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#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	15 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 891 final
Subject:	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

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Delegations will find attached document COM(2021) 891 final.

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Encl.: COM(2021) 891 final



Strasbourg, 14.12.2021  
COM(2021) 891 final

2021/0428 (COD)

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**

{SEC(2021) 440 final} - {SWD(2021) 462 final} - {SWD(2021) 463 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The area without controls at internal borders (the “Schengen Area”) is one of the biggest achievements of European integration. In the Communication ‘*A Strategy towards a fully functioning and resilient Schengen area*<sup>1</sup> (“Schengen Strategy”), the Commission stressed that the foundations of Schengen are part of Europe’s DNA. The Schengen area comprises an area where European Union citizens and non-EU citizens legally staying in the territory, as well as goods and services, can travel without being subject to internal border controls. Schengen is an essential element of the area of freedom, security and justice and a key element for the functioning of the Single Market. Its creation has brought significant social and economic benefits to European society.

However, in recent years, it has been repeatedly put to the test by a series of crises and challenges. The unprecedented 2015 refugee crisis exposed shortcomings in the Union’s management of the external borders and showed that the migration system was not well-designed to meet those challenges, with the consequence that a number of Member States reintroduced internal border controls. Internal border controls were also reintroduced in response to the persistent terrorist threat following a spate of attacks on European soil. The COVID-19 pandemic has also presented an unprecedented challenge and has placed a major strain on the Schengen area, leading many more Member States to reintroduce internal border controls, at times jeopardising the proper functioning of the Single Market. All this has undermined the climate of trust needed to sustain an area free from internal border controls.

For these reasons, the Commission announced that it would aim to complete the range of tools necessary to ensure the proper functioning of the Schengen area in order to put the ecosystem of rules back into balance and restore and reinforce mutual trust between Member States. One such measure to make the Schengen area stronger and more resilient is a new proposal for an amendment to Regulation (EU) No 2016/399<sup>2</sup> (“Schengen Borders Code”). This proposal is a key deliverable from the Roadmap for a New Pact on Migration and Asylum. All the solutions proposed in the New Pact on Migration and Asylum will contribute to effective migration management, closer cooperation, responsibility-sharing among Member States and a binding solidarity framework, thereby reinforcing the Schengen area.

A well-functioning Schengen area requires rules to be applied in a uniform way, both at the external and internal borders. It relies on trust among the Member States, efficient controls of the external borders and alternative measures on the territory of the Member States in order to assure a high level of security within the Schengen area, in the absence of internal border controls.

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<sup>1</sup> Communication from the Commission to the European Parliament and the Council, “A strategy towards a fully functioning and resilient Schengen area”, COM(2021)277 final, 2.6.2021.

<sup>2</sup> 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.

While the framework set out by the Schengen Borders Code provides tools to tackle challenges such as the ones experienced over the last years, there is a room for improvement of specific aspects concerning in particular the capacity to respond in a uniform manner to major public health threats, the capacity to respond to threats resulting from instrumentalisation of migrants as well as the means to respond, within the territory, to terrorism or unauthorised movements.

In view of the emerging challenges to the Schengen area, a number of targeted changes to the current rules set out in the Schengen Borders Code are required in relation to both external and internal borders as well as in relation to the powers exercised within the Member States' territories, without putting into question the division of responsibilities between the Union and the Member States.

This proposal must be seen in the context of ongoing initiatives to improve Schengen's overall governance. Drawing on the work of the Schengen Forum<sup>3</sup> established in 2020, the Commission will adopt in early 2022 a 'State of Schengen Report' summarising the situation as regards the absence of internal border controls, the results of Schengen evaluations, and the state of implementation of recommendations. The Commission will integrate into these reports a 'State of Schengen Scoreboard' to assess in an interconnected manner the implementation of the Schengen acquis in the different policy fields and better support Member States in addressing any challenges. The Commission has also proposed to revise the Schengen Evaluation and Monitoring Mechanism to make it more efficient, strategic and better equipped to tackle new realities and challenges. The revision will increase the Mechanism's capacity to facilitate political dialogue on the state of Schengen, focusing on those areas that have the potential to jeopardise the functioning of the Schengen area as a whole.

### External Borders

Schengen's existence presupposes a high degree of trust in a robust management of the external borders. Based on the experiences covering the period until late 2021, the management of external borders should be reinforced as regards the following two aspects:

- Health related challenges

The COVID-19 crisis has shown that the current rules are not sufficient to respond to crisis situations linked to diseases with epidemiological potential. The global character of COVID-19 required *ad hoc* measures at the external borders to slow down transmission across borders. In March 2020, the Commission proposed a coordinated decision on applying travel restrictions on non-essential travel from third countries into the Schengen area. This led to the adoption of a Council Recommendation in June 2020<sup>4</sup>, with the objective of facilitating a unified approach when it comes to restricting access to the European Union of travellers coming from countries with a highly problematic epidemiological situation. However,

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<sup>3</sup> Under the New Pact on Migration and Asylum, the Commission announced the establishment of a dedicated Schengen Forum, involving the relevant national authorities such as Ministries of Interior and (border) police at national and regional level in order to stimulate more concrete cooperation and more trust among Member States to support the well-functioning of Schengen. The 1st Schengen Forum took place on 30 November 2020, the second Forum on 17 May 2021.

<sup>4</sup> Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, 30.6.2020.

although Member States agreed among themselves on a list of third countries for which the restriction on non-essential travel could be lifted, they have applied the Recommendation referred to above in very different ways<sup>5</sup>. Only some have been applying the list of countries in full, while others decided to lift the restrictions only to some or even none of the countries on the list. Other Member States lifted the restrictions to third countries that were not on the list at all, thus undermining the desired unified approach. A new procedure is needed to codify a consistent practice and avoid the currently experienced discrepancies.

- Challenges related to the instrumentalisation of migrants

As stated in the Commission Communication on responding to state-sponsored instrumentalisation of migrants at the EU external border<sup>6</sup>, in the renewed EU action plan against migrant smuggling (2021-2025) adopted by the Commission on 29 September 2021<sup>7</sup>, as well as in the Commission proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants in relation to illegal entry into the territory of the European Union<sup>8</sup>, a highly worrying phenomenon observed is the increasing role of State actors in artificially creating and facilitating irregular migration, using migratory flows as a tool for political purposes to destabilise the European Union or its Member States.

As expressed in the October 2021 European Council conclusions<sup>9</sup>, the EU and the Member States are committed to giving a response to this increasing role of State actors in facilitating irregular migration and using human beings to create pressure at the EU's external borders. The European Council invited the Commission to propose any necessary changes to the EU's legal framework to address the issue of instrumentalisation. To this end, it is first necessary to define what is to be understood by 'instrumentalisation'. Moreover, there is a need to clarify what measures Member States can take under the Schengen Borders Code in order to protect the EU's common external borders effectively against the instrumentalisation of migrants for political purposes. In parallel, the Commission is proposing additional measures under the asylum and return acquis to further clarify how Member States can and should respond in situations of instrumentalisation while ensuring full protection of the rights of migrants that are instrumentalised, including the right to asylum and protection against non-refoulement.

In line with the Schengen Borders Code, '*Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations*'<sup>10</sup>. It is therefore clear that the Member States with external Schengen borders carry a double responsibility: vis-à-vis all persons benefiting from the possibility to travel without being subject to internal border controls and vis-à-vis their own citizens and business. The Schengen Borders Code contains general rules applicable at the border crossing points (Article 5) and on border surveillance (Article 13) to enable Member States to deliver on border management objectives as

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<sup>5</sup> See Impact Assessment Section 2.1.2.

<sup>6</sup> JOIN(2021) 32 final.

<sup>7</sup> COM(2021) 591 final.

<sup>8</sup> COM(2021) 753 final.

<sup>9</sup> Special meeting of the European Council of 24 and 25 May 2021 – Conclusions, Council document EUCO 5/21 of 25 May 2021.

<sup>10</sup> See Recital 6 of Regulation (EU) 2016/399 (Schengen Borders Code).

mentioned above. However, it is necessary to reinforce those rules to recognise the responsibility of Member States with external Schengen borders and reply to the new challenges created by the phenomenon of instrumentalisation.

### Measures at internal borders and within the territory

The very essence of the Schengen project is the absence of controls at internal borders allowing all persons legally staying in the Union to fully benefit from the possibility to travel without being subject to internal border controls. Based on the experiences covering the period until autumn 2021, the following aspects must be reviewed and reinforced in order to preserve the Schengen area:

- Response to challenges that affect a majority of Member States

Although reintroducing border checks can be a legitimate measure to address serious threats to internal security and public policy, in particular when an urgent response is needed (e.g. terrorist attacks), the geographical scope and duration of these border checks may render the movement of persons and the free circulation of goods more difficult. Even if, *per se*, internal border checks are without prejudice to the right of free movement, in practice the absence of such checks facilitates the movement of persons. The impact of reintroduced border checks has been particularly visible at the internal land borders, affecting the multiple economic and social ties in cross-border regions with the 150 million persons living in these regions<sup>11</sup> and some 3.5 million people crossing internal Schengen-area borders every day<sup>12</sup>. In 2020, the numerous reintroductions of border checks at internal borders intended to help contain the spread of COVID-19 often affected the local capacities to ensure essential services on both sides of the border. A lack of coordination of national measures in response to the COVID-19 pandemic further impacted the transport sector by limiting cross-border transport operations, often amplifying the effects of the initial shock and adding to the disruption of the supply chains. A new procedure is needed to ensure a more coordinated approach in case of crisis situations affecting a majority of Member States, whilst fully respecting the sovereign right of Member States to reintroduce border controls.

Building on the wide range of guidelines and recommendations adopted for the COVID-19 pandemic, such as the ‘Green Lanes’ system<sup>13</sup>, the Commission will also improve the contingency planning for Schengen. For this reason, it will codify the pertinent mitigating measures in the Practical Handbook for Border Guards to become a natural point of reference for border guards in a crisis situation.

- Better use of alternative measures

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<sup>11</sup> Around 150 million Europeans live in border regions, amounting to 30% of the EU population. The cross-border regions cover 40% of the EU territory and produce 30% of the EU's GDP. Therefore, any changes as regards the possibility to cross the borders without controls are socially and economically significant.

<sup>12</sup> See Schengen Strategy of 2 June 2021 and [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621815/EPRS\\_BRI\(2018\)621815\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621815/EPRS_BRI(2018)621815_EN.pdf)

<sup>13</sup> 2020/C 96 I/01 and COM(2020) 685 final.

The COVID-19 pandemic, the migratory crisis of 2015 as well as increased terrorist threats have put the Schengen area to the test in recent years<sup>14</sup>. In response to these challenges, some Member States decided to reintroduce border checks at some or all of their internal borders<sup>15</sup>. While, at first, such decisions responded to clearly identifiable events, and for a certain period of time were underpinned by Council Recommendations<sup>16</sup>, they now appear to have become a permanent precautionary measure.

Long-lasting internal border controls have revealed the limits of the current tools that the Union has to assess the necessity and proportionality of prolonged controls. Therefore, the rules defining internal border controls as a measure of last resort should be reinforced.

In the same vein, the long-lasting internal border controls drew attention to the limited use Member States make of alternative measures which, in many instances can be sufficient to ensure a high level of security without the need of restoring border controls at internal borders.

This concerns in particular the exercise of police powers. The Commission's 2017 Recommendation on police checks and cross-border police cooperation<sup>17</sup> encouraged Member States to make better use of their police powers and to give precedence to police checks before deciding on the temporary reintroduction of internal border controls. Over the past four 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. Some of those cases set examples of good practice in addressing persistent, increased threats to public policy or internal security. Indeed, such checks can often prove equally or 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. In order to ensure that the potential of these measures is fully used, a Member State that considers prolonging the reintroduction of border control should first assess whether the border control can be replaced by such alternative measures. In addition, the experience related to the COVID-19 pandemic made it clear that also other, not typically police-related public powers (e.g. checks related to public health) may make the reintroduction of internal border controls unnecessary. For this reason, the list of alternative measures that should not be considered as equating to internal border controls should be reviewed.

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<sup>14</sup> The fast spread of the COVID-19 pandemic caused between March and October 2020 an excess of deaths amounting to almost 300,000 in the EU, compared with the same period in 2016 – 2019. (See: Eurostat “Excess mortality in 2020: especially high in spring and autumn”, 20 January 2021).

The terrorist threat, while always present, has become very prominent in Europe since the attack on Charlie Hebdo in January 2015, and the growth of the so-called Islamic State in Syria.

In 2015, 1,255,600 first time asylum seekers applied for international protection in the EU, a number more than double that of the previous year (see Eurostat Newsrelease “Asylum in the EU Member States Record number of over 1.2 million first time asylum seekers registered in 2015”). To compare, in 2018 there were 699,000 applications lodged in the EU, including 631,000 first time applications (see: European Commission “Statistics on migration to Europe”).

<sup>15</sup> Since September 2015, border checks at the internal borders have been reintroduced more than 250 times.

<sup>16</sup> Serious deficiencies identified at the Greek external border in 2016 led to the adoption of four Council Recommendations that, based on Article 29, called on five Member States (Austria, Germany, Sweden, Denmark and Norway) to temporarily reintroduce border checks at their internal borders between May 2016 and November 2017.

<sup>17</sup> Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area.

Improved police cooperation can expand the set of alternatives to internal border controls available to Member States. To this end, the Commission adopted on 8 December 2021 legislative proposals for an EU Police Cooperation Code. The Code will provide a coherent EU legal framework to ensure that law enforcement authorities have adequate access to information held by other Member States when they need it to fight crime and terrorism.

Finally, the persistence of internal border controls in relation to unauthorised movements justifies modifications to enable Member States to better address such challenges without needing to resort to internal border controls.

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In view of the above, there is an urgent need to address problems affecting the external and internal borders of the Schengen area related to the following:

- a) Measures at the external borders to address threats related to the major public health threats such as pandemics and instances of instrumentalisation of migrants;
- b) Conditions for the reintroduction of border checks at internal borders and use of other measures to their full potential to ensure a sufficiently high level of security without needing to resort to internal border controls.

### ***Specific objectives and main elements of the proposal***

The proposal has the following specific objectives:

- a) Uniform application of measures at the external borders in case of a threat to public health.

The proposal aims to establish a new mechanism which should allow for a timely adoption, by the Council, of a binding instrument setting out temporary travel restrictions at the external borders in these circumstances. Thanks to this mechanism, travel restrictions will apply uniformly in all Member States for as long as the threat to public health persists in the Union. The proposal determines in a comprehensive manner all necessary elements of an instrument to be adopted by the Council in an implementing act. Accordingly, such an instrument should specify any categories of persons exempted from travel restrictions, even in situations where they travel for non-essential reasons, and/or, on the basis of objective indicators, any geographical areas or third countries from which travel may be subject to specific measures, e.g. travel restrictions. Furthermore, it should define any additional conditions to be imposed on travellers to make travel safe. In line with obligations under Union and international law, Union citizens and third-country nationals who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens and their respective family members should always be permitted to enter the Union. Residents should always be permitted to return to the Union. Moreover, the instrument should define a minimum list of categories of travelers that are considered necessary in connection with essential functions or needs and should therefore not be covered by measures under this instrument. This list should reflect in particular international obligations of the Union and its Member States to allow travel, while it will be left to the individual Council decisions to define additional categories of essential travel, if needed, depending on the specific threat. The instrument could also set up an



emergency brake mechanism, allowing to take relevant measures in case the epidemiological situation dramatically worsens in one or more geographical areas.

b) Response to instrumentalisation of migrants at external borders

The proposal aims to address the instrumentalisation of migrants, where a third country actor is using human beings to destabilise the Union or its Member States. The proposal defines in Article 2 what should be understood by ‘instrumentalisation’. Moreover, the proposed modification of Article 5 and Article 13 should clarify what measures are available at the border crossing points and in the context of border surveillance to prevent and react to illegal border crossings when Member States of first entry are confronted with such pressure from a third country. In addition, a new proposal on exceptional asylum and return procedures aims to ensure coherence with this approach by introducing provisions that allow Member States to take the measures needed to manage in a humane, orderly and dignified manner, fully respectful of fundamental rights and humanitarian principles, the arrival of persons being instrumentalised by a third country.

c) Creation of a contingency planning for Schengen in the situation of a threat affecting a majority of Member States at the same time

The proposal aims to create a new mechanism allowing for a European response to problems affecting a majority of Member States at the same time and thus putting the overall functioning of the Schengen area at risk. This new mechanism should complement the existing mechanism for serious persistent deficiencies at the external borders, as currently set out in Article 29 of the Schengen Borders Code. It should fully respect the right of the Member States to take the necessary actions when confronted with an immediate threat and offer the Council the possibility to authorise, based on a proposal from the Commission, the reintroduction of internal borders controls in some or all Member States affected by the identified threat, thus providing a coherent framework for the use of internal border controls by the Member States and defining appropriate mitigating measures. Upon proposals from the Commission, such an authorisation may be prolonged for further periods of up to six months each, as long as the threat is found to persist. Where the Commission considers that an authorisation to reintroduce internal border controls would not be appropriate, it should, instead, adopt a recommendation specifying the measures that seem more appropriate to deal with the threat than internal border controls or measures that may complement the internal border controls.

d) Procedural safeguards in case of unilateral reintroductions of internal border controls

In order to ensure that internal border controls remain a measure of last resort, the proposal clarifies and expands the list of elements that must be assessed by a Member State when taking the decision on temporary reintroduction of border controls. These elements would include the appropriateness of the measure of reintroducing border controls at an internal border and the likely impact of such a measure on movement of persons within the area without internal border control and on the cross-border regions. Moreover, where a Member State decides to prolong internal border controls in response to foreseeable threats, such an assessment should also include the assessment of the appropriateness and the use of alternative measures such as proportionate checks carried out in the context of the lawful exercise of public powers by competent authorities in the border region, the use of the refusal procedure for third country nationals crossing the internal border and police cooperation as

provided for under Union law. In addition, prolongations concerning foreseeable threats exceeding 6 months should also include a risk assessment. As today, the Commission or any other Member States may at any time adopt an opinion on the necessity and proportionality of reintroduced internal border controls. Wherever internal controls have been in place for a total of 18 months, the Commission will be required to issue an opinion on their proportionality and necessity and launch a consultation process with the Member States.

In order to take account of the experience that certain threats can persist for a considerable amount of time, the possibility to prolong border control in these cases is extended to a total maximum period of two years. However, the proposal recognises that Member States may see the need to maintain internal border controls beyond this timeframe. In such cases, the Member State concerned should inform the Commission, while substantiating in its new notification the maintenance of the threat, including with a risk assessment and taking into account the opinion of the Commission issued in case of border controls lasting 18 months. In such a case, the Commission shall issue a follow-up opinion.

Moreover, in order to enable a *post factum* analysis, Member States should remain obliged to submit a report on the reintroduction of border control at internal borders to the European Parliament, the Council and the Commission, after having lifted the controls. Furthermore, where border controls are maintained beyond a period six months, such a report should be submitted after twelve months, and every year thereafter for as long as the controls are maintained.

- e) Application of mitigating measures and specific safeguards for cross-border regions in cases where internal border controls are reintroduced

The proposal also provides that safeguards should always be applied, to limit the negative impact of the temporary reintroduction of border checks at internal borders, should this reintroduction be inevitable, in particular to limit their impact on the functioning of cross-border regions, transport and, thus, on the Single Market. Examples for the mitigating measures which should be complied with during reintroduced border controls are in particular those set out in the guidelines and recommendations developed in 2020 in relation to the COVID-19 crisis.

- f) Increased use of alternative measures to address the identified threats instead of internal border controls

The proposal aims to ensure a high level of security within the Schengen area in a proportionate manner. To this end, the proposal clarifies the possibility for Member States to make more extensive use of checks other than border controls in border areas. These checks should not necessarily be carried out by police authorities, but could involve any other authorities competent under national law<sup>18</sup> to exercise public powers. In all cases, competent authorities must respect the existing safeguards developed by European Court of Justice case-law<sup>19</sup> for the exercise of police powers, in particular, by providing the necessary framework for the power granted to those authorities to carry out identity checks, including to guide the discretion which those authorities enjoy in the practical application of that power, in order to

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<sup>18</sup> During the COVID-19 pandemic, Member States could have carried out health-related checks in border areas, instead of reintroducing internal border controls.

<sup>19</sup> See Judgment of the Court of Justice of 22 June 2010, Melki and Abdeli, joined cases C-188/10 and C-189/10.

ensure that these checks do not become equivalent to border controls. In the provision of such guidance, Member States should also ensure that discretion exercised by competent authorities is carried out in full respect of fundamental rights, in particular the prohibition of discrimination.

In order to provide further means to Member States to use alternative measures to address the problem of unauthorised movements of irregular migrants, the proposal introduces a possibility of transferring irregular migrants if there is a clear indication that the person apprehended at the internal borders as part of cross-border police operational cooperation has just arrived from that other Member State (for instance, registration in Eurodac by another Member State or recent bills issued in the other Member State). In view of the initiative concerning the cross-border police cooperation put forward on 8 December 2021, this new procedure should encourage the use of joint patrols as a tool allowing this simplified transfer of persons apprehended at the internal borders to be applied. The proposal also provides for lifting of the ‘stand-still’ clause currently applicable to the existing bilateral agreements and arrangements between Member States on this issue, as referred to in Article 6(3) of the Return Directive<sup>20</sup> and determining the conditions under which irregular migrants can currently be sent back once apprehended in a situation of illegal stay in a Member State. The proposal contains a targeted modification to Article 6(3) of the Return Directive that would allow Member States to put in place more effective bilateral readmission agreements and arrangements, able to address the challenges related to unauthorised movements. The modification would equally require Member States to notify such agreements and arrangements to the Commission. Moreover, the Commission is ready to prepare a model bilateral agreement for the main clauses of such agreements, based on a review of existing agreements, in order to support the Member States in this task of creating an efficient tool for managing unauthorised movements.

The proposal also removes obstacles for a more extensive use of monitoring and surveillance technologies, and clarifies that the Schengen Borders Code does not prevent the use of passenger data such as Passenger Name Records or Advanced Passenger Information on intra-Schengen connections<sup>21</sup>, in case this would be allowed by the applicable law.

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

As mentioned above, this initiative is in line with the actions set out in the *Schengen Strategy*.

The proposal, with revamped reporting obligations on the Commission as regards the functioning of the Schengen area, contributes to the principles of the Schengen governance, aiming to increase political dialogue, monitoring and enforcement. It therefore forms an integral component of the Schengen governance structure, as set out in the Schengen Strategy of 2 June 2021. This reporting obligation will in future be fulfilled through the yearly State of Schengen Report that will also contain the report to be provided under Article 20 of the

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<sup>20</sup> 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.

<sup>21</sup> As announced in the Schengen Strategy of 2 June (COM(2021)277), the Commission is preparing a legislative proposal to expand the use of advance passenger information (API) to cover also intra-Schengen flights. Currently, by contrast to the PNR, it is currently only collected systematically for flights entering the Union from third countries.

Regulation on the Schengen Evaluation Mechanism<sup>22</sup>.

The Schengen Evaluation and Monitoring Mechanism provides for a peer-to-peer instrument supporting the building of mutual trust among Member States and ensuring correct and efficient implementation of the Schengen legal framework. Deficiencies and lack of implementation in one Member State can affect all Member States and subsequently put the Schengen area at risk. This makes it necessary to have a mechanism fit for purpose guaranteeing a stronger and resilient Schengen. To achieve this the Commission adopted a reform of the Schengen Evaluation and Monitoring mechanism on 2 June 2021<sup>23</sup>, which is currently subject to discussions in the Council.

The State of Schengen Report should be discussed annually in the Schengen Forum that the Commission established to promote a regular and structured political dialogue among the actors involved in ensuring the proper functioning of the Schengen area. These discussions should involve the relevant national authorities at national and regional level in order to stimulate more concrete cooperation and more trust among Member States to support the well-functioning of Schengen. The first Schengen Forum took place on 30 November 2020, the second Forum on 17 May 2021, with the participation of Members of the European Parliament and Ministers for Home Affairs.

In accordance with Article 33 of the Schengen Borders Code, the State of Schengen Report will be addressed to the European Parliament and to the Council. Building on the discussions in the Schengen Forum, these institutions should therefore consider the conclusions to be drawn from the report.

The proposal complements the rules concerning controls at external border as a prerequisite of the area without controls at internal borders. It contributes to the effective implementation of European integrated border management (EIBM) by the European Border and Coast Guard. The proposal will also be reflected in the upcoming Multiannual Strategic Policy Cycle aiming to set out the strategic framework to steer European integrated border management by eliminating loopholes between border protection, security, return, migration, while ensuring the protection of fundamental rights. As announced in the Schengen Strategy, a policy document to form the basis for a consultation of the European Parliament and the Council on EIBM will be adopted by the Commission at the beginning of 2022.

The new procedure at the external border to be applied in a situation of an infectious disease with epidemic potential as detected by the European Centre for Disease Prevention and Control or the Commission through the European Health Emergency preparedness and Response Authority (HERA), is expected to better prepare the Union for any future pandemic and as such will serve one of the purposes of border controls, i.e. to prevent threats to public health<sup>24</sup>. It will fill in the gap once the existing Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such

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<sup>22</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27.

<sup>23</sup> Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013, COM(2021)278 final, 02.06.2021.

<sup>24</sup> See Recital 6 of the Schengen Borders Code.

restriction<sup>25</sup> ceases to apply. To recall, Council Recommendation 2020/912 was adopted as part of the coordinated response to the COVID-19 pandemic<sup>26</sup>, meaning that it should cease to apply by the time this Regulation is adopted. The new procedure should fully take into account the procedures established by the future Regulation of the European Parliament and of the Council on serious cross-border threats to health<sup>27</sup>, notably in case of recognition of a public health emergency, and the revised mandate of the European Centre for Disease Control.

As regards measures aiming to support the Member States in their efforts to face instrumentalisation of migrants by third countries, the proposal builds on the existing rules concerning border surveillance and border controls at external borders as set out in the Schengen Borders Code.

The proposal responds to a number of Resolutions of the European Parliament<sup>28</sup> and builds on the Recommendations of the Commission adopted in 2017 with a view to paving the way to lifting the long-lasting internal border controls: the Recommendation of 12 May 2017 on proportionate use of police checks and police cooperation in the Schengen area and the Recommendation of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on a temporary reintroduction of border control at internal borders in the Schengen area.

The proposal replaces the Commission's proposal for an amendment of the Schengen Borders Code as adopted by the Commission in 2017<sup>29</sup> which is withdrawn. As explained in the Schengen Strategy<sup>30</sup>, despite agreement by stakeholders on the need to address the issue of internal border controls, the 2017 initiative did not receive sufficient support for negotiations to be successfully pursued by the colegislators and should therefore be withdrawn.

The current proposal takes up procedural safeguards that had found general backing in the 2017 negotiations such as the obligation to submit the risk assessment together with the notification of internal border controls in case of foreseeable threats. Alongside with strengthened safeguards, the proposal simplifies and streamlines the time limits under which controls at the internal borders may be reintroduced or prolonged. In particular, Member States will have the possibility to prolong such controls to a total of up to two years. Beyond that period, border controls may be exceptionally prolonged but require a new notification by the Member State, substantiating the maintenance of the threat, taking into account the Commission's opinion issued after 18 months. Furthermore, the current proposal provides for the intervention of the Council where a threat has become a genuinely European issue,

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<sup>25</sup> Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, 30.6.2020.

<sup>26</sup> Agreement among the Heads of State or Government of the European Union, 26 March 2020.

<sup>27</sup> COM(2020)727.

<sup>28</sup> E.g. European Parliament resolution of 24 November 2020 on the Schengen system and measures taken during the COVID-19 crisis (2020/2801(RSP)), European Parliament resolution of 19 June 2020 on the situation in the Schengen area following the COVID-19 outbreak (2020/2640(RSP)), European Parliament resolution of 17 September 2020 on COVID-19: EU coordination of health assessments and risk classification, and the consequences for Schengen and the single market (2020/2780(RSP)), European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256(INI)).

<sup>29</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017)571, 27.9.2017.

<sup>30</sup> COM(2021)277.

affecting a majority of Member States at the same time. It therefore strikes the right balance between, on the one hand, the sovereign right of Member States to introduce internal border controls and the need to take account of the long-lasting nature of certain threats and, on the other hand, the need to ensure that such reintroductions are done in a coordinated manner with the right safeguards.

- **Consistency with other Union policies**

The proposal for an amendment of the Schengen Borders Code is included in the Commission Work Programme 2021<sup>31</sup>.

The proposal is without prejudice to the right of **freedom of movement** of Union citizens within the meaning of Article 20(1) TFEU and third-country nationals who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens, as well as of their respective family members. This concerns both the proposed measures at external borders, where the right to return home for this category of persons is guaranteed even during a restriction for non-essential travel to the Union, and at internal borders, where the need to assess the impact of measures adopted at internal borders on the movement of persons within the area without internal border control is reinforced. This proposal does not in any respect affect the rights of EU citizens under Directive 2004/38/EC<sup>32</sup>.

The proposal contributes to enhancing **security** within the Schengen area by clarifying the measures which are at the disposal of the Member States to ensure a high level of security, despite the abolition of internal border controls. The proposal follows the adoption on 8 December 2021 of a police cooperation package, comprised of a proposal for a Council Recommendation on operational police cooperation, a proposal for a Directive on information exchange between law enforcement authorities of Member States and for a Regulation on automated data exchange for police cooperation ('Prüm II'). The objective of these proposals is to reinforce the two most important aspects of police cooperation: information exchange and operational police cooperation. This will enhance the alternative measures that Member States have at their disposal and therefore limit the need for reintroducing internal border controls.

The new procedure put forward for the transfer of irregular migrants apprehended at the internal borders as part of cross-border police cooperation and the proposed targeted modification to Article 6(3) of the **Return Directive** serve the purpose of preserving the area without internal border controls. As such, the proposal remains without prejudice to the Return Directive and does not affect its dual nature, i.e. an instrument to fight against illegal immigration while supporting the proper functioning of an area without internal border checks. While fully respecting the fundamental rights of such persons, the objective of an effective removal of an irregular migrant from the Schengen area to a third country prevails, and the Member States should always endeavour to return such irregular migrants to a third

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<sup>31</sup> COM(2020) 690 final, Commission Work Programme 2021, A Union of vitality in a world of fragility, p.6, [https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>32</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

country, instead of transferring the person concerned to another Member State. Moreover, the new derogation will only allow migrants to be sent back to the Member State from where their irregular border crossing has been detected. Any further returning to other Member States will continue to be governed by existing and future bilateral agreements and arrangements between Member States.

The proposal fully respects the **asylum acquis**, both where it proposes measures at the external borders related to the instrumentalisation of migrants and where it proposes a new procedure for addressing unauthorised movements of irregular migrants. In pursuing the objectives on this new procedure, Member States will be able to rely on the proposal amending the **Eurodac** Regulation as well as the Screening proposal, in full respect of fundamental rights and specific safeguards provided for in those instruments.

The proposal takes into account EU transport policy, and in particular the transport Green Lanes introduced to preserve the supply chains and to ease movement of transport workers during the COVID-19 pandemic. The forthcoming contingency plan for transport will provide further details regarding the handling of crisis situations in the transport sector.

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

- **Legal basis**

The proposal is based on Article 77(2) (b) and (e) and 79(2)(c) TFEU.

The proposal amends Regulation (EU) No 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), specifically Title II concerning the rules applicable at external borders and Title III concerning the rules application at internal borders.

The proposal also amends the Return 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, as regards the derogations from the obligation to issue a return decision to a third-country national.

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

Action in the area of freedom, security and justice falls within an area of competence shared between the EU and the Member States in accordance with Article 4(2) TFEU. Therefore, the subsidiarity principle is applicable by virtue of Article 5(3) TEU, according to which the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The objectives of this proposal cannot be sufficiently achieved by the Member States acting alone, and can be better achieved at the level of the Union. This is because they concern checks on persons at the external borders which are a precondition of the area without controls at internal borders. Furthermore, the integrity of the Schengen area and the need to ensure uniform conditions for exercising the right to free movement require a coherent approach across the entire Schengen area to trust-building measures at the external borders, including on restrictions for non-essential travel to the EU and response to instrumentalisation

of migrants by the authorities of third countries.

The absence of any controls at internal borders is guaranteed by the Treaty in Article 77(2)(e) TFEU. While Member States retain the right to take actions in order to respond to internal security and public policy, and thus to exercise the right guaranteed in Article 72 TFEU even if this means reintroducing internal border controls, the rules for such temporary reintroductions have been set out in the Schengen Borders Code in order to ensure that they are applied only under strict conditions. Therefore, any changes concerning these conditions for reintroduction of border controls at internal borders require EU legislation.

The objective of establishing a contingency planning for Schengen, including specific measures at internal borders to address a threat affecting a majority of Member States at the same time and to mitigate the negative impacts of border controls where they have become inevitable, cannot be sufficiently achieved by the Member States acting alone, and can be better achieved at the level of the Union.

The Union may therefore adopt the proposed measures, in accordance with the principle of subsidiarity.

- **Proportionality**

According to the principle of proportionality laid down in Article 5(4) TEU, there is a need to match the nature and intensity of a given measure to the identified problem. All problems addressed in this legislative initiative call, in one way or another, for EU-level legislative action enabling Member States to tackle these problems effectively.

The proposed measures to be applied at the external borders to address a threat to public health take inspiration from the currently applicable framework, as set out in Council Recommendation (EU) 2020/912. In order to guarantee their proportionality, the proposed procedure sets the framework allowing to determine, where needed, the conditions under which restrictions could be introduced, their scope and safeguards, in particular with regard to EU citizens and other persons benefiting from freedom of movement under Union law and/or third country nationals having an essential function.

The proposed measures concerning the instrumentalisation of migrants complement the existing provisions on checks at the border crossing points and on border surveillance. They fully take into account the competences of the Member States as regards border management. They also fully reflect the competences of the European Border and Coast Guard Agency as regards the support of the Member States in their obligation to protect external borders.

The modifications concerning internal borders improve the balance between the checks which can be carried out in the border areas in the context of the exercise of public powers and the reintroduction of internal border controls. The proposed modifications clarify the conditions under which Member States can carry out checks in the border areas without a risk that they can be confused with border controls. They propose a new procedure applicable to irregular migrants apprehended in the internal border areas to address the unauthorised movements without needing to resort to internal border controls. As such, it will complement the existing framework enabling the abolition of internal border controls. The applicability of the new procedure is limited to apprehensions at internal borders, when irregular migrants are apprehended as part of cross-border police operational cooperation, in particular during joint patrols, given that the joint patrols will ensure that both Member States involved have the same level of information as concerns the apprehension of the irregular migrant. In full



respect of subsidiarity and proportionality principles, the proposal leaves the possibility to determine their bilateral cooperation on the matters related to the unauthorised movements to the Member States, while respecting the objectives of the EU's return policy, as set out in the Return Directive. The proposal removes the stand-still clause for the existing bilateral agreements or arrangements in the sense of Article 6(3) of the Return Directive, in order to allow the Member States to update their content. The Member States retain full liberty in this regard, but should notify the Commission about any such new/modified agreements and arrangements. The Commission stands ready to assist the Member States by developing a model bilateral agreement based on the clauses considered as the best practices for addressing the unauthorised movements at present, to be annexed to the Return Handbook.

The proposal fully recognises Member States' sovereign right to reintroduce internal border controls, in particular when urgent reaction is needed, including in the situation of a threat putting at risk the overall functioning of the Schengen area and thus calling for a European response. Finally, it reinforces the safeguards against discretionary prolongations of internal border controls on the account of simple persistence of a threat by increasing the notification requirements over the course of time, in particular as regards the appropriateness of alternative measures.

The proposal maintains the approach that internal border controls may only be carried out as long as necessary, i.e. they should be lifted as soon as other measures can address the identified threat. Accordingly, the responsibility for complying with the existing time-limits is a shared task of the Member States and the Commission. In particular, the Member States should provide a description of identified threats justifying the reintroduction of internal border controls, submitting, in case of a prolongation of border controls to address a foreseeable threat, also a risk assessment. They should also assess on a case-by case basis if the persisting threat is still the same threat justifying a prolongation of border controls or whether it is a new threat, justifying a new notification. Both in the situation of reintroduction and subsequent prolongations of border controls, the Member States should be able to provide an analysis demonstrating the necessity and proportionality of such controls, and in particular how the internal border controls are suitable to address the threat as well as their impact on the movement of persons in the area without internal border controls and the functioning of cross-border regions. In case of any prolongation concerning foreseeable threats, the Member State should demonstrate the need to maintain internal border controls by assessing whether the objectives pursued by such prolongation could be attained by alternative measures. Moreover, the prolongations concerning foreseeable threats exceeding six months should also include a risk assessment. The Commission and any Member State can signal, by means of an opinion on the necessity and proportionality, their concerns on the use of border controls. In case of border controls exceeding 18 months, such an opinion by the Commission should be compulsory. The reintroduction of border controls may be discussed in the framework of consultations carried out by the Commission at its own initiative or at the request of a Member State, with a view to clarifying the relevance of the intended reintroduction of border controls, the appropriateness of alternative measures, as well as mutual cooperation with regard to border controls and mitigating measures. As is currently the case, such a consultation would remain compulsory in a situation where an opinion has been issued by the Commission or a Member State. Finally, in case of threats with a European dimension, the Commission and the Council take the responsibility that the internal border controls are maintained only as long as necessary, without setting any absolute time-limits.

- **Choice of the instrument**

The proposal concerns the amendment of a Regulation and consequential amendment of the Return Directive. As the main elements of the proposal concern the existing provisions of Title II of the Schengen Borders Code relating to external border controls and Title III concerning the temporary reintroduction of border control at internal borders of this Regulation, no other instrument than a Regulation would be appropriate.

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

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

Not applicable.

- **Stakeholder consultations**

As outlined in Annex 2 to the Impact Assessment accompanying this proposal, a **stakeholders' consultation** took place between November 2020 and February 2021 and encompassed, primarily, targeted stakeholders by way of the Schengen Forum and thematic workshops divided according to the topic and stakeholders involved. It included Member States, European Parliament, carriers and NGOs.

In addition, a **public consultation** was carried out. It was launched on 19 January 2021, with the deadline for contributions set at 16 March 2021.

The Commission also published the **Inception Impact Assessment** on its website<sup>33</sup> for four weeks, and received feedback from France, Croatia, Ukraine and one anonymous sender.

- **Collection and use of expertise**

The proposal builds on the evidence collected in the DG REGIO study '*The effects of COVID-19 induced border closures on cross-border regions - An empirical report covering the period March to June 2020*'<sup>34</sup> and the '*20 case studies covering the period March to June 2020*'<sup>35</sup>.

The Commission also relied on the studies on the costs of non-Schengen, prepared by the European Parliament<sup>36</sup>, notifications of the Member States concerning the temporary reintroduction of border checks at internal borders and the reactions from the public manifested in correspondence sent to the Commission.

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<sup>33</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12827-Amendment-of-the-Schengen-Borders-Code>.

<sup>34</sup> <https://op.europa.eu/en/publication-detail/-/publication/46250564-669a-11eb-aeb5-01aa75ed71a1/language-en/format-PDF/source-search>.

<sup>35</sup> <https://op.europa.eu/en/publication-detail/-/publication/bf14de68-6698-11eb-aeb5-01aa75ed71a1/language-en>.

<sup>36</sup> Directorate-General for Internal Policies Policy Department A: Economic and Scientific Policy, European Parliamentary Research Service European Added Value Unit, PE 578.974-May 2016: "Cost of non-Schengen: the impact of border controls within Schengen on the Single Market", requested by the European Parliament's Committee on Internal Market and Consumer Protection, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL\\_STU\(2016\)578974\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU(2016)578974_EN.pdf)

- **Impact assessment**

In line with its ‘Better Regulation’ policy, the Commission conducted an Impact Assessment.<sup>37</sup> The Impact Assessment evaluated three policy options:

**Option 1 - Soft law.** This option considered soft law measures drawing on the lessons learnt from the COVID-19 crisis and others to encourage the use of alternative measures instead of border checks at internal borders. As such, it followed the earlier approach of the Commission in the 2016 Communication ‘Back to Schengen – a Roadmap’<sup>38</sup> and the Recommendation on proportionate police checks and police cooperation in the Schengen area<sup>39</sup>. Under this option, soft law measures on a better coordination of measures at the external borders in a crisis situation have also been considered.

The specific objectives were expected to be achieved through a Communication on the future of Schengen (the so-called *Schengen Strategy*) and, possibly, updates of the relevant Recommendations (in particular of the 2017 Recommendation on proportionate police checks).

**Option 2 - Mixed option (targeted amendment of the Schengen Borders Code combined with soft law).** This option aimed to address the criticism from citizens, the European Parliament, as well as Member States of the current long-lasting checks at internal borders. It would also respond to the call from academia. This option was expected to allow ensuring that persons can move freely in the Schengen area without unnecessary hurdles, thanks to the limitation of the instances where border checks at internal borders are reintroduced. As regards measures at the external borders this option proposed, in view of the guidance and recommendations adopted in response to COVID-19, to develop ‘mitigating measures’ which would need to be taken into account whenever a reintroduction of border checks is inevitable. Moreover, this option implied adopting a clear legal basis for imposing and lifting an ‘entry ban’ to the EU in the case of a threat to public health, to ensure uniformity at the external borders in the situation of a threat to public health. The current proposal embodies the ideas developed under this option.

**Option 3 - Mixed option 2 (more fundamental change of the Schengen Borders Code, combined with soft law elements).** This option looked at the borderless Schengen area as one integral space that must not be fragmented by decisions of individual Member States. In view of that, it proposed to address the identified challenges exclusively at EU level, by providing that any decision on a reintroduction of border checks at internal borders would require the prior approval of one of the EU institutions or removing the possibility of a reintroduction of border checks at internal borders altogether.

As regards the application of measures at the external borders in case of public health threats, the proposed remedies would not differ from option 2 (new restrictions on non-essential travel into the EU applicable in the situation of threat to public health).

**Outcome of the Impact Assessment:** Based on the findings of the Impact Assessment report, Option 2 (mixed approach) is considered to be the preferred option. This choice reflects the

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<sup>37</sup> See the accompanying Staff Working Document.

<sup>38</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen - A Roadmap, COM(2016)120 final, 4.3.2016.

<sup>39</sup> Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area, C(2017)3349, OJ L 122, 13.5.2017, p. 79.

best cumulative score of this option as regards effectiveness, efficiency and proportionality. It draws on the lessons from the past and, at the same time, is sufficiently ambitious. It respects the views of the Member States concerning the role of border checks in addressing serious threats while at the same time respecting also the legitimate expectations of EU citizens and other persons benefiting from the absence of border checks at internal borders as to preserving the Schengen area which facilitates the movement of persons and goods because of the absence of internal border controls.

As regards the economic impacts, notably the new mechanism of contingency planning, bringing the response to crisis situations affecting several or all Member States to the EU level and reinforcing the use of alternative measures as well as mitigating measures, where appropriate, is likely to facilitate the exercise of movement and/or limiting negative impacts of internal border controls on the Single Market. As such, this option may be instrumental in limiting the negative economic impact of border checks at internal borders and thus the economic benefits of this option could be significant. Also the possibility of adopting an EU-wide travel restriction for non-essential travel applicable at the external borders in the situation of a public health threat could contribute to this objective by eliminating a likely ground for the reintroduction of border checks at internal borders.

This option also assures positive social impacts, thanks to the contingency planning for Schengen and the reinforced concepts of the ‘last resort measure’, which are expected to limit the use of border checks at internal borders.

No measurable environmental impacts are linked with the preferred option.

On the other hand, this option may entail relatively the biggest direct impact on the administration. This is due to maintaining the possibility to reintroduce temporarily border checks at internal borders and adding new obligations, such as a risk assessment, a standardised notification concerning the reintroduction of border checks at internal borders and an obligation to report regularly on these. However, as the measures proposed in this option should achieve an overall reduction in the use of border checks, the additional administrative burden should be limited.

No specific analysis was conducted concerning the proposed measures to counter instrumentalisation of migrants, as the proposal, in this respect, is designed to clarify the applicable rules.

On 19 April 2021, the Commission submitted the Impact Assessment to the Regulatory Scrutiny Board (RSB). The RSB gave a positive opinion with comments. These comments related to (i) the lack of sufficient evidence on the strengths and weaknesses of the current key measures of the Schengen Borders Code, (ii) the vagueness of the description of the policy options and the implementation choice, and (iii) the insufficiently developed analysis of the impacts. To address these comments, the Commission in particular further expanded the quantitative data and the information on the views of the stakeholders throughout the report to strengthen the qualitative arguments raised concerning the benefits of lifting internal border controls. It set out more clearly the shortcomings of the process in 2020 from a Schengen perspective, with the EU Integrated Political Crisis Response (IPCR) focusing first on the health aspects before turning to other aspects like border control, underlined that even though border controls can be an efficient tool, the phasing out creates significant problems and showed more in detail that alternative measures are less costly than border controls while often achieving the same result. In addition, the Commission beefed up the various options

envisaged. Finally, additional in-depth information was included on the objective of the previous 2017 proposal, the lessons learnt from its negotiations and on the new perspective brought by the COVID-19 crisis. Further information on how the RSB recommendations are reflected in the Impact Assessment report can be found in Annex I, point 3, of the Impact assessment.

- **Regulatory fitness and simplification**

According to the Commission's Regulatory Fitness and Performance Programme (REFIT), all initiatives with the objective to change existing EU legislation should aim to simplify and deliver stated policy objectives more efficiently (i.e. reducing unnecessary regulatory costs).

The analysis of impacts suggests that the preferred option should help to optimise the allocation of resources in case of crisis and to limit the costs of reintroduction of border checks at internal borders. However, it should be noted that the new obligation concerning the risk assessment, the new template for notifications of reintroductions and reporting obligations, as well as new tasks related to the use of alternative measures, may lead to a situation where the overall burden on Member States will not be reduced, and in some cases even increased.

Additional obligations would arise for the EU institutions. This would concern creating the capacity to take substantiated decisions at the EU level on the use of restrictions on non-essential travel into the EU at external borders, but also to apply the contingency planning in case of need. No major impact on EU bodies and agencies is expected although the instrumentalisation of irregular migration could lead to the bigger involvement of the European Borders and Coast Guard Agency, within the limits of the EBCG Regulation (EU) 2019/1896<sup>40</sup> in order to assist the Member States in addressing this challenge.

Overall, these additional tasks should generate limited additional costs compared to the significant positive impact on managing crisis situations putting the overall functioning of Schengen area at risk.

- **Fundamental rights**

The proposed amendment respects the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union, in particular the freedom of movement and residence (Article 45) as well as the right to asylum (Article 18) and the principle of non-refoulement (Article 19). The safeguards of Article 3, Article 4 and Article 7 of the Schengen Borders Code continue to apply including with regard to the measures taken in order to face the instrumentalisation of migrants by third countries. Furthermore, as concerns the measures proposed to address the instrumentalisation of migrants, the Commission considers it necessary that Member States respect freedom of expression, media freedom and freedom of association of civil society organisations.

The proposed measures seek to address problems which currently have an impact on the following rights: i) the right to family life of persons residing legally in the EU, ii) the right to work, to exercise the right of establishment and to provide services in any Member State, iii)

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<sup>40</sup> 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, p. 1.

the right to move and reside freely within the territory of the Member States, and iv) the right to privacy and protection of personal data.

While restrictions for non-essential travel to the EU will inevitably always affect some of the above rights, the proposed measures will not increase these impacts as they reflect what is currently in place based on the Council Recommendation 2020/912 and as such is considered necessary and proportionate in view of a threat to public health.

The current long-lasting internal border controls and discretionary use of border controls as a precautionary measure especially at the beginning of COVID-19 pandemic, have had a significant impact on the fundamental rights listed above. The proposed measures concerning internal borders may only reduce this impact.

As regards the use of alternative measures promoted in the proposal, the safeguards resulting from the current anti-discrimination obligations under EU and national law including from Article 21 of the EU Charter of Fundamental Rights, as also explicitly reflected in Articles 4 and 7(2) of the Schengen Borders Code, shall fully apply, so as to prevent racial profiling<sup>41</sup> or other illegal practices. The Schengen rules could contribute to that end with increased monitoring measures, e.g. in the context of Schengen Evaluations.

As regards the right to privacy and protection of personal data which could be more at stake in the context of surveillance and monitoring technologies, all proposed measures shall be subject to the applicable EU data protection rules. National law shall provide a legal basis for processing the personal data. In this sense, all options ensure an adequate level of protection to the citizens and national laws providing the legal basis for processing of personal data by such technologies.

#### **4. BUDGETARY IMPLICATIONS**

The proposed amendment has no implications for the EU budget.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The evaluation of the targeted amendment of the Schengen Borders Code as regards the response to threats to the area without controls at internal borders will depend on the information to be received from the Member States.

Table 11 in the Impact Assessment includes a non-exhaustive list of quantitative indicators proposed to monitor the achievement of policy objectives identified in this Impact Assessment. These indicators reflect and define, in practice, the success of the policy options. However, as the proposed option concerns addressing exceptional situations, the regular measurement of the indicators is not possible.

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<sup>41</sup> 'Profiling' can be understood as "categorising individuals according to personal characteristics. These characteristics can be 'unchangeable' (such as age or height) or 'changeable' (such as clothing, habits, preferences and other elements of behaviour). Profiling includes data mining whereby individuals are categorised 'on the basis of some of their observable characteristics in order to infer, with a certain margin of error, others that are not observable.

Moreover, this unpredictability prevents setting fixed quantitative targets.

The Commission website [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en) informing the public on the current border checks at internal borders in place will remain the main information tool allowing to monitor and evaluate the situation at the internal borders. Given the limitations of the legal basis to measures at the internal borders, the Commission cannot develop a separate tool on the use of alternative measures such as police checks in the border areas. However, the conditions of use of the alternative measures at the internal borders (police checks/new technologies) will be subject to monitoring in the framework of the Schengen Evaluation Mechanism, including any possible on-spot visits at the internal borders and infringement proceedings.

- **Detailed explanation of the specific provisions of the proposal**

The proposal consists of four provisions. Article 1 introduces modifications in the Schengen Borders Code. Article 2 provides for an amendment of the Return Directive 2008/115/EC in order to: (i) reflect the new procedure allowing for immediate transfer of irregular migrants apprehended at the internal borders as part of cross-border police operational cooperation to the neighbouring Member State that is proposed to be introduced to the Schengen Borders Code; (ii) remove the stand-still clause from Article 6(3) of the Return Directive, and (iii) set up an obligation on the Member States to notify to the Commission any such new agreements/arrangements and modifications of the existing ones. Article 3 sets the transposition period for the amendment of the Return Directive. Article 4 determines the conditions of entry into force and the effects of the Regulation.

Article 1: Modifications in the Schengen Borders Code:

**Article 2** of the Schengen Borders Code is modified in order to amend the definition of ‘border surveillance’ and reflect the necessary definitions for such concepts as: ‘instrumentalisation of migrants’, ‘essential travel’ and ‘non-essential travel’ which have been introduced for the first time into the Schengen Borders Code and ‘transport hubs’. These definitions are added to better reflect the responsibilities of Member States at the external borders to carry out border surveillance, including preventative measures.

**Article 5** is modified in order to clarify what measures the Member States can apply at their border crossing points when confronted with instrumentalisation of migrants.

**Article 13** is modified in order to clarify what measures the Member States can apply when performing tasks related to border surveillance at their external borders in relation to the instrumentalisation of migrants, along with that what results from Article 5.

**Article 21a** is added in order to create a ground for the uniform application at external borders of restrictions on non-essential travel to the European Union in the situation of a disease with an epidemiological potential. The provision confers on the Council the power to adopt, on the basis of a proposal by the Commission, an implementing regulation in this regard. It sets out all necessary parameters for such a decision and provides for safeguards with regard to EU citizens, long-term residents, as well as persons exercising essential functions.

**Article 23** is modified in order to clarify the type of checks authorised in the border areas. The proposed modifications clarify that checks carried out in border areas with the use of

monitoring and surveillance technologies do not have an effect equivalent to border controls. Similarly, verification of passenger data of persons travelling within the area without controls at internal borders against relevant databases, if possible under the applicable law, should also be permitted from the perspective of the Schengen Borders Code.

The new **Article 23a** sets up a procedure to transfer of irregular migrants apprehended at the internal borders as part of cross-border police operational cooperation to the Member States from where they come directly. It complements the rules applicable under the Return Directive as a necessary flanking measure for the area without internal border controls at internal borders. It provides for the possibility for the Member States to transfer persons who are not entitled to enter or to stay, paired with the obligation to receive such persons, apprehended at the internal borders in the context of cross-border police operational cooperation such as joint police patrols provided there is a clear indication that the person concerned just crossed the internal border. Such indications can consist in the lack of valid documents certifying the identity or the right to stay in the Member State, a registration in Eurodac by another Member State or recent bills issued in the other Member State. The new article and the new Annex XII to the Schengen Borders Code set out the procedure applicable in such cases.

The modified **Article 24** clarifies, in view of the modifications made to Article 23, that the use of monitoring and surveillance technologies at land crossing points may justify, along with safety measures, speed limits or other obstacles at road crossing points at internal borders.

**Article 25** provides for a general framework applicable to the reintroduction of internal border controls at internal borders. It gives examples of the type of threat that may lead to unilateral reintroduction of border controls at internal borders and circumstances under which internal border controls can be prolonged.

**Article 25a** provides for the procedure applicable to unilateral reintroductions of internal border controls by Member States in response to unforeseeable and foreseeable events.

**Article 26** clarifies the criteria that should be taken into account and reflected by the Member States in the subsequent notification of internal border controls. In this regard, as a novelty, it adds the impact on cross-border regions. The provision establishes different requirements for situations where border controls are reintroduced for the first time and where the border controls are prolonged for foreseeable threats, in order to take into account that the conditions for maintaining internal border controls must increase over time, in line with the proportionality principle. This article also introduces the concept of measures that mitigate the impacts resulting from the reintroduction of border controls which should be applied accordingly.

**Article 27** is replaced by a new one, dedicated to the notification of the temporary reintroduction or prolongation of border controls at internal borders. It also sets out an obligation to submit a risk assessment in case of prolongation of internal border controls in relation to foreseeable threats.

**Article 27a** clarifies when consultations between the Commission and the Member States concerned should be carried out and circumstances under which an opinion on the necessity and proportionality of internal border controls could or should be issued.



**Article 28** is replaced by a new provision establishing a specific Schengen area safeguard mechanism where the serious threat to public policy or internal security affects a majority of Member States at the same time, putting the overall functioning of the area without internal border controls at risk. The provision empowers the Council, based on a proposal from the Commission, to adopt an implementing decision on a coordinated approach to the serious threat identified in a majority of Member States at the same time, which would replace any national measures in place. The decision of the Council must be reviewed on a regular basis, upon a proposal from the Commission, with a view to prolonging, modifying or lifting adopted measures.

**Article 31** is modified in order to set general rules concerning information of the European Parliament and the Council, applicable under all four mechanisms.

**Article 33** is modified in order to disconnect the obligation to report on the reintroduction of border control at internal borders from the fact of lifting such controls. It also provides more details on the elements to be included in the yearly report of the Commission on the functioning of the area without internal borders, and cooperation with the Agencies in this regard.

The modified **Article 39** of the Schengen Borders Code complements **Article 2** of the proposed Regulation and provides for an obligation of the Member States to notify to the Commission the cross-border regions, in order to determine the scope of any mitigating measures to be provided for in an Implementing Regulation under Article 28 and the areas to be taken into account when estimating the impact under Article 26 of the Schengen Borders Code.

To better take into account the interests of cross-border regions when applying Article 26 and 28 of the Schengen Borders Code, the new **Article 42b** requires Member States to notify the Commission of designated cross-border regions.

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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (e) and Article 79(2)(c) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In accordance with Article 3(2) of the Treaty on European Union (“TEU”), the Union comprises an area of freedom, security and justice that is free of internal border controls, in which the free movement of persons is ensured in conjunction with appropriate measures regarding external border controls, asylum, immigration and the prevention and combating of crime.
- (2) Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 (“Schengen Borders Code”)<sup>42</sup> lays down rules governing the movement of persons to and from the area without controls at internal borders (the “Schengen Area”) as well as between the Member States that participate in the Schengen Area.
- (3) In recent years, the Schengen area has been subject to unprecedented challenges, which by their nature were not confined to the territory of any single Member State. Such challenges underscored the fact that the preservation of public order and security in the Schengen area is a shared responsibility requiring joined and coordinated action between Member States and at Union level. They also highlighted gaps in the existing rules governing the functioning of the Schengen area both at external and internal borders and the need to create a stronger and more robust framework allowing for a more effective response to challenges faced by the Schengen area.

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<sup>42</sup> 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.

- (4) Border control at external borders is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control and the Union as a whole. Member States are required to ensure high standards in management of their external borders, including through enhanced cooperation between border guards, police, customs and other relevant authorities. The Union provides active support through the provision of financing support by the Agencies, the European Border and Coast Guard in particular and management of the Schengen Evaluation Mechanism. The rules applicable to external borders need to be reinforced in order to better respond to new challenges that have recently emerged at the external borders.
- (5) The COVID-19 pandemic has reinforced the need for the Union to be better prepared to respond to crisis situations at the external borders related to situations of diseases with an epidemic potential that are a threat to public health. The COVID-19 pandemic has shown that threats to public health can require uniform rules concerning travel restrictions for travel into the European Union by third country nationals. The adoption of inconsistent and divergent measures at the external borders to address such threats negatively affects the functioning of the entire Schengen area, reduces predictability for third-country travellers and people-to-people contacts with third countries. To prepare the Schengen area for future challenges of a comparable scale related to threats to public health, it is necessary to establish a new mechanism which should allow for a timely adoption and lifting of coordinated measures at Union level. The new procedure at the external border should be applied in a situation of an infectious disease with epidemic potential as identified by the European Centre for Disease Prevention and Control or the Commission. This mechanism should complement the procedures proposed to be established in the Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health<sup>43</sup>, notably in case of the recognition of a public health emergency, and the revised mandate of the European Centre for Disease Control.<sup>44</sup>
- (6) The mechanism should provide for the adoption by the Council, upon a proposal by the Commission, of a regulation setting out restrictions on travel, including restrictions on entry and any other necessary measures for travel into the European Union, and the conditions for lifting them. In view of the politically sensitive nature of such measures which concern the right to enter the territory of Member States, implementing powers should be conferred on the Council to adopt such a regulation, acting on a proposal from the Commission.
- (7) Importantly, in line with the applicable obligations under Union and international law, Union citizens and third-country nationals who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens, as well as their respective family members should always be permitted to enter the Union. Residents in the Union should also always be permitted to return to the Union. The act should contain all necessary elements to ensure that restrictions on travel are effective, targeted, non-discriminatory and proportionate to the evolving epidemiological

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<sup>43</sup> COM(2020)727.

<sup>44</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 851/2004 establishing a European Centre for disease prevention and control, COM(2020)726.

situation. It should specify, where relevant, any categories of travellers whose travel should be exempted from restrictions on entry. In addition, or alternatively, the act should specify any geographical areas or third countries from which travel may be subject to specific measures, based on an objective methodology and criteria applicable thereto that should include, in particular, the epidemiological situation. The act could specify the conditions under which travel may be permitted such as testing, quarantine, self-isolation or any other appropriate measures, such as the need to fill in a passenger locator form or other contact tracing tool and having regard, in particular, to any Union systems developed to facilitate travel under safe conditions, such as digital certification systems. Where appropriate, the instrument could also set up a mechanism allowing to take additional measures in case the epidemiological situation dramatically worsens in one or more geographical areas.

- (8) It is also necessary to reinforce the rules and safeguards in Union law in order to allow Member States to act swiftly to counter instances of instrumentalisation of migrants. Such instrumentalisation should be understood as referring to a situation where a third country instigates irregular migratory flows to the Union by actively encouraging or facilitating the arrival of third country nationals to the external borders of the Member States, where such actions indicate an intention to destabilise the Union as a whole or 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.
- (9) Instrumentalisation of migrants can refer to situations where irregular travel of third country nationals has been actively encouraged or facilitated by a third country onto its own territory to reach the external border of the Member States but can equally refer to the active encouragement or facilitation of irregular travel of third country nationals already present in that third country. Instrumentalisation of migrants may also entail the imposition of coercive measures, intended to prevent the third country nationals from leaving the border areas of the instrumentalising third country, in a direction other than through a Member State.
- (10) The Union should mobilise all tools from its toolbox of diplomatic, financial and operational measures to support the Member States confronted with instrumentalisation. Diplomatic efforts by the Union or the Member State concerned, should be given priority as the means of addressing the phenomenon of instrumentalisation. This may be supplemented, where appropriate, by the imposition of restrictive measures by the Union.
- (11) At the same time, in addition to these measures, it is equally necessary to further reinforce the current rules in relation to external border controls and border surveillance. To further assist the Member State facing an instrumentalisation of migrants, Regulation (EU) XXX/XXX complements the rules on border control by providing for specific measures in the area of asylum and return, while respecting the fundamental rights the individuals concerned and in particular by ensuring the respect of the right to asylum and providing the necessary assistance by the UN agencies and other relevant organisations.
- (12) In particular, in a situation of instrumentalisation, it should, where necessary, be possible for the Member State concerned, to limit border traffic to the minimum by closing some border crossing points, while guaranteeing genuine and effective access

to international protection procedures. 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. Furthermore, any such limitations should take full account of the rights of Union citizens, third country nationals who are beneficiaries of the right of free movement pursuant an international agreement and third-country nationals who are long-term residents under national or Union law or are holders of long-term visas, as well as their respective family members. Such limitations should also be applied in a manner that ensures respect for obligations related to access to international protection, in particular the principle of *non-refoulement*.

- (13) The European Border and Coast Guard Agency assists Member States with implementing the operational aspects of external border management, including information exchange, the provision of equipment, capacity building and training to national border guards, targeted information and risk analysis, as well as the deployment of the Standing Corps. The Agency's new mandate offers considerable opportunities to support border control activities, including screening and return operations and a launch of rapid border intervention and/or return intervention at the request and on the territory of the host Member State concerned.
- (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.
- (15) Moreover, in the event of instrumentalisation of migrants, the Member State concerned should reinforce border control, including, as appropriate, through additional measures preventing illegal crossings and the deployment of additional resources and technical means to prevent unauthorised crossing of the border. Such technical means could include modern technologies including drones and motion sensors, as well as mobile units. The use of such technical means, in particular, any technologies capable of collecting personal data, needs to be based on and exercised in accordance with clearly defined provisions of national law.
- (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, as a specific response to situations of instrumentalisation of migrants.

- (17) In an area without internal border controls, persons should be able to move freely, and in security between Member States. In this regard, it should be clarified that the prohibition of controls at internal borders does not affect the competence of Member States to carry out checks on their territory, including at their internal borders, for purposes other than border control. It should, in particular, be clarified that national competent authorities, including health or law enforcement authorities, remain, in principle, free to carry out checks in the exercise of public powers provided for under national law.
- (18) While the prohibition of internal border controls also extends to checks having equivalent effects, checks by competent authorities should not be considered equivalent to the exercise of border checks where they do not have border control as an objective, where they are based on general information and experience of the competent authorities regarding possible threats to public security or public policy, including where they aim to combat irregular stay or residence and cross-border crimes linked to irregular migration, where they are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, and where they are conducted at transport hubs, such as ports, train or bus stations and airports or directly on board of passenger transport services, and where they are based on risk analysis.
- (19) While irregular migratory flows should not, per se, be considered to be a threat to public policy or internal security, they may require additional measures to ensure the functioning of the Schengen area.
- (20) The combatting of illegal residence or stay and of cross-border crime linked to irregular migration such as human trafficking, migrant smuggling and document fraud and other forms of cross-border crime could in particular encompass measures allowing the verification of the identity, nationality and residence status of persons provided that such verifications are non-systematic and carried out on the basis of risk analysis.
- (21) The use of 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. The prohibition of internal border controls should not be understood as preventing the lawful exercise of police or other public powers to carry out checks in the internal border areas. This includes checks that entail the use of monitoring and surveillance technologies which are generally used in the territory or that are based on a risk assessment for the purpose of protecting internal security. The use of such technologies for checks should therefore not be considered as equivalent to border controls.
- (22) In order to allow for such technologies to be effective, it should be possible to apply proportionate speed limits at road crossings.
- (23) The prohibition of border controls at internal borders should not limit the carrying out of checks provided for in other instruments of Union law. The rules provided for in

this Regulation, should not therefore, affect the applicable rules regarding the carrying out of checks on passenger data against relevant databases in advance of arrival.

- (24) It is necessary to ensure that checks carried out by Member States in exercise of national competences remain fully consistent with an area that is free of internal border controls. In accordance with the case law of the Court of Justice, the more extensive the indications are that checks conducted by Member States at their border areas have an equivalent effect to border control, having regard to the objective of such checks, their territorial scope and possible differences compared to checks carried out in the remainder of the territory of the Member State concerned, the greater the need for strict and detailed rules and limitations laying down the conditions for the exercise, by the Member States, of their police powers in a border area.
- (25) Measures need to be taken to address unauthorised movements of illegally staying third country nationals in an area without internal border controls. In order to strengthen the functioning of the Schengen area, Member States should be able to take additional measures to counter irregular movements between Member States, and combat illegal stays. Where national law enforcement authorities of a Member State apprehend illegally staying third country nationals at the internal borders as part of cross-border police operational cooperation it should be possible for those authorities to refuse such persons the right to enter or remain in their territory and to transfer them to the Member State from which they entered. The Member State from where the person came directly should in turn be required to receive the apprehended third country nationals.
- (26) The procedure by which a Member State may transfer apprehended illegally staying third country nationals to a Member State from where the person came directly should take place swiftly but be subject to safeguards and carried out in full respect of fundamental rights and the principle of non-discrimination enshrined in Article 21 of the Charter, to prevent racial profiling. It should be possible for the authorities to carry out a verification of relevant information immediately available to the authorities concerning the movements of the persons concerned. Such information may include objective elements that would allow the authorities to conclude that the person had recently travelled from another Member States, such as the possession of documents, including receipts or invoices, evidencing recent travel from another Member State. Third country nationals subject to the transfer procedure should be provided with a reasoned decision in writing. While the decision should be immediately enforceable, the third country national should be afforded an effective remedy to appeal against or seek review of the transfer decision. This remedy should not have suspensive effect.
- (27) The transfer procedure provided for under this Regulation should not affect the existing possibility for Member States to return irregular third country nationals in accordance with bilateral agreements or arrangements referred to in Article 6(3) of Directive 2008/115/EC (the “Return Directive”), where such persons are detected outside of the vicinity of internal borders. In order to facilitate the application of such agreements, and to complement the objective of protecting the area without internal borders, the Member States should be afforded the possibility to conclude new agreements or arrangements and update existing ones. The Commission should be notified of any such modifications or updates of new agreements or arrangements. Where a Member State has taken back a third country national under the procedure provided for in this Regulation or on the basis of a bilateral agreement or arrangement,

the Member State concerned should be required to issue a return decision in accordance with the Return Directive. In order to ensure consistency between the new procedures provided for in this Regulation and existing rules on the return of third country nationals, a targeted modification of Article 6(3) of the Return Directive is therefore necessary.

- (28) In exceptional cases, addressing threats to the Schengen area may require the adoption, by the Member States, of measures at the internal borders. Member States remain competent to determine the need for the temporary reintroduction or prolongation of border controls. Under the existing rules, the reintroduction of controls at internal borders is provided for in circumstances where a serious threat to internal security or public policy manifests itself in a single Member State for a limited period of time. In particular, terrorism and organised crime, large scale public health emergencies or large scale or high profile international events such as sporting, trade or political events can amount to a serious threat to public policy or internal security.
- (29) Furthermore, a serious threat to public policy or internal security can also result from large scale unauthorised movements of irregular migrants between the Member States where this creates a situation putting a strain on the overall resources and capacities of the responsible national services, where the other means provided for under this Regulation are not sufficient to address these inflows and movements. In this context, Member States should be able to rely on objective and quantified reports on unauthorised movements whenever available, in particular, when produced on a regular basis by the competent Union agencies in line with their respective mandates. It should be possible for a Member State to use the information provided by the agencies to demonstrate the exceptional character of the identified threat caused by unauthorised movement in the risk assessment, in order to justify the reintroduction of internal border controls on this ground.
- (30) While action at Union level is provided for in circumstances where the nature of a threat derives from persistent serious deficiencies at the external borders, there is no Union-wide mechanism that would apply to situations where, within the Schengen area, a serious threat to internal security or public policy area is affecting a majority of Member States, putting at risk the well-functioning of the Schengen area. The gap should be filled by putting in place a new Schengen area safeguard mechanism permitting coordinated solutions to protect the interests of persons entitled to benefit from the area without controls at internal borders, by maximising the effectiveness of the measures taken while minimising their negative side-effects.
- (31) The new Schengen area safeguard mechanism should allow the Council to adopt, upon a proposal by the Commission, a decision authorising the reintroduction or prolongation of internal border controls, where this is justified by a particular threat, identified on the basis of notifications received from individual Member States, or other available information, in particular a risk assessment, in case of prolongation of internal border controls beyond six months. Given the politically sensitive nature of such a decision which regulates the possibility for Member States to reintroduce or prolong internal border control in particular circumstances, implementing powers to adopt a decision should be conferred on the Council, acting on a proposal from the Commission.



- (32) In determining whether a reintroduction or prolongation of internal border controls by the Member States is justified, the Council should take into account whether any other measures that could ensure a high level of security within the territory, such as reinforced checks in the internal border areas by the competent authorities, are available. In the event that a prolongation of the controls is not considered justified, the Commission should, instead, recommend the use of other measures deemed more appropriate to address the identified threat.
- (33) The establishment of the new Schengen area safeguard mechanism should not affect the right of Member States to have prior recourse to unilateral measures in accordance with the Regulation, where the situation so requires. However, once adopted, the Union measure should become the single basis for a coordinated response to the threat identified.
- (34) In order to ensure compliance with the principle of proportionality, the decision of the Council should be adopted for a limited period of time of up to six months that may be prolonged subject to regular review upon a proposal from the Commission, as long as the threat is found to persist. The initial decision should include an assessment of the expected impact of the measures adopted, including its adverse side-effects, with a view to determining if controls at internal borders are justified or whether less restrictive measures could be applied in their place in an effective manner. Subsequent decisions should take account of the evolution of the identified threat. The Member States should immediately notify the Commission and the Member States of the reintroduction of internal border controls in accordance with the decision of the Council.
- (35) Reintroduction of internal border controls should also remain possible where serious deficiencies in the management of the external borders persist, putting at risk the overall functioning of the area without internal border control. Periods where the border controls were introduced by Member States because the urgency of the situation required it or where the Council takes a decision to recommend the reintroduction because a threat affects a significant number of Member States, should not be included in the two years' period applicable to reintroductions based on serious deficiencies at the external borders.
- (36) The reintroduction of border controls at internal borders, whether on the basis of unilateral decisions of the Member States or at a Union level, has serious implications for the functioning of the Schengen area. In order to ensure that any decision to reintroduce border controls is only taken where necessary, as a measure of last resort, the decision on temporary reintroduction or prolongation of border controls should be based on common criteria, putting an emphasis on necessity and proportionality. The proportionality principle requires that the reintroduction of internal border controls be subject to safeguards that increase over time.
- (37) In the first instance, Member States should assess the appropriateness of internal border controls having regard to the nature of the serious threat identified. In this context, the Member States should pay particular attention to and assess the likely impact of internal border controls on the movement of persons within the area without internal border controls and the functioning of the cross-border regions. This assessment should be part of the notification that Member States are required to transmit to the Commission. In case of prolongation of internal border controls for

foreseeable events beyond an initial period of six months, the Member State should also assess the appropriateness of alternative measures to pursue the same objectives as internal border controls, such as proportionate checks as carried out in the exercise of police or other public powers or through forms of police cooperation as provided for under Union law, and the possibility to use the transfer procedure.

- (38) In order to limit harmful consequences resulting from the reintroduction of internal border controls, any decision to reintroduce internal border controls should be accompanied by mitigating measures if needed. Such measures should include measures to assure a smooth operation of transit of goods and transport personnel and seafarers by the establishment of ‘green lanes’. In addition, and to take account of the need to ensure the movement of persons whose activities may be essential for preserving the supply chain or the provision of essential services, Member States should also apply the existing guidelines on cross-border workers<sup>45</sup>. Against this background, the rules for the reintroduction of border controls at internal borders should take account of the guidelines and recommendations adopted throughout the COVID-19 pandemic as a solid safety net for the Single Market, for the purpose of assuring that they are applied by the Member States, where appropriate, as mitigating measures during reintroduced internal border controls. Measures should in particular be identified with a view to ensuring the uninterrupted functioning of the Single Market and safeguarding the interests of cross-border regions and of ‘twin cities’ including for instance authorisations or derogations for the inhabitants of cross-border regions.
- (39) The notification to be provided by the Member States should be decisive when assessing compliance with the criteria and conditions for a temporary reintroduction of internal border controls. In order to ensure a comparable set of information, the Commission should adopt a template for the notification of reintroduction of border controls at internal borders in an implementing act. Member States should be entitled to classify all or parts of the information provided in the notification, without prejudice to the functioning of appropriate and secure police cooperation channels.
- (40) In order to ensure that internal border controls are truly a last resort measure applied only for as long as necessary and in order to allow for assessing the necessity and proportionality of internal border controls to address foreseeable threats, Member States should prepare a risk assessment to be submitted to the Commission when internal border controls are prolonged beyond an initial six months in response to foreseeable threats. The Member States must in particular, explain, the scale and evolution of the identified serious threat, including how long the identified serious threat is expected to persist and which sections of the internal borders may be affected, as well as their coordination measures with the other Member States that are impacted or likely to be impacted by such measures.
- (41) The Commission should be entitled to request additional information based on the notification received, including on the risk assessment or cooperation and coordination measures with the Member States affected by the planned prolongation of border control at internal borders. Where the notification does not comply with the minimum

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<sup>45</sup> 2020/C 102 I/03.

requirements, the Commission should discuss the notification with the Member State concerned and request additional information or a resubmission of the notification.

- (42) In order to ensure a sufficient degree of transparency of the actions affecting travel without internal border controls, the Member States should also inform the European Parliament and the Council about the main elements concerning the planned reintroduction of border controls. In justified cases, Member States may also classify such information. Every year, pursuant to Article 33 of the Schengen Borders Code, the Commission should present to the European Parliament and to the Council a report on the functioning of the area without internal border control ('State of Schengen report') which should pay particular attention to the situation as regards the unauthorised movements of third country nationals, building on the available information from the relevant Agencies and data analysis from relevant information systems. It should also assess the necessity and proportionality of the reintroductions of border controls in the period covered by that Report. The State of Schengen report shall also cover the reporting obligations resulting from Article 20 of the Schengen Evaluation Mechanism<sup>46</sup>.
- (43) The mechanism for the temporary reintroduction of border controls at internal borders in urgent situations or to address foreseeable threats should provide for a possibility, for the Commission, to organise consultations between Member States, including at the request of any Member State. Relevant Union Agencies should be involved in this process in order to share their expertise, where appropriate. Such consultations should look into the modalities of carrying out internal border controls and their time-line, possible mitigating measures as well as the possibilities of applying alternative measures instead. Where the Commission or a Member State has issued an opinion expressing concerns regarding the reintroduction of border controls, such consultations should be mandatory.
- (44) The Commission and Member States should retain the possibility to express any concern as regards the necessity and proportionality of a decision of a Member State to reintroduce internal border controls for reason of urgency or to address a foreseeable threat. In case controls at internal borders are reintroduced and prolonged for foreseeable threats for combined periods exceeding eighteen months, it should be a requirement for the Commission to issue an opinion assessing the necessity and proportionality of such internal border controls. Where a Member State considers that there are exceptional situations justifying the continued need for internal border controls for a period exceeding two years, the Commission should issue a follow-up opinion. Such an opinion is without prejudice to the enforcement measures, including infringement actions, which the Commission may take at any time against any Member State for failure to comply with its obligations under Union law. Where an opinion is issued, the Commission should launch consultations with the Member States concerned.
- (45) In order to enable the *post factum* analysis of the decision on the temporary reintroduction of border controls at the internal borders, Member States should remain

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<sup>46</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27.

obliged to submit a report on the reintroduction of border control at internal borders to the European Parliament, the Council and the Commission once they lift the controls. Where the controls are kept in place for prolonged periods of time, such a report should also be submitted after twelve months, and every year thereafter if exceptionally controls are maintained and for as long as the controls are maintained. The report should outline, in particular, the initial and follow-up assessment of the necessity of internal border controls and the respect of the criteria for reintroduction of border controls at internal borders. The Commission should adopt in an implementing act a template and make it available online.

- (46) When implementing this Regulation, Member States shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- (47) The competent authorities shall use their powers to carry out checks within the territory and apply relevant procedures in full respect of the rules on data protection under Union law. Regulation (EU) 2016/679 of the European Parliament and of the Council or Directive (EU) 2016/680 of the European Parliament and of the Council apply to the processing of personal data by competent national authorities for the purposes of this Regulation, in their respective field of application.
- (48) The objective of this Regulation is to strengthen the functioning of the Schengen area. This objective cannot be achieved by Member States acting alone. Therefore, an amendment of the common rules established at Union level is necessary. Thus, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (49) In accordance with Articles 1 and 2 of the Protocol No 22 on the position of Denmark, as annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it in its national law.
- (50) This Regulation 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>47</sup>; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (51) As regards Iceland and Norway, this Regulation 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

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<sup>47</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.

development of the Schengen *acquis*<sup>48</sup>, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC<sup>49</sup>.

- (52) As regards Switzerland, this Regulation 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*<sup>50</sup> which fall within the area referred to in Article 1, point A of Decision 1999/437/EC<sup>51</sup> read in conjunction with Article 3 of Council Decision 2008/146/EC.<sup>52</sup>
- (53) As regards Liechtenstein, this Regulation constitutes a development of the 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*<sup>53</sup> which fall within the area referred to in Article 1, point A of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU<sup>54</sup>.
- (54) This Regulation is without prejudice to the application of Directive 2004/38/EC<sup>55</sup>.
- (55) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

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<sup>48</sup> OJ L 176, 10.7.1999, p. 36.

<sup>49</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10.7.1999, p. 31.

<sup>50</sup> OJ L 53, 27.2.2008, p. 52.

<sup>51</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10.7.1999, p. 31.

<sup>52</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.

<sup>53</sup> OJ L 160, 18.6.2011, p. 21.

<sup>54</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.

<sup>55</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 30.4.2004, p. 77).

(56) Regulation (EU) No 2016/399 and Directive 2008/115/EC should therefore be amended accordingly,

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/EC<sup>56</sup>, 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.

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<sup>56</sup> 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).

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 Council<sup>57</sup>, 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

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<sup>57</sup> 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.



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.<sup>4</sup> 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;
    - 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.
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.”

(5) Article 23 is replaced by the following:

“Article 23  
*Exercise of public powers*”

The absence of border control at internal borders shall not affect:

- a) the exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their internal border areas, as conferred on them under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.

The exercise by competent authorities of their powers may not, in particular, be considered equivalent to the exercise of border checks when the measures:

- i) do not have border control as an objective;
  - ii) are based on general information and experience of the competent authorities regarding possible threats to public security or public policy and aim, in particular, to:
    - combat cross-border crime;
    - combat irregular residence or stay, linked to irregular migration; or
    - contain the spread of an infectious disease with epidemic potential as detected by the European Centre for Disease Control;
  - iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, including where they are conducted at transport hubs or directly on board of passenger services and when they are based on risk analysis;
  - iv) are carried out, where appropriate, on the basis of monitoring and surveillance technologies generally used in the territory, for the purposes of addressing threats to public security or public policy as set out under ii);
- b) the possibility for a Member State to carry out security checks on persons carried out at transport hubs by the competent authorities under the law of each Member State, by their competent authorities or by carriers, provided that such checks are also carried out on persons travelling within a Member State;
  - c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;
  - d) the possibility for a Member State to provide by law for an obligation on third-country nationals to report their presence on its territory pursuant to the provisions of Article 22 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('the Schengen Convention');
  - e) checks for security purposes of passenger data against relevant databases on persons traveling in the area without controls at internal borders which can be carried out by the competent authorities under the applicable law."
- (6) The following Article 23a is inserted:

“Article 23a

*Procedure for transferring persons apprehended at the internal borders*

1. This Article applies to the apprehension of a third-country national in the vicinity of internal borders, in circumstances where all of the following conditions are fulfilled:
  - a) the third country national concerned does not or no longer fulfils the entry conditions laid down in Article 6(1);
  - b) the third country national is not covered by the derogation laid down in Article 6(5) point (a);
  - c) the third country national is apprehended as part of cross-border police operational cooperation, in particular, during joint police patrols;
  - d) there are clear indications that the third country national has arrived directly from another Member State, on the basis of information immediately available to the apprehending authorities, including statements from the person concerned, identity, travel or other documents found on that person or the results of searches carried out in relevant national and Union databases.
2. The competent authorities of the Member State may, based on a finding that the third country national concerned has no right to stay on its territory, decide to immediately transfer the person to the Member State from which the person entered or sought to enter, in accordance with the procedure set out in Annex XII.
3. Where a Member State applies the procedure referred to in paragraph 2, the receiving Member State shall be required to take all measures necessary to receive the third country national concerned in accordance with the procedures set out in Annex XII.
4. From [*one year following the entry into force of the Regulation*] and annually thereafter, Member States shall submit to the Commission the data recorded in accordance with point 3 of Annex XII, regarding the application of paragraphs 1, 2 and 3.”

- (7) At the end of the first paragraph of Article 24, the first paragraph is replaced by the following:

“Member States shall remove all obstacles to fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations or required for the use of the technologies referred to in Article 23, point (a)(iv).”

- (8) Article 25 is replaced by the following:

“Article 25  
*General framework for the temporary reintroduction or prolongation of border control at internal borders*”

1. Where, in the area without internal border controls, there is a serious threat to public policy or internal security in a Member State, that Member State may

exceptionally reintroduce border controls at all or specific parts of its internal borders.

A serious threat to public policy or internal security may be considered to arise from, in particular:

- (a) activities relating to terrorism or organised crime;
  - (b) large scale public health emergencies;
  - (c) a situation characterised by large scale unauthorised movements of third-country nationals between the Member States, putting at risk the overall functioning of the area without internal border control;
  - (d) large scale or high profile international events such as sporting, trade or political events.
2. Border controls may only be introduced pursuant to Articles 25a and 28 where a Member State has established that such a measure is necessary and proportionate, taking into account the criteria referred to in Article 26(1), and, in case such controls are prolonged, also the criteria referred to in Article 26(2). Border controls may also be reintroduced in accordance with Article 29, taking into account the criteria referred to in Article 30.

In all cases, border controls at internal borders shall be reintroduced as a measure of last resort. The scope and duration of the temporary reintroduction of border control shall not exceed what is strictly necessary to respond to the serious threat identified.

3. Where the same threat continues to persist, border controls at internal borders may be prolonged in accordance with Articles 25a, 28 or 29.

The same threat shall be considered to exist where the justification advanced by the Member State for prolonging border controls is based on the determination of the continuation of the same threat that had justified the initial reintroduction of the border controls.”

- (9) A new Article 25a is inserted after Article 25:

“Article 25a

*Procedure for cases requiring action due to unforeseeable or foreseeable events*

1. Where a serious threat to public policy or internal security in a Member State is unforeseeable and requires immediate action, the Member State may, on an exceptional basis, immediately reintroduce border control at internal borders.
2. The Member State shall, at the same time as reintroducing border control under paragraph 1, notify the Commission and the other Member States of the reintroduction of border controls, in accordance with Article 27(1).

3. For the purposes of paragraph 1, border control at internal borders may be immediately reintroduced for a limited period of up to one month. If the serious threat to public policy or internal security persists beyond that period, the Member State may prolong the border control at internal borders for further periods, leading to a maximum duration not exceeding three months.
4. Where a serious threat to public policy or internal security is foreseeable in a Member State, the Member State shall notify the Commission and the other Member States and the Commission in accordance with Article 27(1), at the latest four weeks before the planned reintroduction of border controls, or within a shorter period where the circumstances giving rise to the need to reintroduce border controls at internal borders become known less than four weeks before the planned reintroduction.
5. For the purposes of paragraph 4, and without prejudice to Article 27a(4), border control at internal borders may be reintroduced for a period of up to six months. Where the serious threat to public policy or internal security persists beyond that period, the Member State may prolong the border control at internal borders for renewable periods of up to six months.

Any prolongation shall be notified to the Commission and the other Member States in accordance with Article 27 and within the time limits referred to in paragraph 4. Subject to Article 27a(5), the maximum duration of border control at internal borders shall not exceed two years.

6. The period referred to in paragraph 5 shall not include periods referred to in paragraph 3.”
- (10) Article 26 is replaced by the following:

“Article 26  
*Criteria for the temporary reintroduction and prolongation of border control at internal borders*”

1. To establish whether the reintroduction of border control at internal borders is necessary and proportionate in accordance with Article 25, a Member State shall in particular consider:
  - (a) the appropriateness of the measure of reintroducing border controls at internal border, having regard to the nature of the serious threat identified and in particular, whether the reintroduction of border controls at internal borders is likely to adequately remedy the threat to public policy or internal security;
  - (b) the likely impact of such a measure on:
    - movement of persons within the area without internal border control and
    - the functioning of the cross-border regions, taking into account the strong social and economic ties between them.

2. Where a Member States decides to prolong the border control at internal borders pursuant to Article 25a(5), it shall also assess in detail whether the objectives pursued by such prolongation could be attained by:
  - a) the use of alternative measures such as proportionate checks carried out in the context of the lawful exercise of powers as referred to in Article 23 point (a);
  - b) the use of the procedure as referred to in Article 23a;
  - c) forms of police cooperation as provided for under Union law, including on matters such as joint patrols, joint operations, joint investigation teams, cross-border hot pursuits, or cross-border surveillance.
3. Where border controls at internal borders have been reintroduced or prolonged, the Member States concerned shall, where necessary, ensure that they are accompanied by appropriate measures that mitigate the impacts resulting from the reintroduction of border controls on persons and the transport of goods, giving particular consideration to the cross-border regions.”

(11) Article 27 is replaced by the following:

“Article 27  
*Notification of temporary reintroduction of internal border controls and risk assessment*”

1. Notifications by Member States of the reintroduction or prolongation of internal border controls shall contain the following information:
  - (a) the reasons for the reintroduction or prolongation, including all relevant data detailing the events that constitute a serious threat to its public policy or internal security;
  - (b) the scope of the proposed reintroduction or prolongation, specifying at which part or parts of the internal borders border control is to be reintroduced, or prolonged;
  - (c) the names of the authorised crossing-points;
  - (d) the date and duration of the planned reintroduction or prolongation;
  - (e) the considerations as to the necessity and proportionality referred to in Article 26(1) and, in the case of a prolongation, in Article 26(2);
  - (f) where appropriate, the measures to be taken by the other Member States.

A notification may be submitted jointly by two or more Member States.

The notification shall be provided in accordance with a template to be established by the Commission by an implementing act and to be made available online. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 38(2).”

2. Where border controls have been in place for six months in accordance with Article 25a(4), any subsequent notification for the prolongation of such controls shall include a risk assessment. The risk assessment shall present the scale and anticipated evolution of the identified serious threat, in particular how long the identified serious threat is expected to persist and which sections of the internal borders may be affected, as well as information regarding coordination measures with the other Member States impacted or likely to be impacted by such measures.
3. Where the reintroduction of border controls or its prolongation refers to large scale unauthorised movements referred to in Article 25(1) point (b), the risk assessment shall also provide information on the scale and trends of such unauthorised movements, including any information obtained from the relevant EU agencies in line with their respective mandates and data analysis from relevant information systems.
4. The Member State concerned shall upon request by the Commission, provide any further information, including on the coordination measures with the Member States affected by the planned prolongation of border control at internal borders as well as further information needed to assess the possible use of measures referred to in Article 23 and 23a .
5. Member States submitting a notification under paragraphs 1 or 2 may, where necessary and in accordance with national law, decide to classify all or parts of the notified information.

Such classification shall not preclude access to information, through appropriate and secure police cooperation channels, by the other Member States affected by the temporary reintroduction of border controls at internal borders.”

- (12) The following Article 27a is inserted:

“Article 27a

*Consultation with the Member States and opinion of the Commission*

1. Following receipt of notifications, submitted under Article 27(1), the Commission may establish a consultation process, where appropriate, including joint meetings between the Member State that is planning to reintroduce or prolong border control at internal borders, and the other Member States, especially those directly affected by such measures and the relevant Union agencies.

The consultation shall concern in particular the identified threat to public policy or internal security, the relevance of the intended reintroduction of border controls taking into account the appropriateness of alternative measures, as well as the ways of ensuring implementation of the mutual cooperation between the Member States in relation to the reintroduced border controls.

The Member State planning to reintroduce or prolong border control at internal borders shall take utmost account of the results of such consultation when carrying out border control at the internal border.

2. Following the receipt of notifications, submitted in relation to the reintroduction or prolongation of border controls at internal borders, the Commission or any other Member State may, without prejudice to Article 72 TFEU, issue an opinion, if, based on the information contained in the notification and risk assessment, where appropriate, or any additional information, they have concerns as regards the necessity or proportionality of the planned reintroduction or prolongation of border control at internal borders.
3. Following receipt of notifications submitted in relation to a prolongation of border control at the internal border under Article 25a(4) which leads to the continuation of border controls at internal borders for eighteen months in total, the Commission shall issue an opinion on necessity and proportionality of such internal border controls.
4. Where an opinion referred to in paragraphs 2 or 3 is issued, the Commission may establish a consultation process in order to discuss the opinion with the Member States. Where the Commission or a Member State issues an opinion expressing concerns on the necessity or proportionality of reintroduced internal border controls the Commission shall launch such a process.
5. Where a Member State considers that there are exceptional situations justifying the continued need for internal border controls in excess of the maximum period referred to in Article 25(5), it shall notify the Commission in accordance with Article 27(2). The new notification from the Member State shall substantiate the continued threat to public policy or internal security, taking into account the opinion of the Commission given pursuant to paragraph 3. The Commission shall issue a follow up opinion.”

(13) Article 28 is replaced by the following:

“Article 28

*Specific mechanism where the serious threat to public policy or internal security puts at risk the overall functioning of the area without internal border controls*

1. Where the Commission, establishes that the same serious threat to internal security or public policy affects a majority of Member States, putting at risk the overall functioning of the area without internal border, it may, make a proposal to the Council to adopt an implementing decision authorising the reintroduction of border controls by Member States where the available measures referred to in Articles 23 and 23a are not sufficient to address the threat.
2. The decision shall cover a period of up to six months and may be renewed, upon proposal from the Commission, for further periods of up to six months as long as the threat persists, taking into account the review referred to in paragraph 5.
3. Where Member States reintroduce or prolong border controls because of the threat referred to in paragraph 1, those controls shall, as of the entry into force of the Council decision, be based on that decision.



4. The decision of the Council referred to in paragraph 1 shall also refer to any appropriate mitigating measures that shall be established at national and Union level in order to minimise the impacts caused by the reintroduction of border controls.
5. The Commission shall review the evolution of the identified threat as well as the impact of the measures adopted in accordance with the Council decision referred to in paragraph 1, with a view to assess whether the measures remain justified.
6. Member States shall immediately notify the Commission and the other Member States in the Council of a reintroduction of border controls in accordance with the decision referred to in paragraph 1.
7. The Commission may issue a recommendation indicating other measures as referred to in Articles 23 and 23a that could complement internal border controls or be more suitable to address the identified threat to internal security or public policy as referred to in paragraph 1.”

(14) Article 31 is amended as follows:

- a) Article 31 becomes paragraph 1;
- b) the following paragraph 2 is added:

‘2. Where a Member State notifies the Commission and the other Member States of the reintroduction of border controls in accordance with Article 27(1), it shall at the same time inform the European Parliament and the Council of the following:

- a) the details of the internal borders where border control is to be reintroduced;
- b) the reasons for the proposed reintroduction;
- c) the names of the authorised crossing-points;
- d) the date and duration of the planned reintroduction;
- e) where appropriate, the measures to be taken by the other Member State.

3. The provision of information may be subject to classification of information by Member States pursuant to Article 27(4).

Member States shall not be required to provide all the information referred to in the paragraph 2 in cases justified on public security grounds.

The classification of information shall not preclude information from being made available by the Commission to the European Parliament. The transmission and handling of information and documents transmitted to the European Parliament under this Article shall comply with rules concerning the forwarding and handling of classified information which are applicable between the European Parliament and the Commission.”

(15) Article 33 is replaced by the following:

*“Article 33*

*Report on the reintroduction of border control at internal borders*

1. Within four weeks of the lifting of border control at internal borders, Member States which have carried out border controls at internal borders shall present a report to the European Parliament, the Council and the Commission on the reintroduction and, where applicable, the prolongation of border control at internal borders.
2. Without prejudice to the first paragraph 1, where border controls are prolonged as referred to in Article 25a(5), the Member State concerned shall submit a report at the expiry of twelve months and every twelve months thereafter if border control is exceptionally maintained.
3. The report shall outline, in particular, the initial and follow-up assessment of the necessity of border controls and the respect of the criteria referred to in Articles 26, the operation of the checks, the practical cooperation with neighbouring Member States, the resulting impact on the movement of persons in particular in the cross-border regions, the effectiveness of the reintroduction of border control at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control.
4. The Commission shall adopt a uniform format for such report and make it available online.
5. The Commission may issue an opinion on that ex-post assessment of the temporary reintroduction of border control at one or more internal borders or at parts thereof.
6. The Commission shall present to the European Parliament and to the Council, at least annually, a report on the functioning of the area without internal border control entitled (‘State of Schengen report’). The report shall include a list of all decisions to reintroduce border control at internal borders taken during the relevant year. It shall also include information on the trends within the Schengen area as regards the unauthorised movements of third country nationals, taking into account available information from the relevant Union agencies, data analysis from relevant information systems and an assessment of the necessity and proportionality of the reintroductions of border controls in the period covered by that report.”

(16) In Article 39 (1), the following point (h) is added:

“h) Member States shall notify to the Commission the local administrative areas considered as the cross-border regions and any relevant changes thereto.”

(17) The following Article 42b is added:

*“Article 42b*

*Notification of cross-border regions*

By [two months of the entry into force of this Regulation] at the latest, Member States shall notify the Commission the areas of their territory considered as the cross-border regions.

Member States shall also inform the Commission of any relevant changes thereto.”

(18) The following Annex XI is added:

“ 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.”

(19) A new Annex XII is added:

“ANNEX XII

PART A

*Procedure for transferring persons apprehended at the internal borders*

1. Decisions shall state the grounds for finding that a person has no right to stay. They shall take effect immediately.
2. The decision shall be issued by means of a standard form, as set out in Part B, completed by the competent national authority.

The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision by signing the form and shall be given a copy of the signed form.

Where the third-country national refuses to sign the standard form, the competent authority shall indicate this refusal in the form under the section ‘comments’.

3. The national authorities issuing a refusal decision shall record the following data:
  - a) to the extent that these can be established by them, the identity and nationality of the third-country national concerned,
  - b) the references of the identity document, if any,
  - c) where available, copies of any documents or data relating to the identity or nationality of the third country national concerned, in combination with the relevant national and Union databases.
  - d) the grounds for refusal,
  - e) the date of refusal,
  - f) the Member States to which the third country national was sent back.
4. The national authorities issuing a refusal decision shall collect the following data:
  - a) the number of persons refused entry;
  - b) the number of persons refused stay;
  - c) the number of persons sent back;
  - d) the Member State(s) to which persons were sent back;
  - e) where this information is available, the nationality of the third country nationals apprehended;
  - f) the grounds for refusal of entry and stay;
  - g) the type of border as specified in Article 2 point 1 of Regulation (EU) 2016/399 at which the third country nationals were sent back.
5. Persons refused entry or the right to stay shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national in a language that they understand or are reasonably supposed to understand. Lodging such an appeal shall not have suspensive effect.
6. The authorities empowered under national law shall ensure that the third-country national subject to a refusal decision is transferred to the competent authorities of the neighbouring Member State immediately and within 24 hours at the latest. The authorities empowered under national law in the neighbouring Member State shall cooperate with the authorities of the Member State to that end.

7. If a third-country national who has been subject to a decision referred to in paragraph 1 is brought to the border by a carrier, the authority responsible locally may:
- (a) order the carrier to take charge of the third-country national and transport him or her without delay to the Member State from which he or she was brought;
  - (b) pending onward transportation, take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally.

## PART B

### Standard form for transferring persons apprehended at the internal borders

	Name of State _____
Logo of State (Name of Office) _____ _____	
_____ <sup>(1)</sup>	
<b>TRANSFER PROCEDURE AT THE INTERNAL BORDER</b>	
On _____ at (time) _____ at the location (indicate type of the internal border nearby or other relevant information related to the apprehension by a joint patrol) _____	
We, the undersigned, _____ have before us:	
Personal data (subject to availability)	
Surname _____ First name _____	
Date of birth _____ Place of birth _____ Sex _____	
Nationality _____ Resident in _____	
Type of identity document _____ number _____	
Issued in _____ on _____	
Visa number, if any _____ type _____ issued by _____	
Valid from _____ until _____	
For a period of _____ days: _____	
Coming from _____ by means of _____ (indicate means of transport used, e.g. flight number), he/she is hereby informed that he/she has no right to stay in the country and will be transferred to _____ pursuant to (indicate	

references to the national law in force), for the following reasons:

- (A) has no valid travel document(s)
- (B) has a false/counterfeit/forged travel document
- (C) has no valid visa or residence permit
- (D) has a false/counterfeit/forged visa or residence permit
- (E) has no appropriate documentation justifying the purpose and conditions of stay

The following document(s) could not be provided: \_\_\_\_\_

- (F) has already stayed for 90 days in the preceding 180-day period on the territory of the Member States of the European Union
- (G) does not have sufficient means of subsistence in relation to the period and form of stay, or the means to return to the country of origin or transit
- (H) is a person for whom an alert has been issued for the purposes of refusing entry
  - in the SIS
  - in the national register
- (I) is considered to be a threat to public policy, internal security, public health or the international relations of one or more of the Member States of the European Union (each State must indicate the references to national law relating to such transfer)

Comments

- The person concerned declined to sign the form.

Person Concerned

Officer responsible for checks

The person concerned may appeal against the decision that he/she has no right to stay as provided for in national law. The person concerned receives a copy of this document (each State must indicate the references to the national law and procedure relating to the right of appeal).

## Article 2

### Amendment to Directive 2008/115/EC

1. Article 6(3) of Directive 2008/115/EC is replaced by the following:

“3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State in accordance with the procedure provided for in Article 23a of the Regulation (EU) 2016/399 of the European Parliament and of the Council\* or under bilateral agreements or arrangements.

The Member State which has taken back the third-country national concerned in accordance with the first subparagraph shall issue a return decision in accordance with paragraph 1. In such cases, the derogation laid down in the first subparagraph shall not apply.

Member States shall without delay notify any existing, amended or new bilateral agreements or arrangements to the Commission.”

\* 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 077 23.3.2016, p. 1).

### *Article 3*

#### *Transposition of amendment to Directive 2008/115/EC*

2. Member States shall adopt and publish, by [6 months from entry into force of this Regulation] at the latest, the laws, regulations and administrative provisions necessary to comply with Article 2. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [6 months from entry into force].

When Member States adopt those provisions, they shall contain a reference to Article 2 of this Regulation or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

### *Article 4*

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

However, Article 1, point 6, shall apply from [the date at which the amendments provided for in Article 2 apply in the Member States].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*