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2021/0021 (NLE)

Proposal for a

COUNCIL RECOMMENDATION

amending 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

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 13 October 2020, the Council adopted Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic¹. The 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.

Council Recommendation (EU) 2020/1475 seeks to ensure increased coordination among Member States considering the adoption of measures restricting free movement on grounds of public health in the context of the pandemic. The Recommendation states clearly that when adopting and applying restrictions to free movement, Member States should respect principles of EU law, in particular proportionality and non-discrimination.

The Recommendation tasked the Commission, supported by European Centre for Disease Prevention and Control, to regularly assess the criteria, data needs and thresholds outlined therein in view of the evolving epidemiological situation and, to transmit its findings to the Council for its consideration, together with a proposal to amend the Recommendation, where necessary.

As noted in the Commission's Communication of 19 January 2021 on a united front to beat COVID-19², the turn of the year is likely to mark the beginning of the end of the COVID-19 pandemic. Thanks to pioneering science and remarkable political and industrial efforts, what is normally done in ten years was achieved in ten months and with speedy, mass vaccinations being rolled out, millions of Europeans have now been vaccinated against COVID-19.

However, while infections rise and until vaccinations are done on a scale required to turn the tide of the pandemic, continued vigilance, containment measures and public health controls will be required. The EU and Member States must act now to contain the risk of a potentially harsher third wave of infections, characterised by the more transmissible new variants of the virus, which are already present across Europe.

These new variants of the virus³ are a real and serious cause for concern. While currently there is no evidence that these cause more severe disease, the variants appear to be somewhere between 50–70 % more transmissible⁴. This means that the virus can spread more easily and more quickly, increasing the burden on overstretched healthcare systems. This is one likely cause for the substantial rises in cases in most Member States over recent weeks.

As a result, travel will continue to pose a particular challenge. All non-essential travel, especially to and from high risk areas, should be strongly discouraged until the epidemiological situation has considerably improved.

¹ OJ L 337, 14.10.2020, p. 3.

² COM(2021) 35 final.

³ Variants "B117" and "501Y.V2".

⁴ ECDC Risk Assessment: Risk related to spread of new SARS-CoV-2 variants of concern in the EU/EEA.

This is supported by the recommendations issued by the European Centre for Disease Prevention and Control (ECDC) in its rapid risk assessment of 21 January 2021⁵. ECDC assessed the probability of the introduction and community spread of variants of concern in the EU/EEA as very high due to their increased transmissibility. Such an increased transmissibility was likely to lead to an increased number of infections. This, in turn, was likely to lead to higher hospitalisation and death rates across all age-groups, but particularly for those in older age groups or with co-morbidities. Consequently, ECDC considered that stricter non-pharmaceutical interventions were needed to reduce transmission and relieve the pressure on healthcare systems. Therefore, ECDC considered the impact of introduction and community spread to be high. ECDC assessed the overall risk associated with the introduction and community spread of variants of concern as being high/very high.

In order to slow down the importation and spread of the new SARS-CoV-2 variants of concern, ECDC recommended, as one of the options for response, that non-essential travel should be avoided. In addition to recommendations against non-essential travel, and restrictions on travel for those infected, travel measures such as the testing and quarantining of travellers should be maintained, in particular for travellers from areas with a higher incidence of the new variants. If sequencing is inadequate to exclude the possibility of a higher incidence of the new variants, as per guidance by ECDC on genomic sequencing, proportionate travel measures should also be considered from areas where there is a continued high level of community transmission.

As provided for in Council Recommendation (EU) 2020/1475, the Commission, supported by ECDC, has been regularly assessing the criteria, data needs and thresholds outlined in that Recommendation in view of the evolving epidemiological situation. In view of the abovementioned challenges posed by the more infectious variants of concern, the Commission considers that Council Recommendation (EU) 2020/1475 should be adapted.

Proportionate, non-discriminatory travel restrictions and testing of travellers should be maintained or reinforced, in particular from areas with a higher incidence of variants of concern. Where required, quarantine of travellers should be put in place, with appropriate exceptions for travellers with an essential function or need.

Such targeted measures aim to prevent the need for border closures or blanket travel bans and suspension of flights, land transport and water crossings between Member States, which are not justified as more targeted measures have sufficient impact and cause less disruption. The system of “Green Lanes”⁶ should keep transport flows moving, in particular to ensure the free movement of goods, thus avoiding supply chain disruptions.

⁵ European Centre for Disease Prevention and Control. Risk related to spread of new SARS-CoV-2 variants of concern in the EU/EEA, first update – 21 January 2021. ECDC: Stockholm; 2021. Available at: <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-risk-related-to-spread-of-new-SARS-CoV-2-variants-EU-EEA-first-update.pdf>

⁶ See Communication from the Commission on upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence, COM(2020) 685 final, and Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom, OJ L 436, 28.12.2020, p. 72.

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

This recommendation serves to facilitate the implementation of existing provisions related to restrictions of the freedom of movement on grounds of public health.

- **Consistency with other Union policies**

This recommendation is in line with other Union policies, including those regarding public health and internal border controls.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The Treaty on the Functioning of the European Union (TFEU), and in particular Articles 21(2), 168(6) and 292.

- **Subsidiarity (for non-exclusive competence)**

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 further disruptions caused by unilateral and not sufficiently coordinated measures restricting free movement within the Union. Article 21(1) TFEU stipulates that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them. If action by the Union should prove necessary to attain this objective, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of these rights.

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 free movement that are inconsistent and fragmented, resulting in uncertainty for Union citizens when exercising their EU rights. 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 since the first temporary restrictions were implemented, the information available on the evolving epidemiological situation and relevant available scientific evidence.

- **Impact assessment**

n.a.

- **Fundamental rights**

Freedom of movement is a fundamental right enshrined in Article 45 of the Charter of Fundamental Rights of the European Union. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedom of others. Article 21 of the Charter prohibits restriction on ground of nationality within the scope of application of the Treaties.

Any limitations to the freedom of movement within the Union justified on grounds of public health must be necessary, proportionate and based on objective and non-discriminatory criteria. They must be suitable for securing the attainment of the objective that they pursue; and not go beyond what is necessary in order to attain that objective.

4. BUDGETARY IMPLICATIONS

None.

Proposal for a

COUNCIL RECOMMENDATION

amending 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

(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 21(2), Article 168(6) and Article 292, first and second sentence thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 13 October 2020, the Council adopted Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic⁷. The 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.
- (2) Using the criteria and thresholds established in that Recommendation, the European Centre for Disease Prevention and Control has been publishing, once a week, a map of Member States, broken down by regions, in order to support Member States' decision-making⁸.
- (3) As provided for in recital 26 of that Recommendation, the Commission, supported by European Centre for Disease Prevention and Control, should regularly assess the criteria, data needs and thresholds outlined in this Recommendation, including whether to consider other criteria, such as hospitalisation rates or intensive care unit occupancy rates, in view of the evolving epidemiological situation.
- (4) Two factors impact the current development of the pandemic. On the one hand, since the beginning of 2021, mass vaccinations is being rolled out and millions of Europeans have been vaccinated against COVID-19 already. However, as noted in the Communication from the Commission to the European Parliament, the European Council and the Council on a united front to beat COVID-19⁹, while infections rise and until vaccinations are administered on a scale required to turn the tide of the

⁷ OJ L 337, 14.10.2020, p. 3.

⁸ Available at: <https://www.ecdc.europa.eu/en/covid-19/situation-updates/weekly-maps-coordinated-restriction-free-movement>

⁹ COM(2021) 35 final.

pandemic, continued vigilance, containment measures and public health controls will be required. In particular, the EU and Member States must act to contain the risk of a potentially harsher next wave of infections, characterised by the more transmissible new variants of the SARS-CoV-2 virus, which are already present across Europe.

- (5) The recent emergence of new variants of the virus is a serious cause for concern. While currently there is no evidence that these cause more severe disease, the variants appear to be somewhere between 50–70 % more transmissible¹⁰. This means that the virus can spread more easily and more quickly, increasing the burden on overstretched healthcare systems. This is one likely cause for the substantial rises in cases in most Member States over recent weeks.
- (6) In its latest risk assessment on spread of the new SAR-CoV-2 variants of concern in the EU/EEA¹¹, the European Centre for Disease Prevention and Control states that the risk associated with the introduction and community spread of variants of concern has been increased to high/very high.
- (7) As one of the options to respond to this risk, the European Centre for Disease Prevention and Control recommends that in order to slow down the importation and spread of the new SARS-CoV-2 variants of concern, non-essential travel should be avoided. In addition to recommendations against non-essential travel, and restrictions on travel for those infected, travel measures such as the testing and quarantining of travellers should be maintained, in particular for travellers from areas with a higher incidence of the new variants. If sequencing is still insufficient to exclude the possibility of a higher incidence of the new variants, as per European Centre for Disease Prevention and Control guidance on genomic sequencing, proportionate travel measures should also be considered from areas where there is a continued high level of community transmission.
- (8) In view of the recommendations from the European Centre for Disease Prevention and Control, Council Recommendation (EU) 2020/1475 should therefore be amended accordingly.
- (9) In order to take into account the very high level of community transmission, possibly linked to the increased transmissibility of the new variants of concern, a new colour, dark red, should be added to the map published weekly by the European Centre for Disease Prevention and Control. This colour should indicate areas where the virus is circulating at very high levels, including because of more infectious variants of concern.
- (10) Member States should also take into account the prevalence of new SARS-CoV-2 variants of concern. The Communication from the Commission to the European Parliament, the European Council and the Council on a united front to beat COVID-19 highlights the need for Member States to urgently increase genome sequencing to 5-10% of positive test results, if needed by using capacity of the European Centre for

¹⁰ ECDC Risk Assessment: Risk related to spread of new SARS-CoV-2 variants of concern in the EU/EEA, available at: <https://www.ecdc.europa.eu/en/publications-data/covid-19-risk-assessment-spread-new-sars-cov-2-variants-eueea>

¹¹ European Centre for Disease Prevention and Control. Risk related to spread of new SARS-CoV-2 variants of concern in the EU/EEA, first update – 21 January 2021. ECDC: Stockholm; 2021. Available at: <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-risk-related-to-spread-of-new-SARS-CoV-2-variants-EU-EEA-first-update.pdf>

Disease Prevention and Control to identify the progression of the variants or detect new ones.

- (11) The high level of community transmission in most Member States means that travel will continue to pose a particular challenge. All non-essential travel, especially to and from high risk areas, should be strongly discouraged until the epidemiological situation has considerably improved, particularly in the light of the outbreak of new variants. Given that the risk of infection or transmission is similar for domestic and cross-border travel, Member States should ensure coherence between the measures applied to both types of non-essential travel.
- (12) In the oral conclusions drawn following the video conference of the members of the European Council on 21 January 2021¹², the President of the European Council noted that borders need to stay open to ensure the functioning of the Single market, including the flow of essential goods and services. No indiscriminate travel bans should be imposed. However, measures restricting non-essential travel in the EU may be needed to contain the spread of the virus. While upholding its principles, the Council may need to review its recommendations on intra-EU travel and non-essential travels into the EU in light of the risks posed by the new virus variants.
- (13) A coordinated approach aims to prevent the reintroduction of internal border controls. Border closures or blanket travel bans, as well as suspension of flights, land transport and water crossings, are not justified, as more targeted measures, such as mandatory quarantine or testing, have sufficient impact and cause less disruption. The system of “Green Lanes”¹³ should keep transport flows moving, in particular to ensure the free movement of goods and services, thus avoiding supply chain disruptions.
- (14) Any restrictions to the free movement of persons must continue to be applied in compliance with the general principles of Union law, in particular proportionality and non-discrimination, including on the basis of nationality. Any measures taken should thus not extend beyond what is strictly necessary to safeguard public health. Clear, timely and comprehensive information of the public remains crucial in order to ensure predictability, legal certainty and compliance by citizens. Restrictions should be adequately enforced and any sanctions laid down should be effective and proportionate.
- (15) On 11 January 2020, the Health Security Committee agreed recommendations for a common EU approach regarding isolation measures for COVID-19 patients and quarantine measures for contacts and travellers. The recommendations of the Health Security Committee¹⁴ regarding quarantine measures for travellers should be applied

¹² Oral conclusions drawn by President Charles Michel following the video conference of the members of the European Council on 21 January 2021, available at: <https://www.consilium.europa.eu/en/press/press-releases/2021/01/21/oral-conclusions-by-president-charles-michel-following-the-video-conference-of-the-members-of-the-european-council-on-21-january-2021/>

¹³ Communication from the Commission on upgrading the transport Green Lanes to keep the economy going during the COVID-19 pandemic resurgence, COM(2020) 685 final, and Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom, OJ L 436, 28.12.2020, p. 72.

¹⁴ Recommendations for a common EU approach regarding isolation for COVID-19 patients and quarantine for contacts and travellers, agreed by the Health Security Committee on 11 January 2020, https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/hsc_quarantine-isolation_recomm_en.pdf

by Member States when imposing travel-related quarantine. In particular, where quarantine requirements are imposed for travel from a high-risk area, shortening the required quarantine duration should be considered should a negative test be obtained after 5 to 7 days upon-entry, unless the traveller develops symptoms.

- (16) Given the increase in COVID-19 testing capacity, Council Recommendation (EU) 2020/1475 should be amended to give Member States the option to require travellers coming from areas not classified as ‘green’ to do a test prior to departure.
- (17) In view of the high level of community transmission in areas to be classified as ‘dark red’, persons travelling from such areas for non-essential purposes should be required to undergo a test prior to departure as well as quarantine, in line with the recommendations of the Health Security Committee, after arrival at their destination. Where travellers are not quarantining at their place of residence, appropriate physical conditions for quarantine premises as well as the protection and provision of care for children in quarantine conditions should be ensured and be in line with the WHO Guidelines¹⁵.
- (18) Where persons returning to their Member State of residence have been unable to undergo a test prior to departure, they should be allowed to undergo a test after arrival, in order to avoid that they are prevented from returning to their homes.
- (19) Given the high level of infections in ‘dark red’ areas, essential travellers should also be required to undergo a test for COVID-19 infection and quarantine, provided that this does not have a disproportionate impact on the exercise of their essential function or need, for example because the traveller’s exposure to the general population at destination is very limited. Where a Member State, taking into account the specific epidemiological situation, nevertheless requires tests for transport workers and service providers, this should not lead to transport disruptions¹⁶. To maintain supply chains, quarantine requirements should not apply to transport staff while exercising this essential function.
- (20) Restrictions linked to cross-border travel are particularly disruptive for persons who cross them daily or frequently to go to work or school, visit close relatives, seek medical care, or to take care of loved ones. Such persons should not be required to undergo quarantine when crossing borders for this essential purpose, given the significant disruption this causes to people’s lives and livelihoods as well as the economy as a whole. As long as the epidemiological situation is comparable on both sides of the border, requiring such persons to undergo frequent tests merely because they cross a border appears unnecessary. Close coordination among Member States and cross-border regions will remain particularly important.
- (21) In view of the evolving epidemiological situation, the Commission, supported by the European Centre for Disease Prevention and Control, should continue to regularly assess the criteria, data needs and thresholds outlined in this Recommendation, including whether other criteria should be considered or the thresholds adapted, and

¹⁵ WHO reference number: WHO/2019-nCoV/IHR_Quarantine/2020.3. Available at: [https://www.who.int/publications/i/item/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-\(covid-19\)](https://www.who.int/publications/i/item/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-(covid-19))

¹⁶ See Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom, OJ L 436, 28.12.2020, p. 72.

transmit its findings to the Council for its consideration, together with a proposal to amend the Recommendation, where necessary,

HAS ADOPTED THIS RECOMMENDATION:

Council Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic is amended as follows:

1. In point 10, letter (c) is replaced by the following:

“(c) red, if the 14-day cumulative COVID-19 case notification rate ranges from 50 to 150 and the test positivity rate of tests for COVID-19 infection is 4% or more, or if the 14-day cumulative COVID-19 case notification rate is more than 150 but less than 500,
2. In point 10, the following letter (ca) is inserted:

“(ca) dark red, if the 14-day cumulative COVID-19 case notification rate is 500 or more;”.
3. In point 13, letter (a) is replaced by the following:

“(a) Member States should respect the differences in the epidemiological situation between areas classified as ‘orange’, ‘red’ or ‘dark red’ and act in a proportionate manner;”.
4. In point 13, letter (d) is replaced by the following:

“(d) Member States should take into account testing strategies and pay particular attention to the situation of areas with high testing rates;”.
5. In point 13, the following letter (e) is added:

“(e) Member States should take into account the prevalence of SARS-CoV-2 variants of concern.”.
6. The following point 16a is inserted after the heading “Common framework as regards possible measures for travellers coming from higher-risk areas”:

“Member States should strongly discourage all non-essential travel to and from areas classified as ‘dark red’ and discourage all non-essential travel to and from areas classified as ‘red’ pursuant to point 10. In this context, Member States should ensure coherence between measures taken regarding cross-border travel and travel within Member States’ own territory.

At the same time, Member States should seek to avoid disruptions to essential travel, to keep transport flows moving in line with the “Green Lanes” system as well as avoid disruptions to supply chains and the movement of workers and self-employed persons travelling for professional or business reasons.”.
7. In point 17, letters (a) and (b) are replaced by the following:

“(a) undergo quarantine as recommended by the Health Security Committee¹⁷; and/or

¹⁷ Recommendations for a common EU approach regarding isolation for COVID-19 patients and quarantine for contacts and travellers, agreed by the Health Security Committee on 11 January 2020, https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/hsc_quarantine-isolation_recomm_en.pdf

(b) undergo a test for COVID-19 infection prior to and/or after arrival. This could be either an RT-PCR test or a rapid antigen test listed in the common and updated list of COVID-19 rapid antigen tests established on the basis of Council Recommendation of 21 January 2021 on a common framework for the use and validation of rapid antigen tests and the mutual recognition of COVID-19 test results in the EU¹⁸.”.

8. In point 17, the following subparagraph is deleted:

“Member States may offer travellers the option to substitute the test mentioned in letter (b) by a test for COVID-19 infection carried out prior to arrival.”.

9. In point 17, the following subparagraph is added:

“Member States should offer sufficient testing capacity and accept digital test certificates, while ensuring that doing so does not detract from the provision of essential public health services, in particular in terms of laboratory capacity.”.

10. The following point 17a is inserted:

“Member States should require persons travelling from an area classified as ‘dark red’ pursuant to point 10(ca) to undergo both a test for COVID-19 infection prior to arrival and to undergo quarantine as recommended by the Health Security Committee.

Member States should adopt, maintain or reinforce non-pharmaceutical interventions, in particular in areas classified as ‘dark red’, strengthen testing and contact tracing efforts and increase the level of surveillance and sequencing of a representative sample of community COVID-19 cases, in order to control the spread and impact of the SARS-CoV-2 emerging variants with increased transmissibility.”.

11. The following point 17b is inserted:

“Member States should offer persons residing in their territory the option to substitute a test prior to arrival mentioned in points 17(b) and 17a by a test for COVID-19 infection carried out after arrival, in addition to any applicable quarantine requirements.”.

12. The following point 19a is inserted:

“Pursuant to point 17a, travellers with an essential function or need travelling from a ‘dark red’ area should fulfil testing requirements and undergo quarantine, provided that this does not have a disproportionate impact on the exercise of their function or need.

By way of derogation, transport workers and transport service providers pursuant to point 19(b) should in principle not be required to undergo a test for COVID-19 infection in line with points 17(b) and 17a. Where a Member State requires transport workers and transport service providers to undergo a test for COVID-19 infection, rapid antigen tests should be used, and this should not lead to transport disruptions. Should transport or supply chain disruptions occur, Member States should lift or repeal any such systematic testing requirements immediately in order to preserve the functioning of the “Green Lanes”. Transport workers and transport service providers should not be required to undergo quarantine in line with points 17(a) and 17a while exercising this essential function.”.

¹⁸ <https://data.consilium.europa.eu/doc/document/ST-5451-2021-INIT/en/pdf>

13. The following point 19b is inserted:

“Member States should not require persons living in border regions and travelling across the border on a daily or frequent basis for the purposes of work, business, education, family, medical care or caregiving to undergo quarantine. If a testing requirement on cross-border travel is introduced in these regions, the frequency of tests on such persons should be proportionate. If the epidemiological situation on both sides of the border is comparable, no travel-related testing requirement should be imposed. Persons who claim that their situation falls within the scope of this point could be required to provide documentary evidence or submit a declaration to this effect.”.

14. Point 21 is replaced by the following:

“Any measures applied to persons arriving from an area classified as ‘dark red’, ‘red’, ‘orange’ or ‘grey’ pursuant to point 10 may not be discriminatory, that is, should apply equally to returning nationals of the Member State concerned.”.

Done at Brussels,

For the Council
The President