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NOTE

From: General Secretariat of the Council
To: Delegations

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

Delegations will find attached a revised compilation of replies from Member States on articles 2, 5, 13 and 21a, and annex XI of the Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

WRITTEN COMMENTS SUBMITTED BY THE MEMBER STATES

**Proposal for a Regulation of the European Parliament and the Council
amending Regulation (EU) 2016/399 on a Union Code on the rules governing the
movement of persons across borders**

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AUSTRIA

AT supports the EC's approach regarding the definition of "instrumentalization of migrants". From our point of view, no specific criteria or threshold should be written in the text. It is important for MS to be able to react flexibly to such situations. Therefore, the overall circumstances and the nature of the migration flows must be taken into account in each case. The wording of Art. 2(27) should therefore be open in order to cover different scenarios.

However we support the idea that was raised by several MS to include "non-state actors" to the definition (Art. 2/27).

Article 13

The intensified border surveillance at the external borders is an indispensable aspect for a functioning Schengen area. AT therefore supports the proposal for the explicit and intensified inclusion of "technical means" for the implementation of border surveillance in paragraphs 3, 4 and 5 of Art. 13 SBC.

Covid-19

The direction of the proposal to include the provisions regarding "lessons learned covid" is welcomed by us. Uniform measures are supported in principle. The EC explanations during the WP were very much appreciated last time. In this light we hope that they will reflect in the recitals to clarify that MS are in charge before union measures apply and that flexibility is given to the MS when drafting the implementing decision.

BELGIUM

Tout d'abord, nous souhaitons rappeler notre réserve d'examen sur l'intégralité du texte. Par ailleurs, les commentaires effectués oralement lors du groupe de travail frontières du 07/11 restent valides.

Art.2. 27 – définition «instrumentalisation»

Nous sommes en faveur d'une définition qui ne soit pas trop restrictive afin de permettre d'englober différentes situations d'instrumentalisation auxquelles l'UE pourrait faire face dans le futur, et c'est pourquoi nous soutenons également l'élargissement de la définition à des parties tierces.

Nous considérons également qu'un lien pourrait être fait avec les menaces hybrides. Nous avons relevé que différentes définitions circulent (au sein du EU's Joint Framework on Countering Hybrid Threats du SEAE, de l'OTAN, du European Centre of Excellence for Countering Hybrid Threats), mais elles ont toutes la similarité de décrivent les menaces hybrides comme une utilisation combinée de moyens militaires et non militaires pour miner les sociétés.

Une discussion est cependant possible sur les activités qui peuvent et ne peuvent pas être incluses dans le concept de menaces hybrides. Par exemple, le "Cadre commun de lutte contre les menaces hybrides" de l'UE comprend un très large éventail d'activités visant à contrer les menaces hybrides, ce qui démontre l'étendue du domaine.

Art.13- border surveillance

Nous avons des doutes sur les ajouts proposés au sein du §7 et rappelons notre réserve d'examen sur ce paragraphe plus précisément.

Art.21a- restrictions de voyages vers l'UE

Nous accueillons favorablement l'ajout de cet article, permettant une coordination européenne des restrictions de voyages vers l'UE et la prise de mesures contraignantes et harmonisées aux frontières extérieures. Cependant, nous nous posons la question de savoir si l'article ne devrait pas être élargi à d'autres cas de figure afin de pouvoir couvrir d'autres types de menace que des situations sanitaires. Bien que cela ne soit pas l'intention de la Commission, nous considérons que parler de «*crisis situations*» au sein du 1^{er} paragraphe permettrait à l'UE de faire face à d'autres crises futures ou d'autres situations moins prévisibles pour lesquelles il pourrait s'avérer nécessaire de restreindre l'accès au territoire de l'UE (menace nucléaire, menace terroriste de grande ampleur,...).

Au sein du §3, nous souhaiterions pouvoir limiter et/ou imposer des restrictions supplémentaires aux catégories a) et b), comme par exemple des exigences de testing ou de restrictions de déplacement en cas de transit, voire (pour la catégorie du point b), pouvoir imposer la condition d'être résident dans le pays membre dans lequel ils souhaitent se rendre, ou avoir de bonnes raisons de s'y déplacer etc.

Nous avons également des réserves concernant le §5.

Ce nouvel article devrait également se référer à la possibilité de délivrer un refus d'entrée et de procéder à un refoulement pour une personne soumise à des restrictions de voyage qui se présenterait aux frontières. Une mention au sein de l'art.14, ou, comme proposé par SK, que l'on ajoute une nouvelle raison au refus d'entrée en cas de menace pour la santé publique (à savoir que la personne est soumise à des restrictions de voyage temporaires vers l'UE) est souhaitable.

Annexe XI- Essential travel

Nous soutenons les commentaires appelant à faire preuve de davantage de flexibilité au sein des catégories de l'annexe XI.

De plus, au sein du point iv), aux personnes exemptées pour le fonctionnement des organisations internationales, nous considérons qu'il faudrait y ajouter celle nécessaires au fonctionnement des intérêts essentiels des pays, sans quoi cela crée un déséquilibre étant donné que les organisations internationales peuvent inviter certaines personnes, alors que les Etats membres ne peuvent pas bénéficier de la possibilité de procéder à de telles invitations. Il faudrait permettre aux Etats membres la possibilité de convier des travailleurs et experts hautement qualifiés, des experts en plans d'urgences etc.

Nous souhaitons également davantage définir ce qui est compris sous «*imperative family reasons*» au point vi) afin d'éviter une application disparate au sein des EM.

BULGARIA

Bulgaria places a scrutiny reservation on the entire text of the proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

Article 1 (1) - amendments in Article 2

On letter a), p.12 - we suggest deleting “detect and”. Please, see our comments under Art. 1 para 3 concerning the amendments in Art. 13.

On letter b), p. 27 - we would like to suggest the following definition of instrumentalisation of migrants:

‘Instrumentalisation of migrants’ refers to a situation where a large influx of persons attempt to cross illegally the external borders by endangering the life and health of border guards.

The rationale is to have a definition that is short and clear enough and includes wide range of situations, incl. hybrid threats. Focus should be on the situation itself, allowing for activating concrete measures, not on the third party that allows the instrumentalisation and the actions through which the latter is carried out. Furthermore, we also have concerns on the words “instigates”, “actively encouraging”, “intention” and “destabilize”, since their meaning is not clear and it will be difficult to prove them in order to justify the situation of instrumentalisation.

Article 1 (2) – amendments of Article 5

We support the proposal for limiting the number of border crossing points while in a situation of instrumentalisation of migrants. However, we suggest deleting the second paragraph as it is covered in article 3 Scope of the Schengen Borders Code:

‘4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

~~Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:~~

~~(a) the persons enjoying the right of free movement under Union law;~~

~~(b) third-country nationals who are long-term residents under Council Directive 2003/109/EC¹, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;~~

~~(c) third-country nationals seeking international protection.’~~

Article 1 (3) – amendments of Article 13

Bulgaria would like to reiterate the position expressed in the letter by 12 MSs to the European Commission signed on October 7, 2021 on the need to explicitly include physical barriers at the external borders as an instrument for preventing illegal border crossings. We believe that a greater focus is needed on the prevention of the primary movements, and in this regard, the proposal should be more ambitious.

On para 1 - we suggest deleting “detect and”. As per the explanation given by the Commission, the word detect can be interpreted in different ways. Our understanding is that detection follows prevention. In this regard we join those MSs asking for deletion of the text:

1. *The main purpose of border surveillance shall be to ~~detect and~~ prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.*

On para 3 - we suggest deleting “detected or” at the end of second sentence:

3. *“... It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively ~~detected or~~ prevented.”*

On para 4 - we suggest the following modification to the last sentence of the paragraph:

*“Surveillance may also be carried out by technical means, **including physical barriers**, electronic means, equipment and surveillance systems”.*

On para 5 - we suggest replacing “shall” with “may” since it creates an obligation for the MS. In a situation like instrumentalisation the obligation for the Member State concerned will be an additional burden.

In the third sentence, we suggest adding “physical barriers”:

5. *In a situation of instrumentalisation of migrants, the Member State concerned ~~shall~~ **may** intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State ~~shall~~ **may** enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.*

*Those technical means may include modern technologies including drones and motion sensors, as well as mobile units **and physical barriers** to prevent unauthorised border crossings into the Union.*

On para 6 - We suggest deleting the whole paragraph as it is repetitive to the Regulation (EU) 2019/1896 and we do not see an added value for this approach. Furthermore, it should be taken into account that in the event of a situation of instrumentalisation of migration MSs concerned are focused to address the situation with urgent measures and rapid actions. The vulnerability assessment will impose additional administrative burden.

On para 7 - we place a scrutiny reservation.

Article 1 (4) – New Article 21(a)

On the proposal for new Article 21a and Annex XII, Bulgaria believes that there is a need for more flexibility with regard to travel restrictions in the EU. Member States should be free to take decisions and introduce their own measures. The COVID-19 crisis has proved that analysis at national level is and should remain a prerogative. The same applies to the selected categories of persons where wider interpretation and flexible application by EU Member States should be ensured.

We see that some of the categories of persons (students, highly qualified third-country workers, seasonal rural workers) covered by Annex II of the current Council Recommendation 2020/912 on the temporary restriction of non-essential travel in the EU have been removed in Annex XI. We believe that there should be no such limitation of categories and we would like clarification from the Commission on the reasons for taking those categories of persons out from the Annex XI.

CROATIA

Article 2 point 12

In the definition of Border Surveillance the following text is added: “including preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.“ *This text is already included in Article 13 Para as a purpose of Border Surveillance. Therefore, our question relates to the need to repeat that text in the definition.*

Article 13 Para 3

*At the end of the last sentence we propose to add and/ before the words or. The text would then be as follows: It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively detected **and/or** prevented.*

Article 13 Para 7

*We propose an addition at the end of the sentence: “...and other relevant factors, **such as specificities and configuration of terrain.**”*

Article 21a Para 2

In the second subparagraph it is mentioned that “Such temporary restrictions on travel may include restrictions on entry to the Member States...“ *When looking at the provisions of Article 2 Para 5, Article 4 Para 1 and Article 168 Para 1 and Para 7 of the TFEU, we are not convinced that there is a possibility to regulate or limit the possibilities on entry to Member State through an Implementing Regulation. We would like to ask for explanation as regards the justification and the accordance with the principles of conferral and subsidiarity.*

Article 21a Para 4 Point a)

There it is stated that „The implementing regulation referred to in paragraph 1 shall, where appropriate:

- a) define any categories of persons undertaking non-essential travel to be exempted from any restrictions applicable to travel;“

We would like to ask what is the relation between the mentioned categories and categories of essential functions or needs in Annex XI.

Article 21a Para 5

Here we would like to know why the exceptions from restrictions on essential travel do not include also Point iii (Transport personnel).

Annex XI

Annex II of the Council Recommendation 2020/912 contains Seasonal workers in agriculture and Highly qualified third-country workers if their employment is necessary from an economic perspective. Have these categories been left out on purpose.

CYPRUS

‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by **actively encouraging or, facilitating, deliberately avoiding to exercise the necessary control of or being negligent regarding, the movement** of third country nationals to the external borders onto or from within its territory and then onwards to those external borders, **where such actions are indicative of an intention of a third country to destabilise the Union** or a Member State, **where the nature of such actions is liable to put at risk essential State functions**, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.

CZECH REPUBLIC

General

CZ would like to still keep the parliamentary scrutiny reservation, however can already drop the general scrutiny reservation.

In general terms, CZ welcomes the proposal as it responds to the challenges that Schengen has been facing in recent years as a result of the migration crisis, security threats within Schengen/EU, the fight against the COVID-19 pandemic, as well as the instrumentalisation of migration by third countries.

CZ believes that a fundamental improvement in the external borders control, including the identification of accompanying appropriate compensatory instruments in the area of migration and asylum policy and its external aspects, as well as in the area of security (police and judicial cooperation) are a prerequisite for the future functioning of Schengen as an area without internal border controls.

The rules governing the internal border regime must be clear, transparent and easy to implement in practice in order to meet the public's expectations of a free market while ensuring internal border security and should be able to reflect the justified needs of the Member States.

Article 2

Border surveillance: We do not consider the wording “including preventative measures...” to be of a significant added value, especially if the “prevent” is already included in the definition. The definition should be as clear and simple as possible.

Therefore, we suggest the following:

12. border surveillance’ means the surveillance of borders between border crossing points and of border crossing points outside fixed opening hours, ~~including preventative measures~~ to detect and prevent unauthorised border crossings or the circumvention of border checks;

Instrumentalisation: We suggest explicitly mentioning the asylum and migration system in the definition as it could be put at risk. Then, we think that “actively” might be redundant in this definition; according to our opinion “encouraging” already contains an active behaviour. Moreover, we think that it might be more appropriate to include this definition primarily in the Proposal for a Regulation [addressing the situation of instrumentalisation in the field of migration and asylum](#) and the SBC could only contain a reference thereto.

Furthermore, we would like to support the discussion about broadening the scope as also other entities than third countries could encourage the migration to the EU; we especially think about a non-governmental entities that control (or govern) a certain territory or, also referring to the proposals to blacklist transport operators involved in facilitating the smuggling or trafficking of people, other actors. Please see our proposal within the text.

Therefore, we suggest the following:

27. 'instrumentalisation of migrants' refers to a situation where a third country **or other actor** instigates irregular migratory flows into the Union by **actively** encouraging or facilitating the movement of third country nationals to the external borders, onto or from within ~~its~~ **this** territory and then onwards to those external borders, where such actions are indicative of an intention of a third country **or actor** to destabilise or place political pressure on the Union or on a Member State and where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order, ~~or~~ the safeguard of its national security **or the asylum and migration system;**

Essential travel: We suggest adjusting the wording of the essential travel definition a little bit:

*essential travel' means travel in connection with ~~an essential~~ crucial-function or need, **taking into account any as determined under the applicable international obligations of the Union and of the Member States ~~and~~ listed in Annex XI***

Article 13

- Para 4 – we suggest to add „physical barriers“ (please, see our proposal below).
- Both para 4 and 5 (surveillance in general and the situation of instrumentalisation) describes the possibility to use technical means while carrying out the border surveillance. We are wondering if there is a need to distinguish what type of technical means to use under different circumstances - we asked this question during the meeting, but we were given no answer. If it is not the case, we suggest to merge para 4 and 5 in this regard (please, see our proposal below).
- Para 4 – we suggest to add „and detect“ after „prevent“ as a matter of consistency (please, see our proposal below).
- Para 6 – we cannot see any added value as this exact para is included also in the EBCG Regulation. Therefore, we propose to delete this paragraph.

Therefore, we suggest the following:

Border surveillance

4. *Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent **and detect** unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment, ~~and~~ surveillance systems, **physical barriers, modern technologies such as drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union***

5. *In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.*

~~*Those technical means may include modern technologies including drones and motion-sensors, as well as mobile units to prevent unauthorised border crossings into the Union.*~~

6. ~~*Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (c), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council², with a view to providing the necessary support to the Member State concerned.*~~

~~*On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.*~~

Article 21a

- We would like to support the idea of BE to discuss the possibility of broadening the potential usability of this mechanism outside the health issues.
- We consider the sequence of this article (21a) to be a little bit complicated and potentially confusing as e.g. the Art. does not even mention it in its first three para the important concepts of essential and non-essential travel, and then use them in para 4 only in connection with the possibility of exceptions. Therefore, we suggest to include a small adjustment (in bold) in para 2:

The Council, on the basis of a proposal by the Commission, may adopt an implementing regulation, providing for temporary restrictions on travel to the Member States.

*Such temporary restrictions on travel may include restrictions on entry to the Member States **for persons travelling for non-essential and/or essential purpose**, and other measures considered necessary for the protection of public health in the area without controls at internal borders, such as for instance testing, quarantine, and self-isolation.*

- 2 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.

- Overall, without knowledge of the current recommendations it might be hard to understand why exactly the possibilities for exceptions in para 4 (especially a, b, c) are mentioned, if there are much more, theoretically, and they will vary according to the situation. In order to increase flexibility to react to particular situations, we suggest para 4 to be more general or to be deleted, with the exception of letter b) which we deem useful to be mentioned explicitly, as follows:

*The implementing regulation referred to in paragraph 1 shall, **exceptionally, also** lay down the conditions under which travel restrictions may be imposed, ~~exceptionally~~, on persons undertaking essential travel, in the event that the epidemiological situation worsens quickly and, in particular where a variant of concern or variant of interest has been detected.*

5. Restrictions on essential travel referred to in paragraph X(x) may not include restrictions on entry as regards travellers listed in point i. and points iv. to viii. of Annex XI.”

- We would like to add the possibility for MS to identify the existence of an infectious disease with epidemic potential, please see our proposal:

Para 1

*This Article shall apply to situations where the European Centre for Disease Prevention and Control, or the Commission identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization. **The Member State can also invite the European Centre for Disease Prevention and Control and the European Commission to verify the situation with epidemic potential in one or more third countries based on their national assessment.***

- We suggest to delete holders of the national lon-term visa, as there could be such a situation that we might need to restrict this category of persons considering them as „non-residents“ due to limited period of time and we are of the opinion that their rights are not as strong as the rights of the holders of residence permit, please see our proposal:

3. The following categories of persons shall be exempted from the restrictions on entry, independent of the purpose of their travel:

a) persons enjoying the right of free movement under Union law;

b) third-country nationals who are long-term residents under Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union law or national law ~~or who hold national long-term visas~~, as well as their respective family members.

- Travel restrictions should be reflected in Art. 6 as another entry condition and consequently added to annex V., part B (Standard form for refusal of entry), please see our proposal:

Article 6, para 1:

“(f) they are not subject of restrictions on entry as provided for in the Council implementing regulation adopted pursuant to Art. 21a.”

Annex V

(j) is not subject of restrictions on entry as provided for in the Council implementing regulation adopted pursuant to Art. 21a.”

DENMARK

Instrumentalisation

Article 2

Denmark welcomes and supports the new additions to the article. In accordance with the European Council Conclusions from October, it is important to adapt the EU's legal framework and ensure adequate financial support to allow Member States to address attempts to instrumentalise migrants. However, the article should include a reference to physical barriers, which can constitute a key element in the management of external borders. Funding from the EU budget for physical barriers should also be a possibility in order to ensure EU solidarity.

Article 5, paragraph 4

Denmark notes that the new paragraph makes it clear that a MS can limit the number of border crossing points in the event of instrumentalisation of migrants. However, simply clarifying existing possibilities under the current Schengen Border Code may not be an adequate response to the challenge of instrumentalisation.

Denmark proposes that it is specified what is permitted in relation to border crossing in the event of instrumentalisation of migration, including which groups of persons/vehicles may be permitted to enter the MS.

Article 13

Denmark welcomes and supports the new article 13 as it offers better options for border surveillance based on modern technology. Denmark proposes that a reference to physical barriers, which can be an essential element of border surveillance, is included in article 13.

Denmark would also propose a reference to the funding opportunities for physical barriers under the Border Management and Visa Instrument (BMVI), now that the Council Legal Service has made it clear that it is possible to fund physical barriers from the EU budget. The reference to BMVI funding opportunities could be in the recitals.

Restrictions on travel to the European Union

Article 21a

Denmark supports the necessity of coordination on travel restrictions in the case of an infectious disease with epidemic potential. The current recommendation on the temporary restriction on non-essential travel into the EU reflects the division of competences between the EU and MS on this point. Denmark would like to request the opinion of the Council Legal Service concerning the legal basis for binding temporary travel restrictions.

Annex XI

With regard to point (iii) of Annex XI, the Ministry of Transport notes that it would be appropriate to keep the category as broad as possible so as not to make delimitations that later prove to be inappropriate. If it is to be further defined, the Ministry of Transport emphasizes that the category "Transport personnel" covers persons involved in the transport of goods or passengers.

The following is a specific list of "transport personnel" which should be included in Annex XI, point iii:

Scope: The travel restrictions should not apply to transport personnel, also when they are travelling to or from their vehicle, aircraft or vessel (in order to perform, or after completing, a transport operation). This category should be interpreted broadly. It should cover in particular:

- Car, van and motorcycle drivers, heavy truck and bus drivers (includes bus and tram drivers) and ambulance drivers, including those drivers who transport assistance offered under the Union Civil Protection Mechanism and those transporting repatriated EU citizens from another Member State to their place or origin;
- Airline pilots, cabin crew and maintenance personnel;
- Train drivers and other on-board personnel; wagon inspectors, maintenance workshops' staff as well as the infrastructure managers' staff involved in traffic management and capacity allocation; and
- Maritime and inland navigation workers, including captains, crew and maintenance personnel, to the extent that they are not covered by category viii (seafarers).

ESTONIA

Please find below in **bold underlined** the text proposed by EE and in ~~strike through~~ the deletions of current wording of Articles 2 p 12, 27 and Articles 5 and 13.

Our proposals on the respective Articles are following:

Article 2

12. 'border surveillance' means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to detect, ~~and prevent,~~ **ascertain and counter** unauthorised border crossings or the circumvention of border checks.

Justification: In addition to prevention, border guards must be able to identify the circumstances of illegal border crossings and prevent illegal border crossings. Therefore, in addition to prevention, the concept should also cover measures aimed at identifying the circumstances of illegal border crossings.

27. 'instrumentalisation of **migration migrants**' refers to a situation where a third **party by its acts or omissions is responsible for creating** ~~instigates irregular~~ **illegal** migratory flows into the Union by ~~actively~~ encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders and where such activity poses threat to the internal security or public order of a Member States or the Union, ~~where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;~~

Justification:

1. In our view it is not possible to instrumentalize individuals but phenomenon, i.e. migration not migrants.
2. By the suggested definition, instrumentalisation requires the active involvement of a third country. However, there may be situations in the future where a third country or a third party facilitates the entry of certain third-country nationals into its territory also through their inactivity and does not knowingly prevent them from entering the EU illegally;
3. The word illegal is used in EU law (illegal immigration, illegally staying TCN, also in Art 13(1) and throughout in the SBC).
4. We propose to delete the word „actively“ as the words “encouraging or facilitating” are already referring to the activities.
5. We propose to delete the words after “external border” as this part of the sentence sets the condition, which is very complicated to prove (intention to destabilize the Union). How this intention will be proven?

Article 5

4. In **an emergency situation or** in a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

When adopting the limitations ~~Any limitations adopted pursuant to the first subparagraph shall be implemented~~ **the Member State concerned shall ensure that the fundamental rights of the persons are protected through border crossing points open for traffic** ~~in a~~

~~manner that is proportionate and that takes full account of the rights of:~~

~~(a) the persons enjoying the right of free movement under Union law;~~

~~(b) third-country nationals who are long-term residents under Council Directive~~

~~2003/109/EC56, persons deriving their right to reside from other instruments of~~

~~Union or national law or who hold national long-term visas, as well as their~~

~~respective family members;~~

~~(c) third-country nationals seeking international protection.~~

Justification:

Member States must be able to close border crossing points in the event of any emergency. At the same time, Member States must ensure that such restrictions do not prevent persons from exercising their fundamental rights through other border crossing points.

Article 13

Border surveillance

1. The main purpose of border surveillance shall be **to apply measures** to detect, ~~and prevent,~~ **ascertain and counter** unauthorised border crossings, ~~to counter cross-border criminality or the~~ **circumvention of border checks**, ~~and to take measures against persons who have crossed the border illegally.~~

~~A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.~~

Justification:

1. It must be possible for border guards to take measures to prevent, detect and combat illegal immigration (not only prevention is important in the context of border surveillance)
2. According to Screening Regulation the Directive 2008/115/EC shall apply only after the screening has ended. Therefore we propose to delete the reference to the Return Directive.

*2. The border guards shall use **all necessary surveillance measures, including** stationary or mobile units to carry out border surveillance. ~~That surveillance shall be carried out in such a way as to~~ The **measures shall** prevent and discourage persons from unauthorised border crossings between border crossing points and from circumventing the checks at border crossing points.*

Justification:

Member States should be able to take all kind of measures besides the stationary and mobile units to prevent, detect, detect and combat illegal immigration.

*4. ~~Surveillance shall be carried out by~~ **Surveillance measures shall include** stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally.*

and technical means, including electronic means, equipment and surveillance systems and physical infrastructure where appropriate.

Justification:

Member States must be able to apply different measures to meet the objectives mentioned in paragraph 1. Therefore, the wording of paragraph 4 should be more flexible, allowing for the application of measures other than fixed and mobile units and technical equipment.

*5. In **an emergency situation or** in a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.*

Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.

Justification:

More intensive border controls and surveillance should also be required in other emergencies besides instrumentalisation situations.

7. The Commission shall be empowered to adopt delegated acts in accordance

with Article 37 concerning additional measures governing surveillance,

*including the development of **minimum** standards for border surveillance, ~~in particular the use of surveillance and monitoring technologies at the external borders,~~ taking into account the type of borders, the impact levels attributed to each*

external border section in accordance with Article 34 of the Regulation (EU)

2019/1896 and other relevant factors.

Justification:

1. The current wording is too limiting for the Member States. As Member States should have the flexibility in implementing higher standards than provided in delegated act, we propose to add the word „minimum“.

We propose to delete the reference to the technologies as the standard shall allow the use of all kind of surveillance measures, taking into account the type of borders, the impact levels attributed to each external border section

FINLAND

FI has a scrutiny reservation on the whole text and therefore additional comments may come related to the following articles.

Article 2(12)

The Commission has made changes to the definition of border surveillance. In their changes the double notion of ‘prevent’ has been introduced meaning that unauthorized border crossings are to be detected and then prevented again. Could the Commission elaborate the thinking behind this formulation. Otherwise it would seem more coherent if it would be formulated in the following way:

“12. ‘border surveillance’ means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including **the detection and apprehension of person crossing the border illegally or trying to circumvent border checks and measures with preventative effect.** ~~preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.”~~

Article 2(27)

The definition of instrumentalisation defined in point 27 is not contingent on the number of migrants. Yet, it requires quite significant effects to state functions and moreover it takes in to account the motives by stating: “where such actions are indicative of an intention of a third country to destabilise the Union or a Member State”. It would be preferable to leave out the assessment of their country motives and concentrate on evidence and actual effects to the EU and Member States. In addition, this definition might leave out cases of instrumentalisations that are similarly concerning but do not cause a risk to state functions. Therefore we suggest the following:

27. ‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions ~~are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to~~ **may** put at risk **the reception capacity of that Member State or the** essential State functions, including its territorial integrity, the maintenance of law and order, or the safeguard of its national security;

Article 5(4)

The Commission amendment states that:” In a situation of instrumentalisation of migrants,”. As the actual presence of instrumentalisation is ascertained under a different procedure in a different Regulation, could there exist a possibility where instrumentalization, per se, exists but it has not been ascertained in accordance with the actual decision-making process. This would make actions described in point 4 conditional to the decision-making process by the Commission and the Council. In addition, there might be other reason for a Member State to limit the use of certain border crossing points, such as public health or internal security reasons. In order to avoid this limitation, we suggest the following:

4. ~~In a situation of instrumentalisation of migrants~~, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Article 21a

FI welcomes the effort to develop the coordination mechanisms related to cross-border travel in relation to public health threats. FI has maintained that the EU approach should be an all-hazards approach not limiting itself to purely pandemics. Therefore, we would ask the Commission if more wider scope in this regard was entertained during the preparation of this proposal and if yes, why it was not adopted in the text. In light of the above, we would like to suggest to make the scope wider in this regard and not limit it to merely pandemics. In this regard, the scope of Article 3 of Decision No 1082/2013/EU, where a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the external borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection could be used; or similarly as in the Commission proposal repealing this decision (COM(2020)727).

Regarding situation where a one size fits all implementing regulation is not feasible there should be adequate safeguards that a Member State could at least employ more strict measures at its external borders if the usual passenger profile or specific situation in the countries of origin so require.

Along the same vein the proposed Article 21a outlines the exemptions to the restrictions. These categorical exemptions go against the Member States prerogative to decide who enters the territory of the Member State in accordance with the Schengen Borders Code. Given the proposed obligatory nature of the coordination measure FI considers it necessary to have text inserted that gives the possibility to the Member State to pose restriction that are stricter than ones described in the possible implementation regulation. This would mean that a Member State could pose measures such as to require pre-departure testing etc.

GERMANY

Preliminary remark

Germany welcomes the presentation of the EU Commission's proposal and shares the Presidency's view that this dossier is of great political importance. Speed must not be allowed to take precedence over thoroughness. The legal and technical reviews within the Federal Government are continuing, and further comments are therefore reserved - also in view of the fact that the DEU language version is not yet available. Against this background, Germany is reserving the right to review the proposal as a whole.

Article 1

Regulation (EU) No 2016/399 is amended as follows:

Article 2 is modified as follows:

a) point 12 is replaced by the following:

12. 'border surveillance' means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.

Comments:

We request clarification on why "between border crossing points" should become "between crossing points" when the definition of "border crossing points" remains unchanged.

b) the following points 27 to 30 are added:

27. 'instrumentalisation of migrants' refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;

Comments:

DEU points out that this definition cannot be considered in isolation from the proposal for a regulation on addressing situations of instrumentalisation in the field of migration and asylum (2021/0427 (COD)), which was also submitted by COM on 14.12.2021. There, the existence of the facts of this definition takes a central role (Art. 1). Therefore, question to Council Presidency what the roadmap for consultations of this proposal for a regulation looks like and indication that, if necessary, in the light of the consultations of this proposal for a regulation, it will be necessary to come back to this definition.

Does "irregular migratory flow" mean persons who have no right of residence? What criteria are used to measure irregularity?

The term "flow" is an undefined legal term that requires interpretation. What is the minimum number of persons that can be considered a "flow"? Is such an indeterminate formulation suitable for achieving the regulatory objective?

On the wording "where such actions are indicative of an intention of a third country to destabilise the Union or a Member State": How is this to be understood? Do further circumstances have to be present in addition to the conditions described in the preceding sentence in order to conclude such an intention?

DEU asks for an explanation of the significance of the decision of the European Council mentioned in recital (EC) 12 in determining if the legal requirements are met (cf. EC 12: "Any such decision should take into account whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants.").

28. 'essential travel' means travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States and listed in Annex XI;

Comments:

We ask for clarification:

- What does "in connection with" mean? Preferable seems to be "for the purpose of".
- The request for international protection must undoubtedly remain unaffected. With the envisaged restrictions, access to international protection and the prohibition of refoulement must be preserved without restriction. It is questionable whether this is already sufficiently expressed.
- Why does the wording in Annex XI "persons in need of international protection" differ from the wording in the new paragraph 4 (c) of Article 5 "third-country nationals seeking international protection"? How does this relate to the statement in Art. 3 SBC: "This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to [...] (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement"? More clarity would be desirable here, for example by explicitly classifying the request for international protection as "essential travel" or by clarifying that persons seeking protection are not covered by the provisions on travel restrictions from the outset.

For the rest, we refer to our comments on Art. 21a.

29. 'non-essential travel' means travel for purposes other than essential travel;

(2) In Article 5, a new paragraph 4 is added:

'4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

- (a) the persons enjoying the right of free movement under Union law;
- (b) third-country nationals who are long-term residents under Council Directive 2003/109/EC³, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;
- (c) third-country nationals seeking international protection.'

Comments:

We request clarification in the regulatory text that - as COM explained in the meeting on January 7, 2022 of the Working Party on Frontiers - the temporary limitations under paragraph 4 do not require notification at the EU level.

We ask for clarification:

Also unclear here is the handling of nationals of the Swiss Confederation who are not covered by the right of free movement but can exercise similar rights.

What is the background to the differentiation with regard to the groups of persons mentioned in Art. 5(4)(b)? It is unclear which persons are covered by "family members".

We request that the term "national long-term visa" be replaced by the term "national long-stay visa" throughout the proposed regulation. This is in line with the terminology used in the VIS Regulation and the wording used in other provisions of the Schengen Borders Code (including Article 6(1)(b)).

Are persons entitled to international protection (with regard to Art. 3 SBC) covered by Art. 5(4)(b) or (c)?

3 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).

- (3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points and from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively detected or prevented.
4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems.
5. In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.

Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.

Comments:

On paragraph 5 subparagraph 2: Why was this provision included? In the view of the COM, are the methods mentioned already covered by paragraph 4? If so, the provision would be superfluous, as it is expressly an optional provision ("may").

6. Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (c), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council⁴, with a view to providing the necessary support to the Member State concerned.

On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.

Comments:

We thank the COM for the explanation that Art. 13(6) is purely declaratory. Would a mere mention of this aspect in the recitals then be sufficient?

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, including the development of standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors.'

Comments:

We request clarification of the provision in Art. 13(7), in particular with regard to the legal significance, the standards for and the legal consequences of "standards for border surveillance". Irrespective of this, the use of technical aids is usually governed by the national law of the respective MS. In this respect, it is questionable whether and to what extent the COM can regulate the use of technical aids by the competent authorities of the MS within the framework of delegated acts for the purpose of border surveillance. We would like to point out that the admissibility and design of the use of technical aids are limited by national law.

We welcome that - as COM explained in the meeting of the Working Party on Frontiers on 7 January 2022 - fundamental rights, the principle of proportionality and any data protection concerns must be taken into account when using technical means. For reasons of clarification, this should be made clear in the regulatory text for the entire scope of Article 13.

4 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.

“Article 21a
Restrictions on travel to the European Union”

1. This Article shall apply to situations where the European Centre for Disease Prevention and Control or the Commission identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization.

Comments:

We ask for clarification:

What is the background for the task of the ECDC and/or the COM to determine "the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization"? In any case, the task should be defined in accordance with the assignment of tasks in the relevant legal basis.

Moreover, the terms should be adapted to those of the ECDC Regulation and the SCBHT Regulation ("Regulation on serious cross-border threats to health and repealing Decision No 1082/2013/EU"). There, for example, the term "communicable disease" is used. The new proposals on the CBHT Regulation and the ECDC Regulation should be taken into account.

We propose that Art. 21a para. 1 be worded as follows: "This Article shall apply where a communicable disease in accordance with Article 3 of Regulation (EU) No.../...[the SCBHT Regulation] is recognized."

2. The Council, on the basis of a proposal by the Commission, may adopt an implementing regulation, providing for temporary restrictions on travel to the Member States.

Such temporary restrictions on travel may include restrictions on entry to the Member States and other measures considered necessary for the protection of public health in the area without controls at internal borders, such as for instance testing, quarantine, and self-isolation.

Comments:

A time limit should be set for the implementing regulation. How do these provisions relate to COUNCIL RECOMMENDATION (EU) 2020/912?

We request deletion of the word "considered" in Art. 21a para. 2 sentence 2 and insertion of "and proportionate" after "necessary".

Regarding "such as for instance...": Recital 7 also mentions "the need to fill in a passenger locator form or other contact tracing tool". Why are these measures not mentioned here in the text?

In principle, we welcome the harmonization of the measures of the Member States in the situations mentioned in paragraph 1. However, we would like clarification on the following constellations:

- According to the draft, can Member States impose entry restrictions prior to a Council decision under paragraph 2?

- Do these measures cease to apply when the Council decision under paragraph 2 enters into force? If so, to what extent?

- If the Council has decided on temporary entry restrictions in accordance with paragraph 2, can the Member States also impose entry restrictions that go beyond this during the period of validity of the decision (e.g. entry restrictions for further states; more far-reaching measures than those specified in the Council decision)?

What is the exact relationship between Art. 21a(2) and Art. 6(1)(e) SBC?

- Can Member States (re-)impose entry restrictions after the expiry of such a Council Decision?

3. The following categories of persons shall be exempted from the restrictions on entry, independent of the purpose of their travel:

Comments:

Since we do not know what pandemics we will face in the future, it would be worth considering guaranteeing the necessary room for maneuver in the event that a disease with epidemic potential is identified, insofar as this is permissible under primary law. However, we recognize that even in a pandemic, security of supply as well as the functioning of critical infrastructures must be ensured, in particular to ensure supplies of food, medicines or personal protective equipment. Against this background, we propose to leave the categories in para. 3 a) and b) to the pandemic-specific regulations in the implementing regulation and to limit para. 5 to those categories of travel that are vital. These include, in particular, transport personnel and seafarers, as well as workers in critical infrastructures.

a) persons enjoying the right of free movement under Union law;

Comments:

Articles 27 and 29 of Directive 2004/38/EC ("Free Movement Directive") provide for possibilities to restrict free movement on public health grounds. The correlation of this possibility of restriction to this text, which does not allow such restrictions, should be clarified with legal certainty. Does this mean that restrictions such as (proportionate) quarantine measures should remain allowed, but in no case entry restrictions? Ambiguities in this regard could in turn lead to divergent practical implementation by different member states.

Also unclear is the handling of nationals of the Swiss Confederation, who are not covered by the right of free movement but may exercise similar rights.

b) third-country nationals who are long-term residents under Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union law or national law or who hold national long-term visas, as well as their respective family members.

Comments:

We note that the Schengen Borders Code does not contain a definition of the term "family members." It is unclear which persons are covered by this.

We request that the term "national long-term visa" be replaced by the term "national long-stay visa" throughout the proposed regulation. This corresponds to the terminology of the VIS Regulation and the wording of other standards of the Schengen Borders Code (e.g. Article 6(1)(b)).

What is the background to the differentiation with regard to the groups of persons mentioned in Art. 21a(3)(b)? It is unclear which persons are covered by "family members".

4. The implementing regulation referred to in paragraph 1 shall, where appropriate:

Comments:

Correct reference is paragraph 2.

- a) define any categories of persons undertaking non-essential travel to be exempted from any restrictions applicable to travel;
- b) identify any geographical areas or third countries from which non-essential travel may be subject to restrictions or exemptions from restrictions, having regard to the particular situation of the areas or countries concerned on the basis of objective methodology and criteria, including, in particular, the epidemiological situation;
- c) lay down the conditions under which non-essential travel as referred to under points (a) and (b) may be restricted or exempt from restrictions, including proof to be presented to support the exemption and the conditions relating to the duration and nature of stay in the areas or countries referred to in point (b);
- d) lay down the conditions under which travel restrictions may be imposed, exceptionally, on persons undertaking essential travel, in the event that the epidemiological situation worsens quickly and, in particular where a variant of concern or variant of interest has been detected.

Comments:

We would request clarification:

With regard to the use of the terms "variant of concern or variant of interest", reference should be made to the relevant WHO provisions.

The following WHO definition can be used here:

<https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/>

As this is an EU document, the ECDC definition should additionally be referred to, based on the WHO definitions, but with reference to the impact of the situation in the EU/EEA countries (different wording, but same content): <https://www.ecdc.europa.eu/en/covid-19/variants-concern>

The ECDC reference of the nomenclature "WHO label" should also be included:

“WHO label: As of 31st May 2021, WHO proposed labels for global SARS-CoV-2 variants of concern and variants of interest to be used alongside the scientific nomenclature in communications about variants to the public. This list includes variants on WHO’s global list of VOC and VOI, and is updated as WHO’s list changes.”

5. Restrictions on essential travel referred to in paragraph 4(d) may not include restrictions on entry as regards travellers listed in point i. and points iv. to viii. of Annex XI.”

Comments:

Reference is made to the comment on Art. 21a(3). Transport staff/seafarers, and "frontier workers" as well as workers in critical infrastructure should be exempted from entry restrictions. Even for these occupational groups, it would be perfectly possible to take other health protection measures, such as testing. As a result, Art. 21a para. 5 should therefore be supplemented by ii and iii of Annex XI.

“ ANNEX XI

Essential Travel

Essential functions or needs referred to in Article 2, point (23) refers to travel for any of the following function or needs:

- i. Healthcare professionals, health researchers, and elderly care professionals;
- ii. Frontier workers;
- iii. Transport personnel;
- iv. Diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and humanitarian aid workers and civil protection personnel in the exercise of their functions;
- v. Passengers in transit;
- vi. Passengers travelling for imperative family reasons;
- vii. Seafarers;
- viii. Persons in need of international protection or for other humanitarian reasons.”

Comments:

Without prejudice to the statement on Art. 21a(3), there is a need for discussion:

- to i.) Why only "elderly" (and not care professionals as a whole)? And what about the so-called "24-hour care workers" who, as a rule, are not trained care workers?
- ii.) The term "frontier workers" is not self-explanatory and may need to be defined.
- to iii.) Should the term "transport personnel" refer to cross-border transports?
- to v.) Should the term "passengers in transit" be covered in general, i.e. without regard to means of transport and destination?
- to vi.) Can "for imperative family reasons" be defined in more detail?
- to viii.) We welcome that - as explained by COM in the meeting of the Working Party on Frontiers on January 7, 2022 - the different wording with regard to persons seeking international protection in Annex XI or in Art. 5 para. 4 lit. c) will be reviewed.

Therefore, we ask to review whether the terms of Annex XI should be defined in this Regulation.

GREECE

Article 2 (12)

We believe that the proposed wording is general enough; however, it seems that it limits the utility and usage of technical means for preventing illegal migration. Since the use of technical means and equipment is not enough in the operational field for the prevention of the illegal crossings of the external borders, we propose the word “**operational**” to be added (“*border surveillance means the surveillance of borders...including preventative **operational** measures...*”), so that it will contain the use of any legitimate operational mean, including the operational action and the deployment of human resources (Police, Coast Guard, etc.), which, combined with the use of technical means, will result in effectively preventing any illegal border crossings of the external borders.

Article 2 (27)

EL expresses scrutiny reservation.

We advocate for a broader definition, which will cover all the possible forms of instrumentalisation may appear in the future, as well the cases where the third country encourages or facilitates the movement of third country nationals to the external borders by omitting to abide with undertaken obligations or by tolerating such movements. A narrow and strictly technocratic definition would limit the flexibility of the European Council to acknowledge a situation of instrumentalization as such; an acknowledgement which primarily is of a political nature.

The three elements mentioned in the definition of “instrumentalisation of migrants”, include indefinite and non-countable terms such as “actively”, “indicative of an intention to destabilize”, “liable to put at risk...” etc. That makes the provision hard to be applied and puts at risk any operations to handle instrumentalisation situations at the external borders in an effective, coherent and timely manner, as it does not provide enough clarity.

Furthermore, regarding the relation of the provision with recital 12 of the Proposal, where it is stated that “*Any such decision (in relation with the measures imposed by the MSs in an instrumentalisation situation) should take into account whether the European Council has acknowledged that the Union or one or more of its MSs are facing a situation of instrumentalisation of migrants*”, we would like to confirm that the acknowledgement of the European Council does not impede the sovereign right of the member states to consider a situation as such. In any case, we deem necessary to highlight within the text [recital 12 and art. 2(27)] that the member state has the sovereign right and the competence to assess that a situation at the external border puts at risk the national security and declare it as such.

In this spirit, we propose the provision to be amended as follows:

*'instrumentalisation of migrants' refers to a situation where a third country instigates **in any way** irregular migratory flows into the Union ~~by actively~~, **in particular by** encouraging or facilitating, **by any means**, the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, ~~where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;~~ **this definition does not limit the sovereign right of the Member State to declare itself confronted with instrumentalisation.***

This wording will provide enough flexibility to the MSs to evaluate a situation as such, when there is an instigation of irregular migrant flows by a third country or a facilitation of the migrants' movement towards the external borders, and then activate all the relevant border and asylum procedures, in order to handle the aforementioned situation.

Article 2(28) & (29) - Article 21a - Annex XI

EL expresses scrutiny reservation.

Regarding Annex XI, we propose “students” and “seasonal workers” to be added in the list of the “essential travels”, if they are not covered by Art. 21a (3).

Article 5 (4)

EL expresses scrutiny reservation.

In general we welcome the provision of the first subparagraph providing for the limitation of the number of the border crossing points in a situation of instrumentalisation of migrants; however, we wonder whether there is an added value from an operational perspective, as the possibility to seal temporarily a number of border crossing points already exists. In regards to the second subparagraph and the exemptions mentioned in the provision we consider that they are already covered by Art. 3 of SBC and should therefore be deleted.

Article 13

EL expresses scrutiny reservation.

We deem that the term “detect” should be deleted as redundant. Both in the cases of prevention and apprehension the detection is a self-evident prerequisite. It should be clearly stated in paragraph 1 that the main purpose of border surveillance **shall be to prevent** unauthorised border crossings,...

We also propose on par. 2 the addition of the wording as it follows: “**In case of attempts of migrants to cross illegally the external borders by demonstrating non cooperative behavior or by acting in an aggressive manner which endangers the life or health of border guards, the latter shall apply all necessary preventive measures.**”, which refers to the treatment of non-cooperative or aggressive migrants.

Regarding par. 4, in order to be clear that in case of an attempt of illegal border crossing, the prevention is possible, we propose to replace the phrase “*apprehend individuals **crossing** the border illegally*” with the following wording: “*apprehend individuals **who have crossed** the borders illegally*”.

Regarding par. 7, we propose the provision to be reformed as it follows: “*...in particular the use of surveillance and monitoring technologies **and other necessary technical means of prevention** at the external borders*”, so that the provision will not focus only to the “surveillance and monitoring technologies”.

Lastly, for the reasons mentioned above under the definition of instrumentalisation, we propose a new paragraph 8 as follows:

“8. The rules applicable to the external borders in a situation of instrumentalisation of migrants are without prejudice to/do not hinder their effective protection by the Member State confronted with the threat.”

HUNGARY

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 2016/399 is amended as follows:

(1) Article 2 is modified as follows:

a) point 12 is replaced by the following:

12. ‘border surveillance’ means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.

b) the following points 27 to 30 are added:

27. ‘instrumentalisation of migrants’ refers to a situation where a third party instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;

28. ‘essential travel’ means travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States and listed in Annex XI;

29. ‘non-essential travel’ means travel for purposes other than essential travel;

30. ‘transport hubs’ means airports, sea or river ports, train or bus stations.’

(2) In Article 5, a new paragraph 4 is added:

‘4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

(a) the persons enjoying the right of free movement under Union law;

(b) third-country nationals who are long-term residents under Council Directive 2003/109/EC⁵, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;

(c) third-country nationals seeking international protection.’

(3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings and attempts to cross the border illegally, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points and from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively detected or prevented.

4. Surveillance shall be carried out by means of physical border barriers and related technical infrastructure, as well as stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems.

5 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).

5. In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.

Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.

6. Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (c), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council⁶, with a view to providing the necessary support to the Member State concerned.

On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, including the development of minimum standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors.’

- (4) Chapter V is renamed as follows: “Specific measures relating to the external borders”

In Chapter V, the following Article 21a is inserted:

“Article 21a
Restrictions on travel to the European Union”

1. This Article shall apply to situations where the European Centre for Disease Prevention and Control or the Commission identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization.

6 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.

2. The Council, on the basis of a proposal by the Commission, may adopt an recommendations, providing for temporary restrictions on travel to the Member States.

Such temporary restrictions on travel may include restrictions on entry to the Member States.

LITHUANIA

1. In **Article 2(10)**, it is proposed to supplement the point by extending the sentence "<...> and other measures to prevent, respond appropriately and combat serious threats to public policy or internal security" to read it as follows:

„10. "border control" means, in accordance with this Regulation and for the purposes of this Regulation, border activities exclusively with a view to or in connection with the crossing of a border, without prejudice to any other circumstances involving border checks and surveillance **and other measures to prevent, respond appropriately and combat serious threats relating to public policy or public security.**"

2. **Article 2(12)** does not contain a clear definition of "preventive measures". In view of this, it is proposed to add an additional paragraph to Art. 2 (amending the Article numbering accordingly) that the definition of "preventive measures" should cover not only border surveillance measures, i. e. stationary and mobile means for detecting and identifying objects, human and technical resources, but also engineering installations (permanent or temporary) which impede rapid and unnoticed entry into the territory of a Member State, in particular at those sections of the external border where levels of significant or critical impact have been identified, as well as the organizational, administrative, legal measures that a Member State may take in the event of violence at its external border, including attempts by third-country nationals to enter the country *en masse* and by disproportionate violent means.

3. It is proposed to amend **Art. 4** by extending the last sentence "<...> and in line with the case law of the European Court of Human Rights“ to read it as follows:

“Article 4

Fundamental rights

When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union („the Charter “), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (‘the Geneva Convention’), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis **and in line with the case law of the European Court of Human Rights “.**

4. When assessing both subparagraphs of **Art. 5(4)**, it is unclear as to whether the closures of border crossing points (BCPs) or restrictions on the passenger flows through them – where only the persons listed in points (a) to (c) of the second subparagraph are permitted to pass through the BCP – are meant.

5. It is proposed to add paragraph 5 to **Art. 5**, reading as follows:

“In cases where a Member State facing the instrumentalisation of migrants, and in accordance with Article 6(3) of the Asylum Procedures Directive it has temporarily introduced a requirement to lodge applications for international protection only at specific designated points with the view of exercising its duty to ensure that the external borders are crossed in accordance with the provisions set forth in Art. 5(1), the Member State concerned may prevent illegal entry of persons who do not comply with the aforementioned requirement to its territory, in particular in cases of attempted entry to the territory of the Member State by force and by large numbers of persons, which may constitute a threat to public policy and / or internal security.”

6. **Art. 13(1)**. It is proposed to separate the sentences of this paragraph into separate subparagraphs; to add to the sentence of paragraph 1 the following: "<...>have either made attempts or <...> " to read it as follows:

„1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons **who have either made attempts or** have crossed the border illegally.“

7. It is proposed to supplement **Art. 13(1)** with the third subparagraph and to read it as follows:

„1. Preventive measures shall be taken against any person intending to cross the external border of a Member State illegally. ".

8. **In Article 13 (2)**, it is proposed to replace the word "and" for "or“ and to read the sentence as follows:

„That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points **or** from circumventing the checks at border crossing points.

9. It is proposed to supplement **Art. 13 (4)** by adding „<...> **and by application of other preventive measures.**“ and to read the sentence as follows:

„4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems **and by application of other preventive measures.**“.

10. It is proposed to supplement **Art.13 (7)** by the sentence „ Additional measures should be funded by the Home Affairs Funds. " to read it as follows:

„ 7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, including the development of standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors. **Additional measures should be funded by the Home Affairs Funds. "**

11. In **Art. 23(b)** to delete a repeating phrase „competent authorities“ and to read the sentence as follows:

„b) the possibility for a Member State to carry out security checks on persons carried out at transport hubs by the competent authorities or by carriers under the law of each Member States, provided that such checks are also carried out on persons travelling within a Member State;“

12. **Art. 23a(1)**. The procedure for transferring of persons apprehended at internal borders is not clear. Paragraph 1 states that the Article applies to the detention of a third-country national at internal borders, presuming that they are land borders. Meanwhile, Annex XII, Part A "Procedures for transferring persons apprehended at internal borders" Point 4 (g) states that national authorities issuing a refusal decision shall collect, inter alia, data on the type of border at which third-country nationals were returned. The Commission is asked to provide clarification regarding the application of this Article to other types of internal borders. We are of the opinion that the mechanism for transferring of persons apprehended at internal borders could only apply at land borders and only between the neighbouring Member States.

LUXEMBOURG

Ces commentaires écrits couvrent les passages suivants de la proposition de refonte du CFS:

- [dispositions sur l'instrumentalisation et la surveillance des frontières](#)
- [dispositions relatives aux restrictions de voyage aux frontières extérieures](#)

Dispositions sur l'instrumentalisation et la surveillance des frontières

Article 2

12) Surveillance des frontières

Cette définition est désormais davantage axée sur la prévention d'entrées irrégulières. **LU partage les interrogations d'autres délégations sur les implications de cette reconfiguration, notamment sur ce que signifient les «preventative measures», ceci nous semble très large.** Toute clarification lors des séances à venir serait la bienvenue.

Quant à la question du «**prevent and/or detect**», nous appuyons une formulation avec «or». En effet, il nous semble évident qu'un passage non-autorisé d'une frontière ne peut plus être prévenu après qu'il a été détecté, puisqu'il a déjà eu lieu *de facto* [Idem à l'art.13].

- *Ceci implique d'ailleurs que la partie «prévention» correspond à l'effet dissuasif de la surveillance des frontières et notamment la nature inopinée des patrouilles et autres actions de surveillance (cf. article 13§3) et rendrait par conséquent les «preventative measures» mentionnées dans ce paragraphe redondantes.*

27) Instrumentalisation

Réserve d'examen

LU estime qu'il serait pertinent de retravailler la définition assurant davantage de transparence et de prévisibilité concernant le déclenchement des mesures proposées tant au niveau de l'acquis Schengen que de l'acquis asile. La procédure pour l'identifier n'est pas incluse dans ce texte Schengen, mais évoquée de manière vague au considérant 18 de la proposition de règlement COM(2021)890 : requête de l'EM concerné, prise en compte d'un éventuel avis du Conseil européen, proposition par COM où approprié.

En outre, nous estimons que la référence à l'intégrité territoriale va trop loin pour un instrument JAI. LU propose de supprimer la référence «territorial integrity» au point 27 de l'article 2, et de le remplacer par «border management» ou «border protection». Nous comprenons que ce langage est tiré de l'article 4 TUE, mais pour ce contexte Schengen et asile, il serait préférable de garder un langage qui ne fait pas d'amalgame avec des crises qui ne sont pas de nature migratoire. Les mesures qu'entraîne le constat d'une instrumentalisation de la migration peuvent avoir des conséquences sérieuses pour les demandeurs d'asile, à leur tour instrumentalisés. Il convient de ne pas créer des *a priori*. Nous saluons que la Commission soit ouverte à une modification de cette référence.

D'ailleurs, nous notons que **la proposition introduit l'élément de l'encouragement actif du mouvement de ressortissants de pays-tiers. Le critère de désignation relatif à l'instrumentalisation de la migration dans le cadre du régime sanctions Belarus (2021/1985) se limite à la facilitation du franchissement illégal des frontières extérieures de l'Union.** Les mesures sous les acquis Schengen et asile concernent principalement les personnes qui franchissent ou essaient de franchir les frontières extérieures de l'UE. Se pose donc la question si la proposition n'établit pas un déséquilibre au détriment de ces personnes.

Article 5 §4

Afin de ne pas mettre en question nos obligations internationales, **le c) doit être maintenu.**

Article 13

Plusieurs délégations ayant souhaité mentionner explicitement **les barrières physiques** dans cet article, nous appuyons la vue de la Commission sur cette question: le statu quo – y inclus sur le financement – convient et devrait être préservé. Une référence explicite ne fournirait pas de valeur ajoutée dans ce contexte.

Quant à la question du **«prevent and/or detect»** aux paragraphes 1 et 3, nous appuyons une formulation avec «or». En effet, il nous semble évident qu'un passage non-autorisé d'une frontière ne peut plus être prévenu après qu'il a été détecté, puisqu'il a déjà eu lieu *de facto*.

Dispositions relatives aux restrictions de voyage aux frontières extérieures

Article 2

28) voyages essentiels

29) voyages non-essentiels

ràs

Article 21a et annexe XI

Réserve d'examen

Nous remercions la Commission pour son soutien à notre proposition de **modifier la première phrase du §2 comme suit:** «The Council, on the basis of a proposal by the Commission, may adopt an implementing regulation, providing for temporary restrictions ~~on travel to the Member States at~~ **the external borders**». Ceci aligne le langage avec la partie correspondante du préambule (considérant 5) et nous permettrait de lever notre réserve d'examen sur l'article 21a.

Afin de rationaliser davantage ce paragraphe, nous **proposons aussi de supprimer le 2^e alinéa du §2**, qui ne fait que reprendre l'énumération d'options déjà présente dans le considérant 7.

Sur l'**annexe XI**, nous partageons les vues d'autres délégations qu'**il faut maintenir une certaine flexibilité pour les Etats membres. Il faudra donc impérativement inclure les «travailleurs hautement qualifiés»** comme ils figurent à l'**annexe II de la recommandation 912**. Limiter le personnel qualifié qui peut être exempt de restrictions au seul secteur sanitaire risque d'exposer d'autres secteurs tout aussi cruciaux pour la lutte contre une crise sanitaire.



LATVIA

Latvia is generally positive about the key elements of the proposed amendment to the Schengen Borders code (SBC), which will improve the protection and security of the EU's external borders in practice. We particularly welcome the amendments concerning the Member States ability to respond to situations of instrumentalization of migrants and measures to prevent persons from crossing the border illegally as far as possible.

Article 5, new paragraph (4)

Latvia supports the right granted to Member States to close border crossing points or restrict their opening hours in cases of instrumentalization of migrants. At the same time, we consider that the list of points (a), (b) and (c) in Article 5 (4) of the SBC is unnecessary, and we therefore propose to include only a reference to the measures being taken by Member States in accordance with proportionality and international law.

Article 13 (border surveillance)

It is important for Latvia to maintain the included additions, which clearly emphasize that border surveillance includes not only the detection of illegal border crossing, but its main goal is to prevent such border crossing. Latvia also considers that, in addition to the use of technical means, a direct reference to the possibility/necessity of using physical barriers when it is proportionate and in line with the existing threat, should be included in the text.

Article 21a of Chapter V (Restriction on travel to the European Union)

In conjunction with the new Annex XI (Essential Travel) - It follows from the proposed amendment to the SBC that travel restrictions will apply to all Member States and will not be voluntary but mandatory. Latvia does not oppose such a mandatory requirement, but suggests to include some flexibility for Member States to define additional categories of persons which are not subjects to travel restrictions (e.g. for humanitarian or national reasons) or define additional restrictions, taking into account the epidemiological situation in EU Member State and neighbouring third country.

MALTA

Article 2: Definitions

Clarification is required as to how the amendments to the definition of ‘*border surveillance*’ will benefit Member States with external sea borders of the EU. The Proposal includes a number of possible measures which should be preventative in nature, however Malta notes that these measures (notably drones and motion sensors) will only serve for earlier detection.

With regard to the definition of ‘*instrumentalisation of migrants*’ Malta notes that there may be a political dimension to the assessment of determining a situation on instrumentalisation, and therefore the role of the European Council, as referred to in the recitals, may need to be delineated in the text. Moreover, since there is a separate Proposal on instrumentalisation, we believe that logically this definition should be made under Article 1 or a new article in the Proposal for addressing situations of instrumentalisation in the field of migration and asylum and a reference to that Proposal be made under relevant articles in the Schengen Borders Code.

Article 13: Border Surveillance

(6) On the basis of the results of ~~that the vulnerability~~ assessment ~~or any other relevant vulnerability assessment~~ or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.

Justification: The mechanism and procedure of the Vulnerability Assessment is already regulated in the Frontex Regulation. The wording “any other vulnerability assessment” should be deleted to clarify that the article is referring to the Frontex vulnerability assessment specifically as opposed to other assessments.

Moreover, with regard to Article 13(7), it is important that these instruments remain flexible to avoid a one-size-fits-all approach due to geographical specificities.

Article 21a: Restrictions on Travel to the European Union

While Malta welcomes a more coordinated approach to crises, a legislative instrument delineating restrictions on travel at the external border in the event of threat to public health must be flexible enough to allow for the specificities of different Member States and be able to be amended fast enough to cater for rapid response to effectively manage epidemics or pandemics. The role of International Health Regulations should also be taken into consideration.

Annex XI (Essential Travel, related to Article 21a)

Malta proposes to limit the categories of persons that are listed in the proposed Annex on the basis of international law, namely points iv, v, vi, vii, viii thereof. The other categories listed in the Annex could be introduced, as required, in the instrument being proposed under Article 21a (2).

NETHERLANDS

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

Recitals

- (14) ~~By virtue of Article 41(1) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency is required to recommend to a Member State that it request the Agency to initiate, carry out or adjust the Agency's support, in order to address identified threats and challenges at the external borders, where the conditions laid down in that provision are met. In particular, the need for Agency support may become apparent in situations where the European Border and Coast Guard Agency has carried out a dedicated vulnerability assessment in connection with the instrumentalisation of migrants. On the basis of the results of such a vulnerability assessment or where a critical impact level is attributed to one or more external border sections and taking into account the relevant elements in the Member State's contingency plans, the Agency's risk analysis and the analysis layer of the European situational picture, the Executive Director should recommend to the Member State concerned to request that the Agency initiate, carry out or adjust the Agency's support in accordance with Article 41(1) of Regulation (EU) 2019/1896. This competence of the Executive Director is without prejudice to the general support that the Agency may be providing to the Member States.~~

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 2016/399 is amended as follows:

- (1) Article 2 is modified as follows:

a) point 12 is replaced by the following:

12. 'border surveillance' means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.

b) the following points 27 to 30 are added:

27. ‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk the overall functioning of the Schengen area, and essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;

28. ‘essential travel’ means travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States and listed in Annex XI;

29. ‘non-essential travel’ means travel for purposes other than essential travel;

30. ‘transport hubs’ means airports, sea or river ports, train or bus stations.’

(2) In Article 5, a new paragraph 4 is added:

‘4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

(a) the persons enjoying the right of free movement under Union law;

(b) third-country nationals who are long-term residents under Council Directive 2003/109/EC⁷, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;

(c) third-country nationals seeking international protection.’

(3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

7 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).

A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points and from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively detected or prevented.
4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems.
5. In a situation of instrumentalisation of migrants or other manifest risks or threats, the Member State concerned shall intensify border surveillance as necessary in order to address the increased risk or threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.

Those technical means may include but is not limited to modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.

6. ~~Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (e), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council⁸, with a view to providing the necessary support to the Member State concerned.~~

~~On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.~~

- 8 ~~Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.~~

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, ~~including the development of standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors.~~²
- (4) Chapter V is renamed as follows: “Specific measures relating to the external borders”

In Chapter V, the following Article 21a is inserted:

“Article 21a
Restrictions on travel to the European Union”

1. This Article shall apply to situations where the European Centre for Disease Prevention and Control or the Commission, in close cooperation with the national competent authorities identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization.
2. The Council, on the basis of a proposal by the Commission, may adopt an implementing regulation, providing for temporary restrictions on travel to the Member States.

Such temporary restrictions on travel may include restrictions on entry to the Member States and other measures considered necessary for the protection of public health in the area without controls at internal borders, such as for instance testing, quarantine, and self-isolation.

3. The following categories of persons shall be exempted from the restrictions on entry, independent of the purpose of their travel:
 - a) persons enjoying the right of free movement under Union law;
 - b) third-country nationals who are long-term residents under Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union law or national law or who hold national long-term visas, as well as their respective family members.⁴

The implementing regulation referred to in paragraph ~~1~~² shall, where appropriate:

POLAND

As a general remark, PL maintains a scrutiny and analytical reservation on the whole new text of the proposal. The project requires a very in-depth analysis and extensive consultation on many levels and should be seen in a broader context, i.e. the entire package of changes and reforms in the Schengen area currently being processed.

Article2 (12)

PL propose add into the text physical barrier and destruction or interference with border infrastructure, we propose following definition:

*“border surveillance” means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures and **physical barrier** to detect and prevent unauthorised border crossings or the circumvention of border checks, and **destruction or interference with border infrastructure**.*

Article 2 (27)

PL propose take into account that third countries may use methods other than supporting irregular migration like may passively observe the situation by "not obstructing" migrants to attempt to cross the border by force.

Article 5 (4)

We ask for clarification in the provision that closing and limiting the number of border crossing points do not prejudice the provisions referred to in point (a). a) b) c) categories of persons in such a way that it is clear that the MS which closes the border crossing point do not have to check the categories of persons mentioned in paragraph 4.

Alternatively, we propose to delete:

"Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

- (a) the persons enjoying the right of free movement under Union law;*
- (b) third-country nationals who are long-term residents under Council Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;*
- (c) third-country nationals seeking international protection."*

Article13 (2) and (3)

Add the police and the army to the border guards as bodies supporting border guards in border protection

Alternatively we propose to add the definition of “*border guards*” other public official supporting border guards in border protection.

Article 13 (4)

We propose to add physical measures to preventive measures.

Article13 (5a)

We propose new paragraph: „*Methods and technical means in paragraphs (2) to (5) shall be also applied to prevent destruction of or interference with the border infrastructure*”.

Article 13 (6)

We propose to delete the paragraph in our opinion this issue is properly regulated in the EBCG Regulation, and the provision is an unnecessary repetition of the provisions set out in Art. 10 (1) lit. c, art. 32 and art. 41 (1) of Regulation 2019/1896

Art.13 (7)

We propose to delete the paragraph due to the fact that on this stage, it is difficult to define what such delegated acts would be consist of and how it would be affect the MSs.

Annex XII - v

Passengers in transit – in our opinion it should be emphasized that in the case of passengers in transit, it is necessary to indicate that this only applies to situations where the transit takes place directly from one third country to another third country, and the transport is not of a cabotage nature (it may be necessary to add an appropriate recital).

ROMANIA

As a general remark, RO welcomes the prompt response of COM, which presented a response package to the instrumentalisation of migration supported by state actors including a new proposal on SBC, which also takes into account the latest developments in the field of migration.

RO welcomes the proposals to strengthen border surveillance and, in particular, the provision regarding the possibility of MSs to develop, together with COM, border surveillance standards, taking into account Regulation EBCG 1896/2019.

Article 2 point 27 (new)

In our opinion, the definition of '*instrumentalisation of migrants*' is very important for MSs in order to be able to distinguish between situations related to a migratory crisis in the classical meaning (and apply the corresponding provisions of the *acquis* in the field of asylum and migration) and cases we have to apply the SBC provisions. Therefore, a clear definition is needed in order to avoid the risk of (mis)interpretation or arbitrary application, politically justified on a case-by-case basis. The clarity of the concept '*instrumentalisation of migrants*' is of the essence, because MSs will use this concept as an important factor & vector that it will generate measures for enhancing border surveillance in order to properly address this type of threat.

In this regard, RO suggests to detail/clarify the following issues in this definition:

- What kind of actions must be taken into account: constant flow of migrants, large number of migrants at a certain time, specific activities of a third state, etc.

In this regard, RO support MSs that have asked for greater clarity regarding the situations that could justify the instrumentalisation, respectively massive influx exceeding the accommodation / processing capacity, proving the intention of the third state to destabilise EU.

- Further details on the proceedings to be followed to prove the intention of a third country to destabilise EU. Having regard to COM's explanation during the WP FRONT meeting of 07.01, that "*the nature of the situation should be sufficient to be able to react early*", more information would be useful, as "*nature*" is a term too imprecise to be applied uniformly by all MSs.
- How will the decision regarding the existence of an instrumentalisation situation be formulated? How will the relevant SBC provisions be activated?

RO supports PT's opinion that instrumentalisation "*should be the subject of a political decision and statement*" in order to avoid a challenging situation that goes beyond the national limits of a certain MS to decide alone on a third country's intention to destabilise EU.

- The term "*indicative*", given that it is vague and leave room for interpretation.

Article 5 para 4 (new)

In RO's opinion, it is not clear how MSs can ensure that, although they limit the number of BCPs / their opening hours, they still can take full account of the rights of the categories of persons mentioned in letters a) to c). In particular, it is not clear whether MSs can restrict the crossing at one or more BCPs for these categories, provided that the possibility of exercising their rights through other BCPs could be guaranteed.

Thus, we consider that the text should state clearly that in a situation of instrumentalisation the right of free movement of the three categories of persons mentioned in letters a) - c), should be preserved by enabling their crossing through other BCPs that are kept open.

Article 13

Regarding **para 4 and 5**, RO supports the suggestions made by other delegations to include in one distinct paragraph the provisions regarding the use of technical means, as a general possibility that MSs have at their disposal in the context of border surveillance. Furthermore, we consider that any exemplification should be included in the relevant corresponding recital. In this respect, RO proposes the following wording (and renumbering the subsequent paragraphs):

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. ~~Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems.~~

5. Surveillance may also be carried out by technical means, including modern technologies, electronic means, equipment and surveillance systems.

5.6. In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.

~~Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.~~

At **para 7**, as regards the development of standards for border surveillance, RO considers necessary that the connection with recital 18 from EBCG Regulation should be observed and our suggestion is to use the language already agreed in the context of the EBCG Regulation:

*The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, including the development of **common minimum** standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors, **such as geographical particularities. When developing those common minimum standards, possible limitations deriving from national law should be taken into account.***

Furthermore, for consistency reasons both with recital 18 of the EBCG Regulation and the new Art. 13 para. 7, RO considers that recital 16 should be modified as follows:

*(16) The Commission should be empowered to specify, in delegated acts adopted under this Regulation, appropriate standards for border surveillance, concerning in particular the new technologies that Member States may use, while taking into account the type of borders (land, sea or air), the impact levels attributed to each external border section in accordance with Article 34 of Regulation (EU) 2019/1896 and other relevant factors, **such as geographical particularities**, as a specific response to situations of instrumentalisation of migrants. **When developing those common minimum standards, possible limitations deriving from national law should be taken into account.***

Annex XI - Essential Travel (new)

Regarding point *ii. Frontier workers*, RO considers that, for an uniform application of the exemption from travel restrictions of the category "*frontier workers*", it would be useful to clarify the persons included here either by introducing a definition or by referring to the legislative act which regulates it, for the following reasons:

- According to the provisions of the Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment ***frontier workers*** means *workers who are employed in the frontier zone of a Member State but who return each day or at least once a week to the frontier zone of a neighboring country in which they reside and of which they are nationals.*
- In the current SBC Annex VII point 5.2 the term ***cross-border workers*** is used.
- Communication COM/2017/0534 final on boosting growth and cohesion in EU border regions refers to *cross-border workers who live on one side of the border and travel to work on the other side of the border on a daily or weekly basis*, further specifying in footnote 25 that *cross-border workers (frontier workers) are defined as EU/EFTA citizens who live in one EU or EFTA country and work in another, moving across borders regularly on a daily or at least weekly basis, regardless of their precise citizenship (provided they are EU-28/EFTA citizens).* Moreover, it includes a map of terrestrial border regions along internal EU.
- The use of two different terms (*frontier workers* and *cross-border workers*) could trigger different interpretations and that there are two different categories.

SLOVAKIA

Article 2 point 27

We propose following amendment:

'instrumentalisation of migrants' refers to a situation where a third country or another entity instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country or another entity to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;

Not only a third country but also another entity (e.g. any criminal organization) may instigate irregular migratory flows into the Union.

Third country may not have full power over their territory, or third country can simply allow such entity to operate this way in its territory.

Article 13 point 4

We support to add the possibility of establishing physical barriers as a means of border surveillance.

Article 13 point 6

We propose specifying Frontex tasks as regards a vulnerability assessment in this case. Frontex should not carry out a specific vulnerability assessment but only request the necessary information.

Member state sends all requested data on a regular basis (each year) including their contingency plans and crisis procedures. Frontex thus has a sufficient amount of updated information on border sections, resources in MS, etc. Frontex should use a data obtained from regular vulnerability assessment and minimally create administratively burden for the MS facing a crisis situation.

Article 21a

We propose to add the new reason for refusal of a entry at the border (add Annex V, part B – Standard form): *(J) is a person subject to temporary travel restrictions to Member States*

If the temporary restriction will be a refusal of a entry at the border, there are no specific reason for this situation.

Article 21a point 2

We suggest specifying this provision in order to prevent the intentional circumvention of these restrictions in such a way that persons do not enter to the Member states of destination directly (although it is possible) but enters the territory of the Member States in another (usually in a neighboring) Member State.

SLOVENIA

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 2016/399 is amended as follows:

(1) Article 2 is modified as follows:

a) point 12 is replaced by the following:

12. ‘border surveillance’ means the surveillance of borders between crossing points and of border crossing points outside fixed opening hours, including preventative measures to detect and prevent unauthorised border crossings or the circumvention of border checks.

b) the following points 27 to 30 are added:

27. ‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;

28. ‘essential travel’ means travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States and listed in Annex XI;

29. ‘non-essential travel’ means travel for purposes other than essential travel;

30. ‘transport hubs’ means airports, sea or river ports, train or bus stations.’

(2) In Article 5, a new paragraph 4 is added:

‘4. In a situation of instrumentalisation of migrants, Member States may limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Any limitations adopted pursuant to the first subparagraph shall be implemented in a manner that is proportionate and that takes full account of the rights of:

(a) the persons enjoying the right of free movement under Union law;

(b) third-country nationals who are long-term residents under Council Directive 2003/109/EC⁹, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term visas, as well as their respective family members;

(c) third-country nationals seeking international protection.’

(3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to detect and prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points and from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively detected or prevented.

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems.

5. In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.

Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.

9 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).

6. Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (c), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council¹⁰, with a view to providing the necessary support to the Member State concerned.

On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance., including the development of standards for border surveillance, in particular the use of surveillance and monitoring technologies at the external borders, taking into account the type of borders, the impact levels attributed to each external border section in accordance with Article 34 of the Regulation (EU) 2019/1896 and other relevant factors.’
- (4) Chapter V is renamed as follows: “Specific measures relating to the external borders”

In Chapter V, the following Article 21a is inserted:

“Article 21a

Restrictions on travel to the European Union

1. This Article shall apply to situations where the European Centre for Disease Prevention and Control or the Commission identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization.
2. The Council, on the basis of a proposal by the Commission, may adopt an implementing regulation, providing for temporary restrictions on travel to the Member States.

Such temporary restrictions on travel may include restrictions on entry to the Member States and other measures considered necessary for the protection of public health in the area without controls at internal borders, such as for instance testing, quarantine, and self-isolation.

10 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.

SPAIN

Recitals (11)

The reference to border control already includes border surveillance, making this specific mention unnecessary, for which its deletion is requested.

Article 2 Definitions

27. 'instrumentalisation of migrants' refers to a situation where a third country instigates irregular migratory flows into the Union by ~~actively~~ encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, ~~where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;~~

Elimination of "actively" and the rest of the paragraph from "external borders". If it is to facilitate a reaction to a perceived threat, specifying examples would mean not including other possible measures. Such examples could be included in the recitals.

Article 13

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to prevent unauthorised border crossings or apprehend individuals crossing the border illegally.

Surveillance may also be carried out by technical means, including electronic means, equipment and surveillance systems, and be assisted by the installation of passive elements.

Annex XI

The proposed list should be flexible, so that MS are able to allow entry to categories of persons whose entry is necessary for MS.

Essential functions or needs referred to in Article 2, point (23) refers to travel for any of the following function or needs:

- i. Healthcare professionals, health researchers, and elderly care professionals in the exercise of their functions;
- ii. Frontier workers;
- iii. Transport personnel;

iv. Diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and humanitarian aid workers and civil protection personnel in the exercise of their functions;

v. Passengers in air transit;

vi. Passengers travelling for imperative family reasons;

vii. Seafarers;

viii. Persons in need of international protection or for other humanitarian reasons.

SWEDEN

From Sweden we have the following questions with regard to the proposed article 21a:

- SE kindly requests written guidance from the Council Legal Service regarding the legal basis for binding restrictions on travel and other measures considered necessary for the protection of public health, such as for instance testing, quarantine, and self-isolation (article 21a). We would appreciate clarification about whether the proposed legal basis is deemed appropriate for the envisaged measures and whether such measures are consistent with the national competence for health as per 168 TFEU.
- MS should have the necessary information to make an informed decision as per article 21a. What criteria/considerations will the Commission's proposal as per article 21a 2 take into account (e.g. subsidiarity, proportionality, envisioned impact, other consequences?). What is the rationale for not specifying these criteria/considerations in the regulation?
- MS should have due insight and influence regarding the decision making related to possible measures as per article 21a. What is the decision making process for the adoption of the implementing regulation as per article 21a 2 (examination procedure or advisory procedure)?
- SE would appreciate further clarification regarding "relevant instruments of the World Health Organization" (article 21a). What instruments does this refer to (the International Health Regulation or other instruments, and in that case which)?

SWITZERLAND

Changes to articles 2, 5, 13

No comments.

New article 21a

CH welcomes this new provision, which allows the Council to issue binding and uniform regulations with regard to temporary restrictions on travel into the Schengen area in case of future epidemic. It amounts to the codification of the management of the Covid-19 pandemic so far and it serves so the interest of legal certainty and better coordination.

We take note that this provision should also concern border sanitary measures. We have stumbled upon this element, as these measures are not “traditional” entry restrictions strictly speaking. Although we recognize the substantive link to entry restrictions in an epidemic situation, we wonder if the Schengen Borders Code is the right place to regulate these aspects.

New annex XI

Three categories of essential workers are missing in this list that are instead present in Council Recommendation 2020/912: Seasonal workers in agriculture; third-country nationals travelling for the purpose of study & highly qualified third-country workers if their employment is necessary from an economic perspective and the work cannot be postponed or performed abroad. Why were these three categories omitted?

Our experience so far in the Covid-19 pandemic has shown that a general hardship clause permitting the authorisation to entry on a case-by-case basis is very useful to allow the necessary flexibility and justice in the decision of a single specific case. Reality often goes beyond what we can regulate in a finite list. We suggest to include such a hardship clause in Annex XI in order to enables Schengen States to grant in their own competence justified exceptions on a case-by-case basis.
