. This helps countries to mitigate the implication that could arise in regard to administrative burden for workers and corporations.

Another scenario that may arise for individual is when he gets stranded in host country and currently unable to come back to his country of residence. In principal, the country where he is stranded now may tax the remuneration from the employment subject to few circumstances. To derogate from the principal rule, legal fiction is used again so that the host country does not count the days that the person presents in their territory. It must be understood that the circumstance of this person stay in host country is not because of his willing, but because of the public health measure. It should be rational if a country disregards the days the person started to get stranded in counting 183-day time test. The example of a country that applying this exceptional measure is Finland. In Finland, the days spent in Finland resulting from COVID restriction will not be counted in residency time test.[65] However, in Sweden if a person continues to stay in Sweden because he is forced to, in the context of pandemic, the day he continues to stay in Sweden will be counted for residency time test and fulfils the criterion of habitual abode. As a consequence, that person will have unlimited tax liability in Sweden. It can be seen that not every country has a special derogation when it comes to COVID special tax measure. In the end, it needs to be checked countries' tax measure to see whether the stay will result to some tax implication.

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[63] Service Public Fédéral Finances, *Prolongation Des Accords COVID-19 Sur Le Travail À Domicile* [website], https://finances.belgium.be/fr/Actualites/prolongation-des-accords-covid-19-sur-le-travail-à-domicile ,(accessed 5 May 2021).

[64] OECD, *Updates Guidance on Tax Treaties and The Impact of The COVID-19 Pandemic*, 21 January 2021, available at https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic, p.17.

[65] VERO Skatt, *Effects of the Coronavirus Pandemic on Taxes on Income Received Under An Employment Contract in A Foreign Country (the six-month rule and forces majeures)* [website], https://www.vero.fi/en/detailed-guidance/statements/82178/effects-of-the-coronavirus-pandemic-on-taxes-on-income-received-under-an-employment-contract-in-a-foreign-country-the-six-month-rule-and-forces-majeures2/ , (accessed 5 May 2021).

4.2 Tax Concerns Associated to Individual Residence Status

Mobility restrictions can affect a change of residence status for individual. Residence matters is ruled out in Article 4 OECD Model Treaty. Basically, an individual can only be a resident in one state for tax treaty purpose, which will be determined based on Article 4 (2) OECD Model Treaty even if the individual is a resident in both contracting states. There will be a tie breaker rule which gives priority to a permanent home of that person, then to a centre of vital interest, habitual abode and nationality.

In a situation where a taxpayer gets stranded in a host country in the context of pandemic, as stated in the previous section it is sensible that he is not going to be deemed as resident even if he is present in that country exceeding the time test. When the first tie breaker rule applies, it will be rewarded to permanent home. In the context where the person is stranded in a host country as a result for a job he previously done, that person is most likely to stay in a hotel or other temporary accommodation that the company provides for. As stated in paragraph 13 of the Commentary on Article 4 OECD Model, permanence means that the person has that dwelling available to him at all time, and not occasionally for the purpose of a short duration stay. Hotel and temporary accommodation obviously cannot be deemed as a permanent home. The circumstance changes if the taxpayer purchases a house or apartment in that state knowing that he sometimes goes on a business trip there. Then, that house/apartment will be adequate to be a permanent home if he didn't rent it out. If the condition is that way, then the tie breaker will be seen from his centre of vital interest. To sum up, hotel or temporary accommodation cannot be deemed as a taxpayer's permanent home in host country for the purpose of tie breaker rule.

The other situation is expatriates which already have residence status in source jurisdiction but forced to return to their home country, in the context of pandemic. The recent OECD guidance stated that it is not likely that he will get residence status in home country only because he moved there in the context of pandemic.[66] The preference to the tie breaker rule will be awarded to habitual abode if he has permanent home in both state or he neither have permanent home in both state. Based on paragraph 19 of the Commentary on Article 4 OECD Model, habitual abode needs to be assessed based on where the person habitually lives, routines, usually present in a normal context and not going to be based on more days spent in which jurisdiction. Therefore, his move to home country should not change his residency status from the perspective of OECD Model. Nevertheless, his residence status may change if he continues to stay in home country when the context of pandemic is over.

[66] OECD, supra note 64, para. 41.

4.3 Tax Concerns Associated to Entities' Residence Status

As specified in Article 4 (3) OECD Model Treaty, in assessing residence status for a person other than individual, a person shall be deemed to be resident in the place of effective management, where it is incorporated, or other place of any relevant factors. Entities' dual residency is relatively rare but there were issues about tax avoidance. Therefore, OECD stated that the solution to that is assessing entity's residency on a case-by-case basis. [67] There are factors that need to be taken into account in assessing entities' residence status such as where the important meeting of the board usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day to day management is carried on, location of headquarter, where its accounting records are kept. [68]

What becomes a concern related to entities' residence status is when the key person of the entity, either the chief executive officer or other senior executives, is stranded in a country where he isn't supposed to, which make him continue to work from that jurisdiction will lead the entity having a residence status in that jurisdiction. The key person might continue to work remotely from that jurisdiction by attending important meeting online and making important decision for the company. Does this circumstance change the entity's place of effective management?

Place of effective management refers to the ordinary place where the most senior group of persons (for example board of directors) made the key management and important commercial decision for the company's business.[69] From that definition, it can be seen that the emphasis is 'ordinary'. Ordinary can also be interpreted as being the 'usual' place in a normal circumstance. With the fact that the most senior group of person stranded in another jurisdiction and continue his work by attending important meeting and decide important decision for the company should not be a guiding factor that the company will obtain resident status in that jurisdiction. It is because that jurisdiction is not the usual and ordinary place to make important decisions at. Also bearing in mind that the key person's presence in that jurisdiction is temporary and not being there by his willing, rather it is because of mobility restriction as a public health measure.

Example of EU member state that give leniency to the interpretation of treaty in the context of pandemic is Greece. Greece issued that with the key person being present in Greece, in the context of pandemic, will not affect the place of effective management of the entity.[70]

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[67] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, Commentary on Article 4, para. 23.
[68] Ibid, para. 24.1.
[69] Op. Cit, Commentary on Article 29, para.149.
[70] Greek Independent Authority for Public Revenue, *Implementation of the provisions on tax residence and permanent establishment in accordance with Law 4172/2013 ("K.F.E.") and the rules of the Contracts for the Avoidance of Double Taxation of Income and Capital ("S.A.D.F. »), And addressing issues of cross-border workers in accordance with the provisions of the SADF, in the context of the crisis caused by the COVID-19 pandemic*, https://www.aade.gr/sites/default/files/2020-07/E2113_2020.pdf (accessed 5 May 2021).

4.4 Tax Concerns Associated to Permanent Establishment

The concern associated to permanent establishment arises when employee is compelled to work from his home country, which is a different country where he regularly works. The question in here is whether the home where the employee performs his work can be regarded as home office, which leads to the creation of permanent establishment in that jurisdiction. Explanation about home office can be found on Commentary on Article 5 paragraph 18 OECD Model. It is stated that home office cannot be automatically assumed that it is at the disposal of the enterprise, but it must depend on fact and circumstances. Furthermore, it is emphasized that when an enterprise clearly does not provide an office when it is actually needed and the enterprise required the worker to use his home office continuously to perform his work, such situation can make the home office to be at the disposal of the enterprise. From the phrase, it is seen that the requirement for a home office to be at the disposal of the enterprise is for it being 'continuous' and if the enterprise does not provide any office for its employees activity. In regard to a situation faced right now, most people work from home because of the public health measure and not because the enterprise does not provide office. Most likely the scenario is the enterprise has an office in another jurisdiction which that jurisdiction currently closed its border for worker from another jurisdiction. It can also be argued from the permanent establishment concept with it demanding a certain degree of permanence. It is clear that home office that the employee is using now doesn't have a certain degree of permanence because once the pandemic is over and border starts open up again, employee will start to go back working from the enterprise' office. Again, it needs to be reminded that this pandemic is an extraordinary circumstance so that the tax authority needs to make an exception to such situation so that it does not create unnecessary burden to taxpayers. OECD in its guidance also stance that home office should not trigger the creation of permanent establishment in the context of pandemic.

There are critics about how home office cannot be considered a permanent establishment is hasty. [71] He argued that OECD failed to consider the fact that the decision about the employee to return to his home country and work from home was actually taken by agreement from the employee and the enterprise. Therefore, by disregarding that it also means disregarding the existence of permanent establishment. He further commented that it may be impossible to determine whether a home office can be considered permanent establishment because it is not in line with the purpose of permanent establishment concept, also because the requirement is not explicitly worded in the model, which leads to interpretation problem without foundation.

His critics is reasonable, but making home office at the disposal of the enterprise in this situation considering there is no degree of permanence and

[71] A. Moreno, 'Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties', *Intertax*, vol.48, issue 8&9, 2020, p. 817.

other reason explained above is not acceptable. Afterall, it needs to be reminded that in taxation there is a principle of ease of administration. If home office is going to be considered as a permanent establishment, imagine the administrative burden the enterprise will carry. It is certainly not in line with the principle of ease of administration.

The second concern is related to dependent agent permanent establishment. A person is deemed to be a dependent agent when he is acting on behalf of another person. In establishing whether an entity has a permanent establishment in a jurisdiction, dependent agent is one of the determinant factors. According to Article 5 (5) OECD Model, if a person is acting in contracting state on behalf of enterprise, habitually conclude contracts or plays the principal role to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that state. Again, the emphasize in here is the word 'habitually' which can be interpreted as the normal routine in a normal situation, the 'usual'. If a key managerial person had to work from another contracting state and conclude contracts in the name of the enterprise in the context of pandemic, the enterprise shall not be deemed to have permanent establishment in that contracting state. It is because the key person does not 'habitually' conclude contracts there. It cannot be habitual when the person is doing so as a result of mobility restriction in the context of pandemic. Furthermore, there is no degree of permanence that he will continue to conclude contracts on behalf of the enterprise there. It is also stated in OECD Model Commentary on Article 5 paragraph 98 that the presence has to be more than transitory to be regarded as having permanent establishment. Therefore, even when the concern exists, the presence of an employee in a jurisdiction cannot be regarded as dependent agent which triggers the creation of permanent establishment. However, if the person continues to conclude contract on behalf of enterprise after the restriction is lifted, then it can creates permanent establishment because that the term 'habitually' may be fulfilled.

OECD promotes that the temporary conclusion of contracts in the home jurisdiction of an employee or agent should not create permanent establishment for the business. [72] In the EU, Greece is the example of a country that will not consider an employee or an agent to be dependent agent permanent establishment merely for the reason he is stranded in Greece in the context of pandemic. [73] It has to be noted that due to tax sovereignty of countries, national tax law can differ. Therefore, to see whether there is tax implication for a company's situation, research need to be done regarding which countries providing a special COVID tax rules that is more lenient and which one is not.

[72] OECD, *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis,* 3 April 2020, available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/, para. 6.

[73] Supra note 70.

4.5 Need A Change for the Future?

From the above section, one can see that there is discrepancy in national tax law with regards to treaty interpretation in the context of pandemic in the EU. Then, it is questionable whether a particular member state that does not give leniency to the treaty interpretation, as recommended by OECD, can be accused of being not proportionate in a situation where it leads to additional tax burden of taxpayers.

In general, principle of proportionality may serve as a tool to limit the state's legislative competence, ensuring the state will not impose a measure that is not proportionate.[74] It is also mentioned that proportionality is closely connected with equality principle, suggesting that similar situations will be treated similarly and different situation will be treated differently.[75] In a context of pandemic, take an example of a national tax law of a Member State that does not give leniency to the situation and counting the days of an individual presence in that country that will lead him to have an unlimited tax liability. This will no doubt create additional administrative tax burden for the taxpayer. In this situation, that Member State is treating this exceptional situation the same as the normal pre-pandemic situation. From this point of view, such measure may not be proportionate because that Member State does not treat different situation differently.

OECD has issued guidelines regarding the analysis of tax treaty and the impact of COVID crisis. The guideline aims to provide certainty to taxpayers during this exceptional time and only relevant in the context of pandemic. Essentially, the guideline stances to disregard changes in the context of pandemic so that such changes will not lead to additional tax burden for taxpayers, either by a creation of permanent establishment or a change in residence status. However, as explained in previous sections there are countries that follow the recommendation and others seem not very lenient to the circumstances. It is understandable that the discrepancy exists because countries' have tax sovereignty which make them able to design and enforce their tax legislation. Furthermore, it needs to be understood that OECD guideline is soft law, which is non-binding. It is not necessary to follow a guideline that has no legal force. In fact, it is up to each member states to decide whether they wanted to follow the guideline or not. Nevertheless, the importance of OECD guideline, OECD model treaty and its commentaries cannot be underestimated because these instruments are widely used by tax administrations, tax advisors, judges, scholars, and most importantly their practical importance is paramount to better interpret and apply international tax rules.[76] Furthermore, it also helped shaped an international system of concepts that promote uniformity along many jurisdiction, which is a positive aspect. [77] As a pandemic is a global problem, it appears right to also have a global solution, especially in regard

[74] A. Zalansinski, 'The Principle of Proportionality and (European) Tax Law', in C. Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD Publishing, 2014.
[75] Ibid.
[76] A. Navarro, 'International Tax Soft Law Instruments The Futility of the Statis v. Dynamic Interpretation Debate', *Intertax*, vol.48, issue.10, 2020, p. 849.
[77] Ibid, p.850.

to taxation. Therefore, it is sensible for a member state to follow the guideline of OECD in tax treaty interpretation for uniformity and ease of administration.

Additionally, as the pandemic has been going on for more than a year, the new routine of getting the job done remotely is inevitable. Online meeting is the new normal, lectures are also held online, tax courts are also started to use video meeting application. The new way to do the job has shown that it is working and it is effective. The lesson learned in here is that once this way become the new norm after the pandemic, it is rational that new tax regulation needs to be issued. The new tax regulation needs to be issued are especially regarding the creation of permanent establishment and the creation of residence status of individual and entity. It is also useful to create a derogation in the context of pandemic, in case there will be another pandemic in future, therefore taxpayers will not have to be feeling uncertain when it comes to tax implications. Noted that in OECD Model and its Commentary, a derogation in the context of pandemic as an exceptional situation is not exist yet, it is only in the update guidance on tax treaty that OECD published, the word ‘exceptional circumstances’ exists.

5. Conclusion

Restriction on freedom of movement of person is allowed from EU legal perspective. It is because the right to free movement is not absolute, as long as it can be justified on grounds of public policy, public security or public health. Mobility hindrance in the context of pandemic justified on the ground of public health is allowed from EU legal framework. However, looking from the established case law it shows that CJEU took the the justification on the ground of public health strictly. Member state need to be able to show that there is a real ground of concern that the threat to public health exists by recent scientific research. The measure that is taken also has be proportionate and no other less restrictive measure can be adopted to reach the same objective. Justifying whether a measure is proportionate or not can be problematic in this situation, especially knowing that there is scientific uncertainty with this exceptional circumstance. The role of precautionary principle plays it part when dealing with scientific uncertainty, which requires member state to do detailed scientific risk assessment. The burden of proof that the measure taken is suitable and necessary lies in the shoulder of member state. Recently, EU has took a step forward in coordinating the exercise of freedom of movement of person by proposing Digital Green Certificate to member states. This certificate is very promising because it is less restrictive rather than a total ban of travel. The nature of this measure is temporary and it is line with EU law that when a threat to public health no longer exists, measures related to that must be revoked.

Restriction on freedom of movement of person also give implication to tax matters. It raises concern for taxpayers regarding the unwanted residency status and creation of unwanted permanent establishment by individual and corporation. OECD issued a guideline relating to that, but since OECD guideline is a soft law without legal force, it is up to member state either they want to follow the guideline or not. In this difficult time, it is sensible for a member state to follow the guideline of OECD in tax treaty interpretation for uniformity and ease of administration. Furthermore, the pandemic has changed the method of work since most of the job is done remotely and it is effective. It might be a high time to regulate this since it could be the new normal after the pandemic. The new regulation would likely to give legal certainty to taxpayers so there would be no uncertain concerns towards tax implications they are facing in such situation.

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