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2021/0398 (NLE)

Proposal for a

## **COUNCIL RECOMMENDATION**

**amending Council Recommendation (EU) 2020/1632 as regards a coordinated approach to facilitate safe travel during the COVID-19 pandemic in the Schengen area**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

The Union shall constitute an area of freedom, security and justice, in which the absence of internal border controls for persons shall be ensured. Under the Schengen *acquis*, internal borders may be crossed at any point without a border check being carried out on persons, irrespective of their nationality. This includes third country nationals lawfully residing in the EU and third country nationals who have legally entered the territory of a Member State and who may move freely within the territories of all other Member States during no more than 90 days in any 180-day period.

In response to the outbreak of the COVID-19 pandemic, the Member States have adopted various, and often diverging, measures to limit the spread of the virus, some of which have had an impact also on the right of third country-nationals legally staying or residing in the Union to travel freely between the territories of the Member States, such as restrictions on entry or requirements for cross-border travellers to undergo tests for SARS-CoV-2 infection. When adopting and applying restrictions to free movement, Member States are under an obligation to respect principles of EU law, in particular proportionality and non-discrimination.

Unilateral measures in this area have caused significant disruptions as businesses, citizens, residents and visitors were confronted with a wide array of diverging and rapidly changing measures. This is particularly harmful in a situation where the European economy has already been significantly affected by the virus. Such divergence may also undermine public trust in health measures, in particular vaccination, which could in turn exacerbate the epidemiological situation.

To ensure increased coordination among Member States, on 13 October 2020 the Council adopted, based on a proposal of the Commission, Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic<sup>1</sup>. The Council Recommendation established a coordinated approach on the following key points: the application of common criteria and thresholds when deciding whether to introduce restrictions to free movement, a mapping of the risk of COVID-19 transmission based on an agreed colour code, and a coordinated approach as to the measures, if any, which may appropriately be applied to persons moving between areas, depending on the level of risk of transmission in those areas. This Council Recommendation was later updated in light of developments in the epidemiological situation<sup>2</sup>.

In parallel, with regard to third-country nationals legally staying or residing in the EU, on 30 October 2020, the Council adopted Recommendation (EU) 2020/1632 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen Area<sup>3</sup>.

To facilitate safe free movement during the COVID-19 pandemic, the European Parliament and the Council adopted on 14 June 2021 Regulations (EU) 2021/953 and (EU) 2021/954 on the EU Digital COVID Certificate. The EU Digital COVID Certificate has proved to be a

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<sup>1</sup> OJ L 337, 14.10.2020, p. 3.

<sup>2</sup> Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 36 I, 2.2.2021, p. 1.

<sup>3</sup> OJ L 366, 4.11.2020, p. 25.

fundamental tool to help restoring travel within the Union<sup>4</sup>. To make best use of the EU Digital COVID Certificate framework, the Council also amended, on the same day, Council Recommendation (EU) 2020/1475<sup>5</sup>. According to the amended rules, vaccinated or recovered persons should be exempted from restrictions applied in line with the Recommendation.

Since June 2021, the rollout of the EU Digital COVID Certificate has progressed at a rapid pace. As of 13 October 2021, Member States have issued more than 591 million EU Digital COVID Certificates, made up of 437 million vaccination certificates, 144 million test certificates, and 10 million certificates of recovery<sup>6</sup>. The EU Digital COVID Certificate is thus a widely available and reliably accepted tool to facilitate free movement during the COVID-19 pandemic. According to a Eurobarometer survey published in September 2021, about two-thirds (65%) of respondents agreed that the EU Digital COVID Certificate is the safest means for free travel in Europe during the COVID-19 pandemic<sup>7</sup>. Almost all Member States also use the EU Digital COVID Certificate for domestic purposes.

The EU Digital COVID Certificate framework is not only used successfully by the EU Member States, the three non-EU European Economic Area countries<sup>8</sup> and Switzerland<sup>9</sup>, but also by an increasing number of third countries<sup>10</sup>, with more third countries expected to join in the future. As a result, the EU Digital COVID Certificate framework is the only large-scale system operational internationally<sup>11</sup>.

At the same time, the epidemiological situation within the Union, characterised by a high and increasing overall case notification rate, remains challenging, justifying the maintenance of measures aimed at protecting public health. The European Centre for Disease Prevention and Control (ECDC) recommends the further increase of COVID-19 vaccination coverage in all eligible age groups, as well as the maintenance of non-pharmaceutical measures, such as the

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<sup>4</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) facilitate free movement during the COVID-19 pandemic and Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic, OJ L 211, 15.6.2021, p. 24.

<sup>5</sup> Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 213I, 16.6.2021, p. 1.

<sup>6</sup> Report from the Commission to the European Parliament and the Council pursuant to Article 16(1) of Regulation (EU) 2021/953 of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (COM(2021) 649 final).

<sup>7</sup> Available at: <https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2021/soteu-flash-survey/soteu-2021-report-en.pdf>

<sup>8</sup> Iceland, Liechtenstein and Norway.

<sup>9</sup> Union citizens and Swiss nationals enjoy reciprocal rights of entry and residence based on the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ L 114, 30.4.2002, p. 6).

<sup>10</sup> [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate\\_en#recognition-of-covid-certificates-from-third-non-eu-countries](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en#recognition-of-covid-certificates-from-third-non-eu-countries)

<sup>11</sup> COM(2021) 649 final.

use of face masks, improved ventilation in closed spaces and physical distancing measures, as major tools to reduce the further spread of the virus and its variants<sup>12</sup>.

On 25 November 2021, the Commission adopted a proposal for a Council Recommendation on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475<sup>13</sup>. In it, the Commission proposes to adapt the coordinated approach in the light of two important developments with an impact on the epidemiological situation. First, vaccine uptake has increased significantly, and second, the rollout of the EU Digital COVID Certificate, also available to third country nationals legally staying or residing in the EU, has progressed at rapid pace. The rationale behind the proposal is further explained in the Commission proposal for a Council Recommendation on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and repealing Recommendation (EU) 2020/1475<sup>14</sup>.

As a result, and to ensure consistency, Council Recommendation (EU) 2020/1632 should be amended to refer to the new Recommendation, once adopted.

- **Consistency with existing policy provisions in the policy area**

This recommendation serves to implement the existing provisions related to restrictions of travel within the Schengen area on grounds of public health.

- **Consistency with other Union policies**

This recommendation is in line with other Union policies, including those regarding the freedom of movement of Union citizens, the protection of public health, the absence of internal border controls within the Schengen Area.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The Treaty on the Functioning of the European Union (TFEU), and in particular Article 77 (2)(c) and (e) and Article 292.

- **Subsidiarity**

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

This applies in the current situation, as a consistent approach is necessary to avoid disruptions caused by unilateral and not sufficiently coordinated measures restricting travels within the Schengen Area. Article 77(1)(a) TFEU stipulates that the Union shall constitute an area of freedom, security and justice, in which the absence of internal border controls for persons shall be ensured. Under the Schengen *acquis*, internal borders may be crossed at any point without a border check on persons being carried out, irrespective of their nationality. This includes third country nationals lawfully residing in the EU and third country nationals who have legally entered the territory of a Member State, who may travel freely within the territories of all other Member States no more than 90 days in any 180-day period.

In addition, Article 77(2) (c) and (e) (TFEU) stipulate that the conditions under which nationals of third countries shall have the freedom to travel within the Union and that the

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<sup>12</sup> <https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-rapid-risk-assessment-16th-update-september-2021.pdf>

<sup>13</sup> COM(2021)749 final.

<sup>14</sup> COM(2021)749 final

absence of any controls on persons, whatever their nationality, when crossing internal borders shall be laid out by European Parliament and the Council, acting in accordance with the ordinary legislative procedure, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them.

Pursuant to Article 168(6), the Council, on a proposal from the Commission, may also adopt recommendations for the purposes of ensuring a high level of human health protection in the definition and implementation of all Union policies and activities.

- **Proportionality**

The adoption of unilateral or uncoordinated measures is likely to lead to restrictions on travels within the Schengen area that are inconsistent and fragmented, resulting in uncertainty for third country nationals who have legally entered the territory of a Member State and who may travel freely within the territories of all other Member States. The proposal does not go beyond what is necessary and proportionate for achieving the intended objective.

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

- **Ex-post evaluations/fitness checks of existing legislation**

n.a.

- **Stakeholder consultations**

The proposal takes into account the discussions held at regular intervals with Member States, the information available on the evolving epidemiological situation, and relevant available scientific evidence.

- **Impact assessment**

n.a.

- **Fundamental rights**

n.a.

### **4. BUDGETARY IMPLICATIONS**

None.

### **5. OTHER ELEMENTS**

n.a.

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## **COUNCIL RECOMMENDATION**

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(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77 (2)(c) and (e) and Article 292, first and second sentence thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) In accordance with Article 67 TFEU, the Union shall constitute an area of freedom, security and justice, in which the absence of internal border controls for persons shall be ensured. Under the Schengen *acquis*, internal borders may be crossed at any point without a border check on persons being carried out, irrespective of their nationality. This includes third country nationals lawfully residing in the EU and third country nationals who have legally entered the territory of a Member State and who may travel freely within the territories of all other Member States for up to 90 days in any 180-day period.
- (2) On 30 January 2020, the Director-General of the World Health Organization (WHO) declared a public health emergency of international concern over the global outbreak of novel coronavirus, which causes Coronavirus disease 2019 (COVID-19). On 11 March 2020, the WHO made the assessment that COVID-19 can be characterised as a pandemic.
- (3) To limit the spread of the SARS-Cov-2 virus, the Member States have adopted various measures, some of which have had an impact on the right to reside and travel freely within the territory of the Member States, including for third-country nationals legally staying or residing on a Member State territory, such as restrictions on entry or requirements for cross-border travellers to undergo quarantine. These measures have had a detrimental and disproportionate impact due to checks on persons, whatever their nationality, when crossing internal borders within the Schengen area.
- (4) On 13 October 2020, on a proposal from the Commission, the Council adopted Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic<sup>15</sup>. That recommendation defines general principles and common criteria, including common thresholds when considering restrictions to free movement in response to the COVID-19 pandemic. It also establishes a common framework as regards possible measures for travellers

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<sup>15</sup> Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 3).

coming from higher risk areas. It recommends to Member States to coordinate and to communicate to public when restrictive measures are adopted.

- (5) Council Recommendation (EU) 2020/1632 recommends that the general principles, common criteria, common thresholds and common framework of measures, including recommendations on coordination and communication as laid down in Recommendation (EU) 2020/1475 should also be applied with respect to travel within the area without controls at internal borders.
- (6) In order to take account of developments in the evolution of the COVID-19 pandemic since the adoption of Recommendation (EU) 2020/1475, the Council has, on the basis of a proposal by the Commission, replaced that Recommendation with [Recommendation (EU) 2021/XXXX *[number and date to be inserted by the OJ]*].
- (7) In order to ensure that the common criteria, thresholds and framework of measures applied by Member States to facilitate safe travel within the area without controls at internal borders during the COVID-19 pandemic remain up-to-date and fully aligned with the common approach intended to facilitate the freedom of movement as laid down in Recommendation (EU) 2021/XXXX], the reference in Council Recommendation (EU) 2020/1632 to Recommendation (EU) 2020/1475 should be replaced by a reference to [Recommendation (EU) 2021/XXXX]. This Recommendation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC<sup>16</sup>; Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (8) As regards Bulgaria, Croatia, Cyprus and Romania, this Recommendation constitutes a development of the Schengen *acquis* within, respectively, the meaning of Article 3(2) of the 2003 Act of Accession, Article 4(2) of the 2005 Act of Accession and Article 4(2) of the 2011 Act of Accession.
- (9) As regards Iceland and Norway, this Recommendation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC<sup>17</sup>.
- (10) As regards Switzerland, this Recommendation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC<sup>18</sup> read in conjunction with Article 3 of Council Decision 2008/146/EC<sup>19</sup>.

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<sup>16</sup> Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).

<sup>17</sup> OJ L 176, 10.7.1999, p. 36.

<sup>18</sup> OJ L 53, 27.2.2008, p. 52.

<sup>19</sup> Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

- (11) As regards Liechtenstein, this Recommendation constitutes a development of provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 1 point C, of Decision 1999/437/EC<sup>20</sup> read in conjunction with Article 3 of Decision 2011/350/EU<sup>21</sup>,

HAS ADOPTED THIS RECOMMENDATION:

Recommendation (EU) 2020/1632 is amended as follows:

In the sole recommendation, “Council Recommendation (EU) 2020/1475” is replaced by “Council Recommendation 2021/XXXX”.

Done at Brussels,

*For the Council  
The President*

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<sup>20</sup> OJ L 160, 18.6.2011, p. 21.

<sup>21</sup> Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons, OJ L 160, 18.6.2011, p. 19.