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2020/0134 (NLE)

Proposal for a

COUNCIL RECOMMENDATION

on the temporary restriction on non-essential travel into the EU

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 10 March 2020, the Heads of State or Government of the EU emphasised the need for a joint European approach with regard to the COVID-19 pandemic. On 16 March 2020, the Commission adopted a Communication[1] recommending a temporary restriction of non-essential travel from third countries into the EU+ area[2]. On 17 March 2020 EU Leaders agreed on coordinated action at external borders based on the recommendation from the Commission. Since then, all EU Member States (with the exception of Ireland) and Schengen Associated States (hereafter 'Member States') have taken national decisions to implement the travel restriction[3].

On 8 April 2020[4] and 8 May 2020[5], the Commission adopted two follow-up Communications. In the latter, the Commission invited the Member States to prolong the travel restriction until 15 June 2020.

In their meeting of 5 June 2020, Home Affairs Ministers discussed how long the EU entry restrictions for third country nationals should be maintained as well as the criteria and measures that should be applied when deciding to gradually lift such restrictions for individual third countries. In line with the 'Joint European Roadmap towards lifting COVID-19 containment measures'[6] of 15 April, consensus was reached on the need to first lift internal border controls and then follow a unified approach to the gradual lifting of restrictions on non-essential travel to the EU. The Commission was invited to propose a coordinated way forward based on clear criteria.

On 11 June 2020, the Commission adopted a Communication[7] that recommends prolonging the travel restriction until 30 June 2020 and sets out an approach for the gradual lifting of the restriction on non-essential travel into the EU as of 1 July 2020. The objective of this proposal is to operationalise this approach in the form of a Council recommendation.

• Consistency with existing policy provisions in the policy area

This recommendation serves to implement the existing provisions in the policy area, namely carrying out checks on persons and efficient monitoring of the crossing of external borders.

• Consistency with other Union policies

This recommendation is in line with other Union policies, including those regarding external relations and public health.

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1 COM(2020) 115, 16 March 2020.

2 The "EU+ area" includes all Schengen Member States (including Bulgaria, Croatia, Cyprus and Romania), as well as the four Schengen Associated States. It also includes Ireland and the United Kingdom if they decide to align.

3 The United Kingdom has also been encouraged to implement this temporary travel restriction, but decided against doing so. As UK nationals are, until the end of the transition period, still to be treated in the same way as EU citizens, they are exempt from the travel restriction.

4 COM(2020) 148, 8 April 2020.

5 COM(2020) 222, 8 May 2020.

6 https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf

7 COM(2020) 399, 11 June 2020.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The Treaty on the Functioning of the European Union (TFEU), and in particular Article 292, 2nd sentence, and point (b) of Article 77 (2) thereof

• Subsidiarity (for non-exclusive competence)

Article 292 TFEU enables the Council to adopt recommendations. According to the second sentence of this provision, the Council shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission.

This applies in the current situation, as a consistent approach at the external border requires a common solution. Article 77 (1) (b) TFEU states that the Union shall develop a policy with a view to carrying out checks on persons and efficient monitoring of the crossing of external borders. Article 77 (2) (b) TFEU provides for measures on checks on persons crossing the external borders. Measures on the basis of Article 77 (2) TFEU are to be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. Pursuant to Article 289 (1) TFEU, the ordinary legislative procedure takes place on a proposal from the Commission.

• Proportionality

The present proposal takes account of the evolving epidemiological situation and all available relevant evidence. The authorities of the Member States and the Schengen Associated Countries remain responsible for implementing the proposed Council Recommendation. Therefore, the proposal is suitable for achieving the intended objective and does not go beyond what is necessary and proportionate.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Ex-post evaluations/fitness checks of existing legislation

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• Stakeholder consultations and impact assessment

This proposal takes into account discussions with Member States since the first temporary restrictions were implemented. No impact assessment was undertaken though the proposal takes into account the evolving epidemiological situation and all available relevant evidence.

4. BUDGETARY IMPLICATIONS

None

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292, 2nd sentence and Article 77 (2) (b) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) On 10 March 2020, the Heads of State or Government of the European Union emphasised the need for a joint European approach with regard to COVID-19.

(2) On 16 March 2020, the Commission adopted a Communication[8] recommending a temporary restriction of non-essential travel from third countries into the EU+ area[9] for one month. On 17 March 2020, the Heads of State or Government of the EU agreed to implement the temporary restriction of non-essential travel. The four Schengen Associated States also implemented it.

(3) On 8 April 2020[10] and 8 May 2020[11], the Commission adopted two follow-up Communications, each recommending the extension of the non-essential travel restrictions by one month, respectively. All Schengen Member States as well as the four Schengen Associated States (hereafter 'Member States') decided to implement these extensions, in the last instance until 15 June 2020.

(4) On 15 April 2020, the President of the European Commission and the President of the European Council set out a 'Joint European Roadmap towards lifting COVID-19 containment measures'[12]. The Roadmap lays down a two-stage approach whereby internal border controls should be lifted in a coordinated manner. Subsequently, temporary restrictions at external borders would be gradually relaxed and non-EU residents would be allowed to resume non-essential travel to the EU.

(5) Consultations with Member States confirmed a need to have a further short extension of the existing restrictions at external borders and the imperative of a unified approach to their gradual lifting .

(6) On 11 June 2020, the Commission adopted a Communication[13] which recommended to extend the restriction on non-essential travel into the EU until 30 June 2020, and

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8 COM(2020) 115, 16 March 2020.

9 The "EU+ area" includes all Schengen Member States (including Bulgaria, Croatia, Cyprus and Romania), as well as the four Schengen Associated States. It also includes Ireland and the United Kingdom if they decide to align.

10 COM(2020) 148, 8 April 2020.

11 COM(2020) 222, 8 May 2020.

12 https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf

13 COM(2020) 399, 11 June 2020.

which sets out an approach for a gradual lifting of the restriction on non-essential travel into the EU as of 1 July 2020. All Member States have implemented the further extension until 30 June.

(7) Discussions have since then taken place between Member States on the criteria and methodology to be applied.

(8) This Recommendation is without prejudice to the responsibility that Member States have to continue applying Article 6 of the Schengen Borders Code[14], which lays down the entry conditions for third-country nationals. In particular, the Member States keep the responsibility to assess whether, on a case by case basis, a third-country national is to be considered a threat to public health. In this context, Member States should ensure a close cooperation between border guard authorities and transport providers.

(9) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Member States should therefore ensure that measures taken at the external borders are coordinated in order not to put at risk the functioning of the Schengen area.

(10) Decisions on the possible lifting of the restriction on non-essential travel into the EU should take into account the epidemiological situation within the EU, i.e. the average number of COVID-19 cases over the last 14 days and per 100,000 inhabitants. The EU average is currently at 16 cases.

(11) The International Health Regulations (2005) ('IHR') adopted by the Fifty-eighth World Health Assembly on 23 May 2005 reinforced the coordination among States Parties to the World Health Organization (WHO), which include all the Member States of the Union, of the preparedness for, and response to, a public health emergency of international concern. The IHR Monitoring Framework identifies core public health capacities to be maintained by WHO State Parties. Data reported periodically by countries under this framework can be compiled into an overall score as a proxy for the overall capacity for response.

(12) The effectiveness of decisions on lifting the restriction on non-essential travel into the EU depends on their implementation by Member States for all external borders in a uniform manner. There is a treaty-based obligation to ensure coordination in order not to put at risk the functioning of the Schengen area. While a more restrictive approach would not endanger, as such, the functioning of the Schengen area, a less restrictive approach than the one coordinated at Schengen area level could entail such a risk. A Member State should therefore not unilaterally decide to lift the restriction on non-essential travel into the EU for a particular third country before the lifting of travel restriction has been decided in a uniform manner by the other Member States for that country.

(13) In accordance with Articles 1 and 2 of Protocol No 22 on the Position of Denmark annexed to the Treaty on European Union and to the TFEU this Recommendation does affect Denmark. Given that this Recommendation builds upon the Schengen acquis, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Recommendation whether it will implement it in its national law.

[14] 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 77, 23.3.2016, p. 1.

(14) This Recommendation constitutes a development of the provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC[15]; this Recommendation does therefore not affect Ireland.

(15) As regards Iceland and Norway, this Recommendation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC[16].

(16) As regards Switzerland, this Recommendation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC[17] read in conjunction with Article 3 of Council Decision 2008/146/EC[18].

(17) As regards Liechtenstein, this Recommendation constitutes a development of provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1 point A, of Decision 1999/437/EC[19] read in conjunction with Article 3 of Decision 2011/350/EU[20].

(18) The legal status of this recommendation as recalled in recitals 13 to 17 is without prejudice of the need for all Member States, in the interest of the proper functioning of the Schengen area, to decide on the lifting of the restriction on non-essential travel into the EU in a uniform manner,

HAS ADOPTED THIS RECOMMENDATION:

1. To determine the third countries for which the current restriction on non-essential travel into the EU is to be lifted, Member States should apply the methodology and criteria set out in the Communication of the Commission of 11 June 2020[21] on the

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15 Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

16 OJ L 176, 10.7.1999, p. 36.

17 OJ L 53, 27.2.2008, p. 52.

18 Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (OJ L 53, 27.2.2008, p. 1).

19 OJ L 160, 18.6.2011, p. 21.

20 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

21 COM(2020) 399, 11 June 2020.

third assessment of the application of the temporary restriction on non-essential travel to the EU. The criteria mentioned in the Communication relate to the epidemiological situation and containment measures, including physical distancing, as well as economic and social considerations.

2. As regards the epidemiological situation, third countries should meet the following criteria, subject to regular review:

   – close to or below 16 new COVID-19 cases over the last 14 days and per 100,000 inhabitants;

   – the trend of new cases over the same period in comparison to the previous 14 days is stable or decreasing; and

   – the overall response to COVID-19 taking into account available information on aspects such as testing, surveillance, contact tracing, containment, treatment and reporting. Where data on such aspects is unavailable, Member States may use the total average score across all dimensions for International Health Regulations (IHR) when this is above 50. Information provided by EU Delegations based on the checklist annexed to the Communication of 11 June 2020 may also be taken into account.

3. When deciding whether the temporary restriction on non-essential travel to the EU applies to a third-country national, residence in a third country for which the restrictions on non-essential travel have been lifted should be the determining factor (and not nationality).

4. Travel restrictions may be lifted or reintroduced for a specific third country according to changes in the conditions set out in paragraph 2 regarding the epidemiological situation. Rapid decision-making should be applied in case the situation in a third country worsens quickly.

5. However, even where temporary travel restrictions continue to apply to a third country, essential travel should be allowed for the categories of travellers[22] listed in the Communication of 16 March[23] and 11 June 2020[24], and the Guidance of 30 March 2020[25]. Member States may introduce additional security measures for these travellers, especially when their trip originates in a high risk region.

6. In particular, the following categories of persons should be exempted from the travel restriction, independent of the purpose of travel:

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22 Specific categories of travellers with an essential function or need:
   i. Healthcare professionals, health researchers, and elderly care professionals;
   ii. Frontier workers;
   iii. Seasonal workers in agriculture;
   iv. Transport personnel;
   v. Diplomats, staff of international organisations, military personnel and humanitarian aid workers and civil protection personnel in the exercise of their functions;
   vi. Passengers in transit;
   vii. Passengers travelling for imperative family reasons;
   viii. Persons in need of international protection or for other humanitarian reasons respecting the principle of non-refoulement;
   ix. third-country nationals travelling for the purpose of study;
   x. highly qualified third-country workers if their employment is necessary from an economic perspective and the work cannot be postponed or performed abroad.

23 COM(2020) 115, 16 March 2020.

24 COM(2020) 399, 11 June 2020.

25 C(2020) 2050, 30 March 2020.

(a) Union citizens within the meaning of Article 20(1) TFEU and third-country nationals who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens, as well as their respective family members[26],

(b) third-country nationals who are long-term residents under the Long-term Residence Directive[27] persons deriving their right to reside from other EU Directives or national law or who hold national long-term visas, as well as their respective family members.

Member States can, however, take appropriate measures such as requiring such persons to undergo self-isolation or similar measures upon return from a third country for which the temporary travel restriction is maintained, provided they impose the same requirements on their own nationals.

7. Reciprocity should be assessed regularly and on a case-by-case basis, in particular with regard to third countries that have a lower infection rate than the EU average.

8. These steps should be implemented by all Member States at all external borders. Member States should endeavour to apply all measures in a uniform manner.

9. In the interest of the proper functioning of the Schengen area, a Member State should not decide unilaterally to lift the restriction on non-essential travel into the EU for a specific third country before the lifting of the restriction has also been decided in a strictly coordinated manner by the other Member States.

Done at Brussels,

For the Council
The President

[26] As defined in Articles 2 and 3 of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

[27] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44.