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From:	Presidency
To:	Working Party on Frontiers
Subject:	Report on the questionnaire on Article 4 of the Screening Regulation

In view of the Informal VTC of the members of the Working Party on Frontiers on 18 December 2020, delegations will find enclosed a report from the Presidency on the questionnaire on Article 4 of the Screening Regulation.

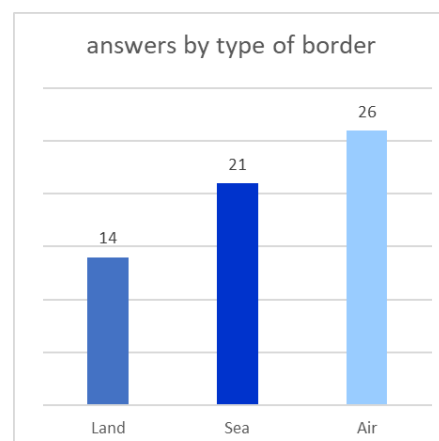
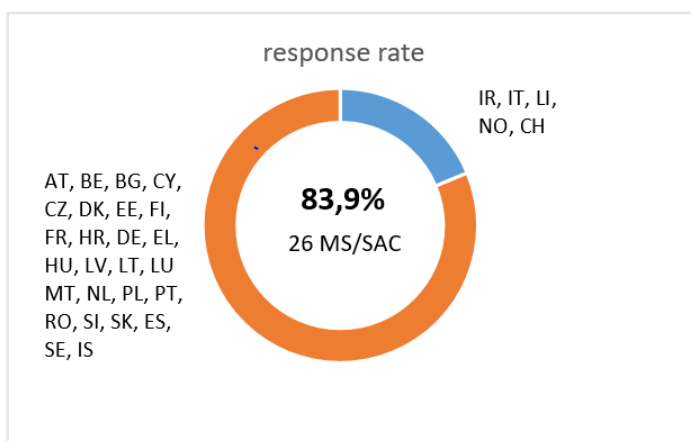
Summary of the written consultation of the Working Party on Frontiers (WK 12970/2020 INIT)

EU Member States (MS) and Schengen-associated States (SAC) use deprivation of liberty and restrictions on freedom of movement at the external borders to various degrees and for several, often-combined reasons, among which:

- 1) to control new arrivals and to prevent unauthorized entry;
- 2) to determine or verify identity;
- 3) for reasons of national security or public order or health;
- 4) to secure the presence and to prevent absconding during the processing of an asylum claim;
- 5) and/or to facilitate the return and removal.

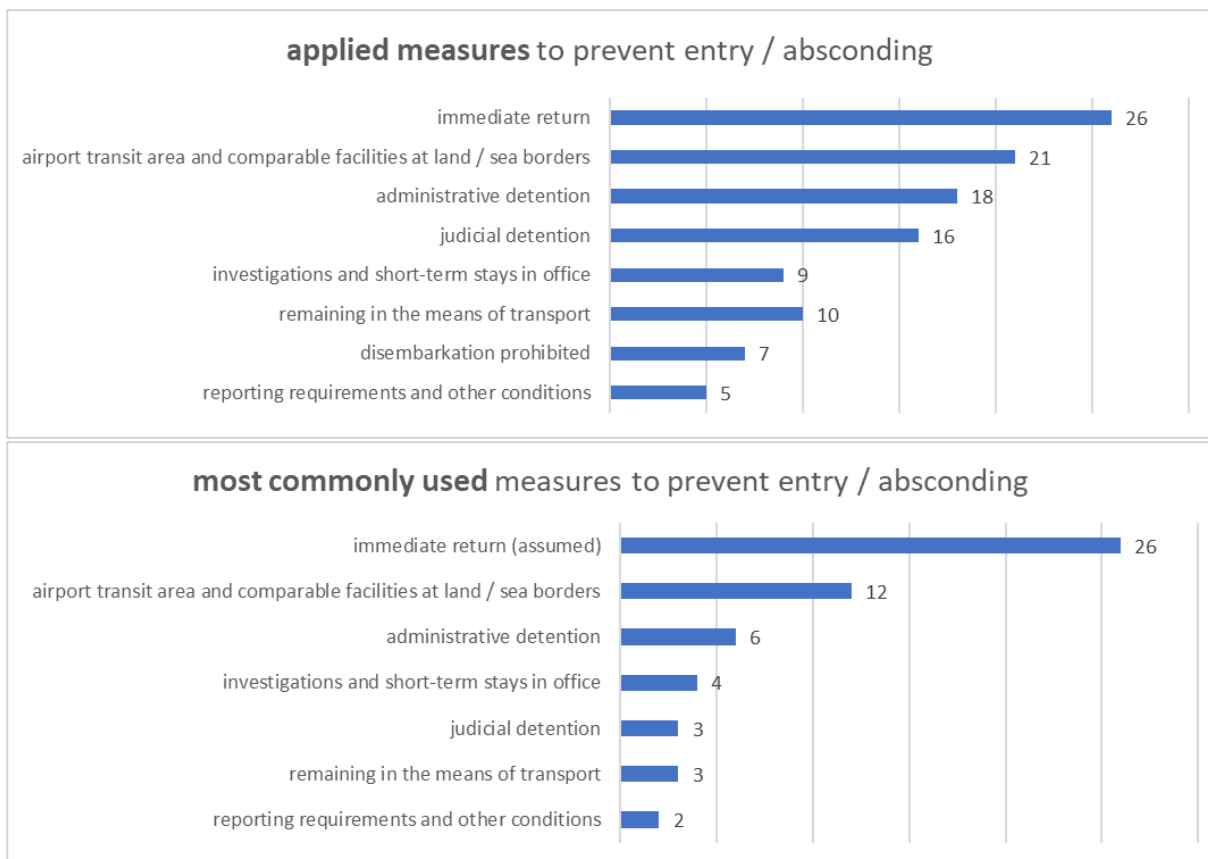
One of the key questions during the discussion on the proposed Screening Regulation, which is also relevant with regard to the entire pre-entry procedure, is how a legally compliant and functional implementation of the obligation to prevent entry and absconding during the screening phase can be achieved. Related measures, especially the modalities of deprivation of liberty, are regulated at national level. Accordingly, there seems to be no uniform procedure in the Schengen area. Against this background, some delegations of the Working Party on Frontiers expressed the need for clarification or called, to some extent, for European rules.

In order to contribute to the discussions on the practical implementation of the proposed screening regulation (article 4), the current border control practice should be considered, to understand how MS/SAC comply already with the obligation to prevent unauthorized entry according to Article 14 (4) of the Schengen Borders Code (SBC). Moreover, it should be considered how these practices might also be applicable during the proposed screening phase. When assessing the practical impacts, taking into account their degree or intensity, it is key to consider deprivation of liberty and restrictions on freedom of movement as well as other suitable measures below this threshold. Moreover, geographic conditions, the applicability in different situations (migratory pressure) or the respective law must also be considered. The written consultation should identify possibilities and potential limits which exist in this regard. In response to the questions of the DE Presidency, a sufficiently large number of contributions have been received. In this respect, the border-specific particularities are largely covered. They are distributed as follows.



On the other hand, the scope and level of detail of the answers differ. Due to the national legal and practical differences as well as the conceivable case constellations, a comparison between the contributions is possible only with reservations. In this respect, the analysis is not of sufficient statistical validity. Nevertheless, some preliminary conclusions can be drawn. The results are described in detail below.

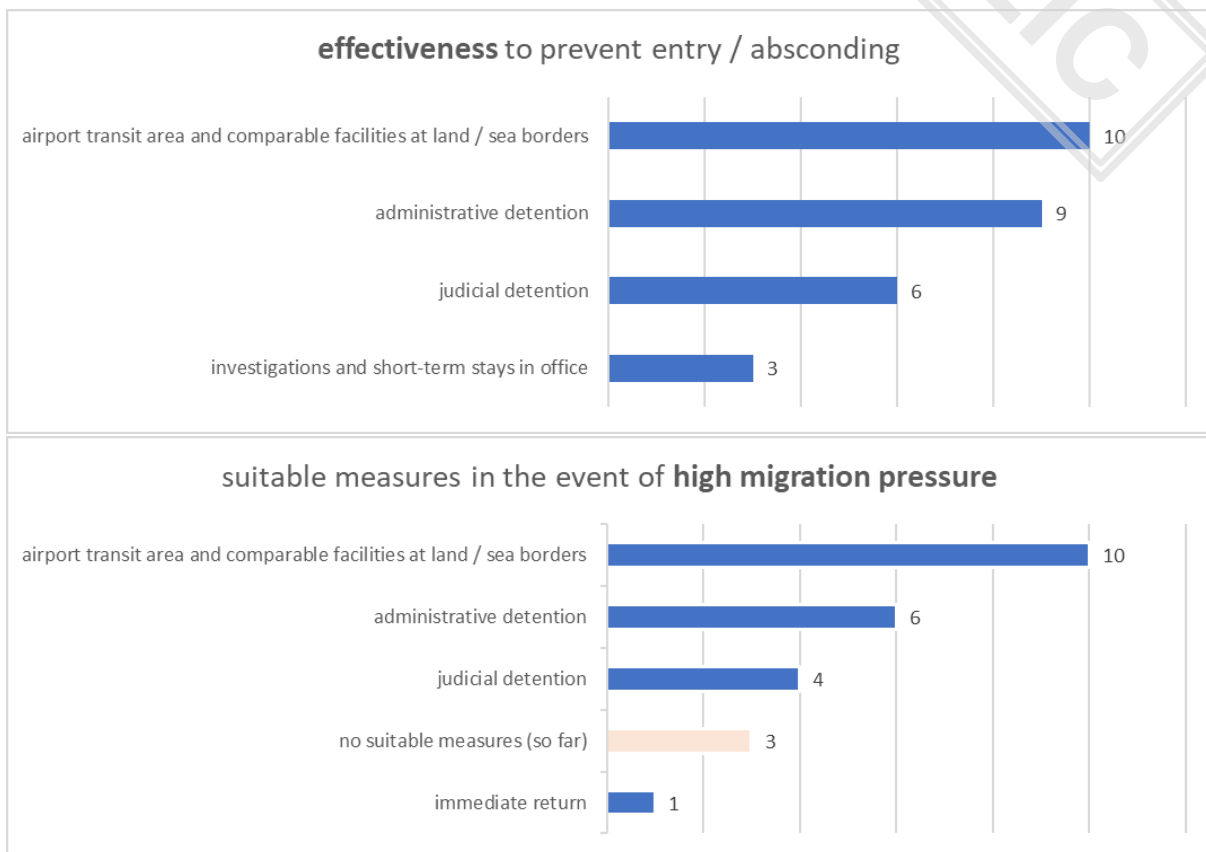
First of all, the delegations were asked how they currently prevent unauthorized entry within the meaning of Article 14 (4) of the Schengen Borders Code and which of the measures are most commonly used at their external borders. The answers were sufficiently informative, although not all delegations answered in the same level of detail. It is assumed that the measures outlined below can be taken in almost all MS / SACs. Moreover, it is assumed that the measures essentially depend on the intended objective and the circumstances of an individual case.¹ It becomes evident, if a direct return is not applicable, affected third-country nationals are mainly accommodated in transit areas or comparable facilities for a short time. This mostly relates to air borders. However, in individual MS / SAC, there are comparable permanent or temporary facilities at land and / or sea borders. Deprivation of liberty for a short-term, that does not require a judicial decision, appear to be the primary form of deprivation of liberty. Short-term stays in the office or in the means of transport as well as other restrictions on freedom of movement are also predominantly used. Moreover, deprivation of liberty is made in general on the basis of an individual decision. Furthermore, there does not seem to be much difference in terms of legal understanding of deprivation of liberty. However, differences became clear in connection with accommodations in airport transit areas for a longer duration. The point in time from when a court decision is required for these cases varies.



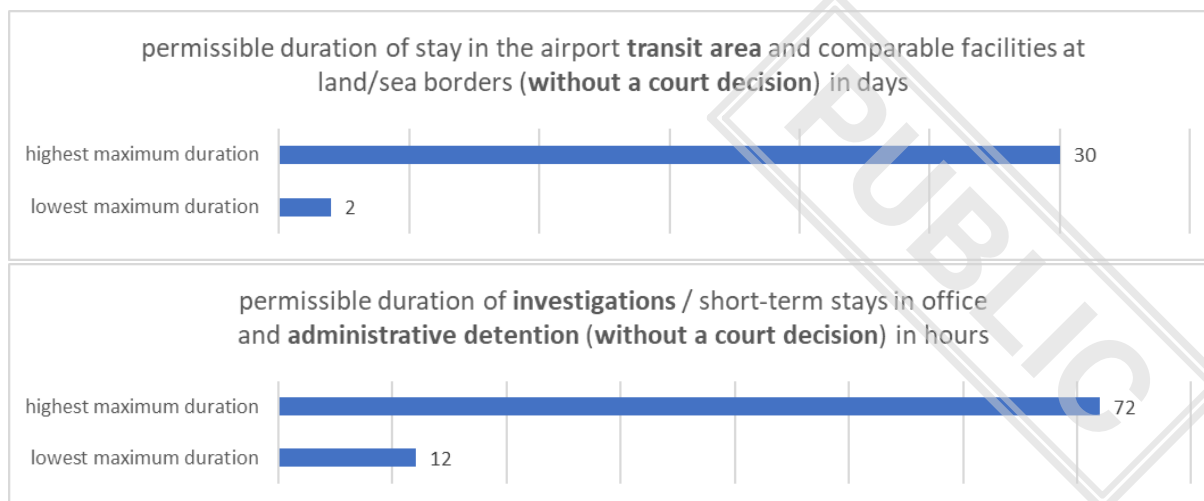
Furthermore, the delegations were asked which of the above-mentioned measures have the greatest effect at their external borders or prevent absconding most effectively. Additionally, delegations were asked, based on their experiences, which of the aforementioned measures are suitable in the sense of the questionnaire even in the event of an exceptional migratory pressure (short-term peak or total

¹ For example: identity determination, criminal procedural measures, return in the context of voluntary departure, forced return, refusal and necessary passport procurement / requested readmission by a third country, asylum application at the border, need for special protection, search and rescue cases etc.

number). In line with the findings above, delegations consider accommodation in transit areas or comparable facilities, deprivation of liberty as well as short-term stays in the office as the most effective ways to enforce the obligation within the meaning of Article 14 (4) of the SBC. When asked which of these measures might be effective even in the case of high migration pressure, accommodation in transit areas or comparable facilities and deprivation of liberty were mainly mentioned. Some delegations claim that none of the current measures is suitable in the event of high migratory pressure. Despite the limited number of comments in this regard the information available seem to be relevant. Moreover, it is assumed, that accommodation in transit areas or in comparable facilities is largely preferred.



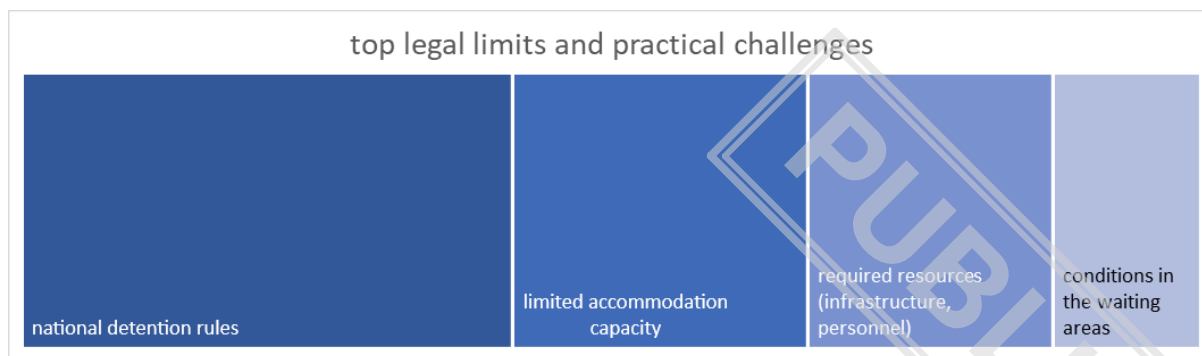
Against the background of the aforementioned remarks, it is also highlighted, how long third-country nationals can be accommodated in transit areas or comparable facilities without the need for a court decision. As mentioned before, the results indicate clear differences between the MS / SAC, which range from a permissible stay of 2 to 30 days. In addition, it was examined which maximum duration of deprivation of liberty apply in the MS / SAC. Again, only those types are listed below, which do not require a court decision or may be applied independently by enforcement authorities. In this regard, the result ranges from a permissible duration of 12 to 72 hours.



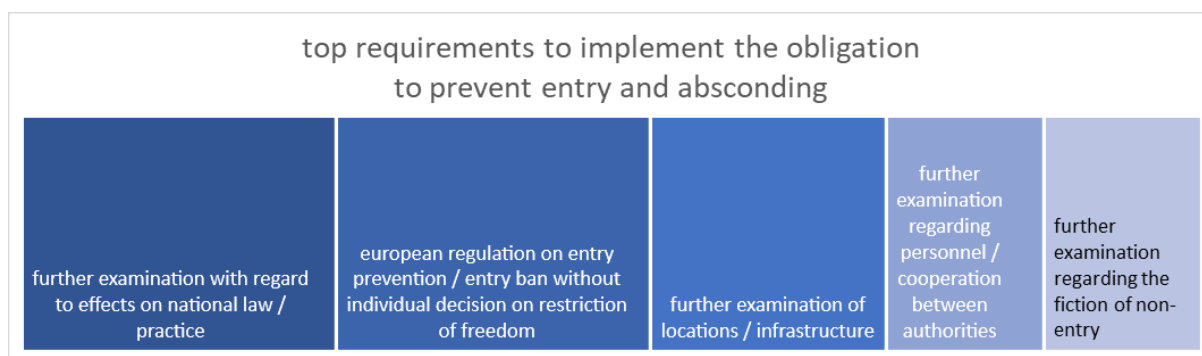
Again, the results are of limited informative value as not all delegations have provided equally detailed information. An assessment of an intersection is not possible with sufficient validity due to the limited statements on this. In addition, the consideration of average times is not constructive if there are significant deviations or the lowest value forms the common baseline. Nevertheless, as a preliminary remark, there seems to be no harmonious provisions in the Schengen area that can be equally applied during the discussed screening phase and that allow the prevention of entry or abscondance for this entire period.

Moreover, delegations were asked what specific legal limits or practical challenges are associated with the above-mentioned measures and what additional legal and practical steps do they consider necessary in order to be able to implement the obligation contained in Article 4 (1) of the proposed Screening Regulation. Due to the wide range, only the most frequently mentioned challenges are highlighted below. The existing legal challenges relate primarily to national detention rules. In those cases mentioned, these are seen as too restrictive in terms of duration and requirements. The effects of an asylum application on deprivation of liberty were also expressed. In addition, deprivation of liberty for the purpose of establishing identity is very limited in time. Practical challenges, in terms of the question, were presented in more detail². In this regard, limited accommodation capacities, the required resources (infrastructure and staff) as well as the sometimes inadequate conditions in the waiting areas are predominantly part of this. It is assumed, that these challenges exist largely in almost all MS / SAC, but vary in terms of migratory pressure. Individual delegations referred, regardless of the questions, to the challenges associated with secondary migration.

² limited accommodation capacity; required resources (infrastructure, personnel); conditions in the waiting areas; procurement of identification documents; readmission by a third country; determinability of the departure dates; uncooperative third-country nationals; abusing the asylum procedure for the purpose of absconding; distance / location from detention facilities; forced return by air; minors and those in need of protection; abuse of special regulations for unaccompanied minors for the purpose of absconding; applicability to high migratory pressure; risk of infection in facilities



With regard to the necessary legal and practical steps in order to be able to implement the obligation contained in Article 4 (1) of the proposed Screening Regulation, again, wide ranges of answers were given³. A large number of the delegations emphasized that there is a need for further assesment with regard to effects on national law and practice. This primarily concerns the identification of suitable locations, the necessary infrastructure, the necessary cooperation between the authorities concerned and the necessary personnel. Some delegations also stressed the need to clarify the fiction of non-entry. A number of delegations also underlined that European rules are required with regard to obligation mentioned. In this context, it was also emphasized that an individual decision by the authorities should not be necessary.



Summary:

The results of the written consultation show both possibilities and potential limits but especially further need for clarification. Currently, the duration of deprivation of liberty and restrictions on freedom of movement at the external borders seems to depend largely on the individual case and national regulations. In general, there does not appear to be any harmonious regime in the Schengen area that would allow the same application during the screening phase under discussion and prevent entry and absconding for the entire duration. It is to be seen what impact this can have on the intended aim of the proposed regulation.

³ further examination with regard to effects on national law and practice; European rules on entry prevention / entry ban without individual decision on restriction / deprivation of liberty; further examination of locations / infrastructure; further examination regarding personnel /cooperation between authorities; further examination regarding the fiction of non-entry; adaptation of national legislation; further examination regarding restriction / deprivation of liberty during the screening; further examination regarding the competence of the authorities; further examination regarding the status of those affected during screening phase; further examination regarding the status of the screening facilities; further examination with regard to the handling of minors / persons in need of protection; financial resources; further examination with regard to the adaptation of the national monitoring of fundamental rights

In general, the majority of delegations consider a limited accommodation in transit areas or comparable facilities as well as deprivation of liberty to be decisive. Especially at the air borders, there seem to be fewer challenges if an immediate return is possible. An effective short-term entry prevention appears to be possible through accommodation in a transit area in the case of regular migration pressure. This procedure is currently working well in most MS/SAC.

However, with a view to the expected challenges, it is obvious that increased migration pressure requires sufficient accommodation capacities. Against the background of the above-mentioned limitations, the present findings could be concretized in the further course of the discussions through more information from the delegations. We also invite the MS/SAC, which have not replied so far, to share their views.