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**NOTE**

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From:	Presidency
To:	Council
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders - Policy debate

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On 14 December 2021, the Commission presented a proposal for a Regulation amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders. This proposal aims to address the challenges of the instrumentalisation of migration flows, to draw lessons from the pandemic by codifying and providing a framework for measures restricting travel to the European area, to revise the framework for internal border controls and to better prevent unauthorised movements.

Following a presentation under the Slovenian Presidency on 14 December 2021, an initial 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 discussed at technical level. That draft corresponds to the first three of the four items for discussion proposed below. It will be supplemented by a compromise on the text as a whole in March.

The Presidency would stress that strengthening controls at our common external border is a prerequisite 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, the Prüm mechanism and the Pact on Asylum and Migration) or in the process of being adopted (the Schengen evaluation mechanism), the revision of the Schengen Borders Code will provide Member States with modernised tools to better respond to health, migration and security risks. With that in mind, the Presidency wishes to continue to examine the Commission proposal with a view, if possible, to adopting a general approach at the June JHA Council.

To that end, the Presidency invites ministers to express their views on the following points, and in particular on the items for discussion in bold type.

### **Instrumentalisation of migration and border surveillance**

The Commission proposal defines the instrumentalisation of migration (Article 2) and aims to adapt the legislative framework to such situations and to improve border surveillance in that context (Articles 5 and 13). It thus offers Member States faced with such situations the possibility of closing their border crossing points (Article 5) and the means of better preventing or detecting irregular border crossings (Article 13).

During the talks, two main topics were discussed and taken into account in the compromise proposal:

- The first concerns the stakeholders to be taken into account when defining instrumentalisation: it seems useful to bear in mind the possibility of instrumentalisation by non-state stakeholders so as to reflect the reality of a phenomenon which might change, 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 as regards the means of surveillance at the external border (Article 13). The choice of means deployed at the external borders is a matter of sovereignty of the Member States, and the Schengen Borders Code is not intended to provide an exhaustive list of those means. However, a number of Member States supported a reference to the possibility of erecting physical barriers. Both the Schengen Borders Code and the Commission proposal already provide for such surveillance to be carried out by technical means, and in particular electronic means and surveillance equipment and systems, including by stationary or mobile units. It is proposed that those references be strengthened while also specifying that the means deployed must be proportionate and respect for fundamental rights guaranteed.

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

The Commission proposal aims to improve coordination measures at the external borders in the event of a health crisis with epidemic potential outside the Union (Article 2, Article 21a and Annex XI) through a common mechanism. That mechanism involves the identification of the pandemic risk, the adoption of a regulation on travel restrictions to the European Union, on the basis of a proposal by the Commission, and the definition of essential travel (Annex XI).

In that context, the Commission proposes that the measures to be put in place should be adopted by means of a Council implementing regulation, relating in particular to three aspects:

- the restrictions on entry which may be imposed by the Member States;
- the health measures to be imposed on travellers from third countries, which may be supplementary to the entry restrictions, such as mandatory testing, quarantine or self-isolation;
- the list of categories of travellers exempted from restrictions.

**Ministers are invited to indicate whether the Commission proposal makes it possible, in their view, to strike an appropriate balance between effectiveness and flexibility with regard to each of the three aspects.**

### **Checks within the territory and transfer procedures**

The Commission proposal provides for new measures available in the absence of internal border controls. Those measures are intended to help ensure better security in the Schengen area and to encourage cooperation between Member States.

In border areas, the text extends, beyond the police authorities alone, the scope of the authorities competent to carry out checks and specifies the scope of the threats taken into account in the risk assessment (Article 23): in addition to combating cross-border crime, which was already included in the Schengen Borders Code, it authorises the Member States to carry out checks on the legality of the stay or to take steps to prevent a pandemic risk. The Commission proposal also introduces a simplified procedure for transfer between Member States (Article 23a) in cases where an illegally staying third-country national who has arrived directly from another Member State has been apprehended in the vicinity of internal borders. This possibility is available in the context of a cross-border operation.

### **Reintroduction of internal border controls**

The Commission proposes to strengthen the procedural safeguards in the event of the unilateral reintroduction of internal border controls: the proposal specifies and expands the list of aspects to be evaluated by the Member State concerned, and the content of the evaluation is strengthened in the event of a prolongation. It also provides for the establishment of a European response mechanism where the same threat affects a majority of Member States at the same time and thus endangers the overall functioning of the Schengen area.

The Commission has also taken into account the opinion of the Advocate-General in two cases pending before the Court of Justice of the European Union<sup>1</sup>, with the judgment itself still pending.

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<sup>1</sup>. Jointed Cases C-368/20, *Landespolizeidirektion Steiermark*, and C-369/20, *Bezirkshauptmannschaft Leibnitz*.

The Council's initial examination of this proposal covered, in particular, the grounds for reintroducing controls, including the taking into account of large-scale secondary movements (Article 25c) and the procedure for reintroducing controls (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).

Those provisions will be the subject of a Presidency compromise in March.

**Ministers are invited to express their views on the simplified transfer procedure and on the proposed mechanism for reintroducing internal border controls.**

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