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NOTE

From: Presidency
To: Permanent Representatives Committee/Council
Subject: Regulation amending the Schengen Border Code Regulation on a Union Code on the rules governing the movement of persons across borders
- policy debate

Courtesy translation

The Commission presented on December 14th 2021 its proposal for a Regulation amending Regulation (EU) 2016/399 establishing a Union code on the rules governing the movement of persons across borders. This proposal aims to respond to the challenges of the instrumentalisation of migratory flows, to draw the lessons of the pandemic by codifying and framing measures restricting travel to the European area, as well as to revise the framework for internal border controls and better prevent unauthorised movements.

After a presentation under the Slovenian Presidency on 14 December 2021, a first examination of the text was completed on 26 January. On 24 February, the Presidency proposed a first draft compromise on part of the text, which is currently being examined at technical level. This draft corresponds to the first three of the four discussion points proposed below. It will be completed by a compromise on the whole text during the month of March.

The Presidency stresses that strengthening the control of our common external border is the precondition for the functioning of the area without internal border controls. Together with the reforms already adopted (strengthening of Frontex, reform of information systems and interoperability), under negotiation (police cooperation code, Prüm, Pact on Asylum and Migration) or in the process of being adopted (Schengen evaluation mechanism), the revision of the Schengen border code will provide the Member States with modernised tools to better respond to health, migration and security risks. In this perspective, the Presidency would like to continue this work with a view, if possible, to adopting a general approach at the JHA Council in June.

To this end, the Presidency invites Ministers to express their views on the following points, in particular on the discussion points presented in bold.

Instrumentalisation of migration and border control

The Commission's proposal defines the instrumentalisation of migration (Article 2) and aims to adapt the legislative framework to such situations and to improve border surveillance in this context (Articles 5 and 13). It thus gives Member States faced with such situations the possibility to close their border crossing points (Article 5) and the means to better prevent or detect irregular crossings of external borders (Article 13).

During the debates, two main topics were discussed and are taken into account in the compromise proposal.

- The first concerns the actors to be taken into account in the definition of instrumentalisation: it seems useful to take into account the hypothesis of instrumentalisation by non-state actors in order to take into account the reality of a phenomenon that could evolve, while distinguishing it from organised crime.

- The second concerns the means available to Member States to combat these situations: several Member States wanted the new provisions of the Code to be more explicit about the means of surveillance of the external border (Article 13). The choice of means deployed at the external borders is a matter for the sovereignty of the Member States; it is not the purpose of the Schengen Borders Code to list all such means. A number of Member states nevertheless supported mentioning the possibility of erecting physical barriers. The Schengen Borders Code as well as the Commission proposal already provide that such surveillance may be carried out by technical means, including electronic means, surveillance equipment and systems, including by stationary or mobile units. It is proposed to strengthen these references and to specify that these means must be proportionate and that respect for fundamental rights must be guaranteed.

Coordination measures in the event of a health crisis at external borders

The Commission's proposal aims to improve coordination measures at external borders in the event of a health crisis with epidemic potential outside the EU (Article 2, Article 21a and Annex XI) through a common mechanism. This mechanism involves identifying the pandemic risk, adopting a regulation on travel restrictions to the European Union, based on a Commission proposal, and defining essential travel (Annex XI).

In this context, the Commission proposes that the measures to be put in place be fixed by a Council implementing regulation in three respects particularly:

- Restrictions on entry that can be decided by Member States ;
- Health measures to be imposed on travellers from third countries, such as compulsory testing, quarantine or self-isolation, possibly in addition to restrictions on entry ;
- The list of categories of travellers exempted from restrictions.

Ministers are invited to indicate whether in their view, the Commission's proposal achieves an appropriate balance between effectiveness and flexibility on each of the three aspects.

Checks on the territory and transfer procedure

The Commission's proposal foresees new measures available in the absence of internal border controls. These measures aim to will contribute to a better security of the Schengen area and to encourage cooperation between Member States.

In border areas, the text extends, beyond exclusively police authorities, the scope of the authorities competent to carry out checks and specifies the scope of the threats taken into account in the assessment of the risk (Article 23): in addition to the fight against cross-border crime, which was already included in the Schengen Borders Code, it authorises Member States to carry out checks to combat illegal stay or to take measures to prevent a pandemic risk. The Commission's proposal also introduces a simplified transfer procedure between Member States (Article 23a) when an illegal staying third country nationals coming directly from another Member State is apprehended at the internal border. This procedure applies in the context of cross-border operations.

Re-establishment of internal border controls

The Commission proposed to strengthen the procedural guarantees in the event of the unilateral reintroduction of internal border controls: the proposal specifies and extends the list of elements that must be assessed by the Member State concerned, and the content of the assessment are strengthened in the event of a prolongation. It also proposes the establishment of a mechanism to provide a European response when a same serious threat affects simultaneously a majority of Member States and thus jeopardise the overall functioning of the Schengen area.

The Commission has also taken account of the Advocate General's opinion in two cases pending in Court of Justice of the European Union¹, the judgment itself being still awaited.

¹. Joined cases C-368/20, *Landespolizeidirektion Steiermark*, and C-369/20, *Bezirkshauptmannschaft Leibnitz*.

The Council's first examination of this proposal provided an opportunity for discussions on the grounds for reintroducing controls, in particular taking account of large-scale unauthorized movements (Article 25(c)), and on the procedure for temporary reintroduction of border control (Article 26). In addition, clarification was sought on the creation of a new mechanism in the event of a risk to the overall functioning of the Schengen area (Article 28).

These provisions will be the object of a Presidency compromise during the month of March.

The ministers are invited to pronounce themselves on the simplified transfer procedure and on the proposed arrangement regarding the reintroduction of internal border controls.