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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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COMMISSION RECOMMENDATION

of 12.5.2017

on proportionate police checks and police cooperation in the Schengen area

COMMISSION RECOMMENDATION

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on proportionate police checks and police cooperation in the Schengen area

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) In an area without controls at internal borders, it is necessary to have a common response to cross-border threats affecting the public policy or internal security of that area. The proper functioning of such an area relies not only on the uniform application of the Union acquis, but also on the use of national competences with regard to the maintenance of law and order and the safeguarding of internal security in line with the objectives of Schengen acquis. For the proper functioning of the Schengen area, it is important to consider not only how the Member States manage their external borders, but also how they exercise their police powers, across their entire territory as well as in the border areas.
- (2) In 2012, the Commission issued Guidelines for Member States concerning police measures in the internal border zones accompanying the First Bi-annual report on the functioning of the Schengen area.¹ Based on the experience of the last three years, those guidelines should be reviewed. This Recommendation serves that purpose. This Recommendation builds upon the 'lessons learnt' over the last three years in addressing threats to public policy or internal security and good practice in exercising police powers and cross-border police cooperation, relevant case-law on the police checks, Schengen evaluations conducted so far in the field of police cooperation and new possibilities resulting from technological developments.

¹ COM(2012)230, Report covering period 1 November 2011 - 30 April 2012.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0230:FIN:EN:PDF>

- (3) In accordance with Regulation (EU) 2016/399 of the European Parliament and of the Council², the absence of border controls at internal borders does not affect the exercise of police powers by competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks. The exercise of police powers should not, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective, are based on general police information or experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, and are carried out on the basis of spot-checks. In light of the judgement of the Court of Justice in the Adil case³, this is neither a cumulative nor an exhaustive list of criteria, meaning that these criteria should not be considered as prescribing the only set of possible police measures in border areas.⁴
- (4) The provisions of Article 23 of Regulation (EU) 2016/399 and the wording of Article 72 of the Treaty on the Functioning of the European Union confirm that the abolition of internal border controls has not affected the prerogatives of the Member States with regard to the maintenance of law and order and the safeguarding of internal security.
- (5) Police powers applicable across the territory of a Member State are compatible with Union law. Accordingly, Member States may carry out police checks also in the border areas, including internal border areas, in the context of the police powers that exist under national law applicable to the entire territory.
- (6) In the current circumstances of threats related to public policy or internal security from terrorism and other serious cross-border crime and risks of secondary movements of persons who have irregularly crossed the external borders, the intensification of police checks in the entire territory of Member States, including in border areas and the carrying-out of police checks along the main transport routes such as motorways and railways, may be considered necessary and justified. The decision on such checks, their location and intensity remains fully in the hands of the Member States and should always be proportionate to the identified threats. Such checks may prove more efficient than internal border controls, notably as they are more flexible than static border controls at specific border crossing points and can be adapted more easily to evolving risks.

² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

³ Judgement of the Court of Justice of 19 July 2012, Adil, ECLI:EU:C:2012:508, C-278/12 PPU.

⁴ Judgement Adil, ECLI:EU:C:2012:508, point 65.

- (7) Border areas may have specific risks as regards cross-border crime and may also be more exposed to certain offences committed throughout the entire territory such as burglaries, vehicle theft, drugs trafficking, unauthorised secondary movement of third-country nationals, migrant smuggling or trafficking in human beings. The risks of breaches of the rules on the legality of residence within the territory might be also higher in border areas. Taking account of those risks, Member States may decide to carry out and intensify police checks in border areas, which are adapted to the specific risks of border areas, as long as those measures do not have an effect equivalent to border checks.
- (8) Modern technologies to monitor traffic flows, notably on motorways and other important roads determined by the Member States, can be instrumental in addressing threats to public policy or internal security. From that perspective, the use of monitoring and surveillance systems allowing for automatic number plate recognition for law enforcement purposes should therefore be encouraged, subject to the applicable rules concerning camera surveillance, including data protection safeguards. This could help the surveillance of the main European transport corridors, used by considerable numbers of travellers and vehicles to move across the Union, without a disproportionate impact to the traffic flow.
- (9) It is only in cases of police powers under national legislation which are specifically limited to border areas and imply identity checks even without concrete suspicion, that Member States have to provide for a specific framework to ensure that those police checks do not amount to measures equivalent to border controls. While in the Melki judgment⁵ the Court of Justice recognised that Member States may establish such specific police powers for internal border areas allowing for enhanced identity checks only in those parts of the territory, it ruled that in those situations, Member States must provide specific provisions in relation to the intensity and frequency of such controls. In addition, if a check does not depend upon the behaviour of the person checked or on specific circumstances or information giving rise to a risk for public policy or internal security, Member States are to provide for the necessary framework to guide its practical application to avoid that such police measures have an effect equivalent to border controls.
- (10) Over the past three years a number of Member States have intensified police checks in the border areas in the context of the increased threats to public policy or internal security (namely, Austria, Belgium, Czech Republic, Germany, Denmark, Netherlands, France, Italy, Slovenia, and Switzerland). Those checks sometimes focused on specific means of transport, for instance, trains, or specific border areas. The use of technological means is also increasing in this context. The Commission has not contested any of those cases. Some of those cases set examples of good practice in addressing persistent, increased threats to public policy or internal security.

⁵ Judgment of the Court of Justice of 22 June 2010, Melki and Abdeli, joined cases C-188/10 and C-189/10, ECLI:EU:C:2010:363, points 73 and 74.

- (11) Pursuant to Regulation (EU) 2016/399, the temporary reintroduction of border controls may be used only in exceptional circumstances, as a last resort measure. In this context Council Implementing Decision (EU) 2017/246⁶ explicitly encouraged the Member States to assess whether police checks would not achieve the same results as temporary internal border controls, before introducing or prolonging such controls.
- (12) While in some circumstances it may be clear from the outset that police checks alone are not sufficient to address the identified threats to public policy or internal security (for example, searching for specific suspects following a terrorist attack), in other cases, similar objectives as those of reintroduced border controls may be pursued by means of enhanced police checks in border areas. Therefore, on the one hand, the decision on the temporary reintroduction of border controls at internal borders should be in principle preceded by the assessment of other alternative measures. In particular in case of decisions on the temporary reintroduction of border controls at internal borders due to foreseeable events Member States should demonstrate that such assessment has been carried out. On the other hand in specific cases of urgent and serious threats to public policy or internal security at the level of the area without internal border control or at national level, the temporary reintroduction of internal border controls may be necessary immediately.
- (13) This Recommendation encourages Member States to better use their police powers and to give precedence to police checks before deciding on the temporary reintroduction of internal border controls.
- (14) Whichever measures a Member State takes to address a specific threat to its public policy or internal security, it should ensure that the implementation of the measure does not lead to obstacles to the free movement of persons and goods which would not be necessary, justified by and proportionate to those threats to public policy or internal security and that it fully respects fundamental rights and in particular the principle of non-discrimination.
- (15) The area without internal border control also relies on the effective and efficient application by the Member States of accompanying measures in the area of cross-border police cooperation. The Schengen evaluations conducted so far in the field of police cooperation have highlighted that even though Member States are generally legally compliant with the Schengen acquis, a number of obstacles hamper the practical use of some of the cross-border police cooperation tools available to Member States. Member States should therefore be encouraged to tackle these obstacles to better address cross-border threats.

⁶ Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 36, 11.2.2017, p. 59).

- (16) Joint police patrols and other existing tools of operational police cooperation contribute to internal security in the area without internal border controls. Joint patrols on board of cross-border trains e.g. clearly enhance security, by preventing situations where the lack of symmetry in controls undermines the efforts taken on one side of the border only. A number of Member States have established practices which facilitate or allow for joint police operations to take place (for instance, the joint police stations which Germany and Poland have established at their border focussing on joint patrolling and other operations, or the micro-teams established for joint investigations at the Austrian-Czech border, joint train patrols in Austria, Germany, France, Italy, and Hungary, or the recruitment by German police of nationals from other Member States, in particular for patrolling in the border regions). Other Member States should be encouraged to follow these best practices.
- (17) Joint threat analysis and cross-border information exchange between Member States sharing border regions can help in designing efficient police checks to address the identified threats. Such cooperation can cover the risks on specific cross-border traffic routes, as well as specific means of transportation often used in criminal activities, in order to allow for targeted police checks ahead of border areas. Such police checks can provide a joint tool to address the threats to public policy or internal security faced by the Member States concerned. For this reason it is important to encourage Member States to further develop cross-border cooperation.
- (18) To reinforce cross-border police cooperation, Member States may request the support from the Commission in the implementation of this Recommendation. Such support can contribute for instance to facilitate the exchange of best practices among practitioners and decision makers of the Member States and enhance the cooperation between Member States and the relevant agencies (Europol and the European Border and Coast Guard). It can contribute also to further enhance cross-border cooperation structures such as the Police Customs Cooperation Centres. In addition, the Commission will support the updating, based on input from Member States, the 2011 'Schengen catalogue',⁷ which identifies, among others, best practices in the field of operational cross-border police cooperation, and the National Fact Sheets of the 'Manual on cross-border operations'.⁸

⁷ Council document 15785/3/10 Rev 3.

⁸ Council Document 10505/4/09 Rev 4.

- (19) As demonstrated by the recent migratory crisis, uncontrolled secondary movements of irregular migrants may pose a serious threat to public policy or internal security. The proper application of the bilateral readmission agreements in accordance with Article 6(3) of Directive 2008/115/EC of the European Parliament and of the Council⁹, can be instrumental in addressing secondary movements of illegally staying third-country nationals. The bilateral agreements may also help in achieving similar results as targeted border controls at internal borders in terms of addressing the threats to public policy or internal security, while limiting the impact on the movement of bona fide travellers. It is therefore important that Member States apply the bilateral readmission agreements efficiently while respecting the Commission Recommendation (EU) 2017/432.¹⁰
- (20) The Commission considers that this Recommendation needs a reasonable time to be implemented; therefore the Commission recommends that it should be implemented as soon as possible and at the latest within 6 months.
- (21) This Recommendation should be implemented in full respect of fundamental rights.
- (22) This Recommendation should be addressed to all Schengen States bound by Title III of Regulation (EU) 2016/399.

HAS ADOPTED THIS RECOMMENDATION:

More effective use of police checks

- (1) To adequately remedy the threats to public policy or internal security within the Schengen area, Member States should, where needed and justified in accordance with national law:
- (a) intensify police checks across the entire territory, including in border areas;
 - (b) carry out police checks on main transport routes, including in border areas;
 - (c) adapt the police checks in border areas on the basis of continuous risk assessment, while ensuring that those police checks do not have border control as an objective;
 - (d) make use of modern technologies in order to monitor vehicles and traffic flows.

⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

¹⁰ Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council (OJ L 66, 11.3.2017, p. 15).

Giving precedence to police checks in case of a serious threat to internal security or public policy

- (2) Where in a situation of a serious threat to public policy or internal security, Member States consider applying chapter II of Title III of the Regulation (EU) 2016/399, they should first assess whether the situation can be adequately addressed by way of stepping up police checks within the territory, including in border areas.

Strengthening cross-border police cooperation

- (3) To strengthen cross-border police cooperation in addressing threats to public policy or internal security, Member States should:
- (a) re-assess the extent to which they currently use all available cross-border police operational cooperation tools such as joint patrols, joint operations, joint investigation teams, cross-border hot pursuits, or cross-border surveillances, Police and Customs Cooperation centers;
 - (b) work jointly with their neighbouring Member States to remove legal or operational barriers to the full use of all cross-border operational police cooperation tools;
 - (c) develop and implement, as appropriate, joint threat analysis and cross-border information exchanges with their neighbouring Member States to support joint actions to address threats to public policy or internal security in shared internal border areas, including through coordinated police checks in their internal border areas;
 - (d) assess the need for technical investments to enhance joint operations, notably for surveillance and detection.

Effective use of bilateral readmission agreements or arrangements between Member States

- (4) To ensure that police checks and police cooperation can lead to the effective countering of unauthorised secondary movements where those movements pose a specific threat to public policy or internal security, Member States should:
- (a) in accordance with Article 6(3) of Directive 2008/115/EC, take back third-country nationals who transited their territory before being apprehended in another Member State, under the provisions of bilateral agreements or arrangements existing on the date of entry into force of that Directive (13 January 2009), in particular among neighbouring Member States;

- (b) take all necessary measures, including establishing operational practices between competent authorities and facilitating the exchange of information among them, to ensure that procedures under such bilateral agreements or arrangements are finalised swiftly by the Member States concerned, to ensure that the transfer is carried out as soon as possible;
- (c) ensure that, where a Member State decides not to apply the provisions of a bilateral readmission agreement or arrangement or where the third-country nationals concerned are taken back by another Member State, return procedures are launched in accordance with Directive 2008/115/EC and in line with Commission Recommendation (EU) 2017/432.

Done at Brussels, 12.5.2017

For the Commission
Dimitris AVRAMOPOULOS
Member of the Commission

