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COM(2017) 40 final

Proposal for a

COUNCIL IMPLEMENTING DECISION

setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

In 2015, a number of EU Member States reintroduced temporary border controls, following record flows of migrants arriving in the European Union and important secondary movements. This situation constituted a serious threat to public policy or internal security in several Schengen States¹.

Threats were due to serious deficiencies in ensuring efficient border control at parts of the Union's external border, which put the functioning of the entire Schengen area at risk. Therefore, the Council recommended², on a proposal from the Commission³, that the five Schengen States the most affected (Austria, Germany, Denmark, Sweden and Norway) maintain proportionate temporary border control at a limited number of their internal border sections, for a period of six months.

The triggering of Article 29 of the Schengen Borders Code and the adoption of a coordinated approach at EU level to temporary border controls were among the initiatives envisaged by the Back to Schengen Roadmap⁴, which aimed at creating conditions for lifting all internal border controls and returning to a normally functioning Schengen area as soon as possible.

On 11 November 2016, the Council adopted, on a proposal by the Commission, an Implementing Decision under Article 29 of the Schengen Borders Code setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. It was considered that the consequences of the exceptional circumstances that led to the triggering of Article 29 still persisted.

This Recommendation was addressed to the same five Schengen States (Austria, Germany, Denmark, Sweden and Norway), concerned the same internal border sections in these States and allowed for the maintenance of targeted and proportionate controls for a further period of three months, namely until 12 February 2017. The reintroduced border control was nevertheless submitted to stricter conditions than under the Recommendation of 12 May 2016 and a detailed monthly reporting obligation for the Schengen States concerned⁵.

Under Articles 25 and 29 of the Schengen Borders Code, this period can be again prolonged in accordance with the conditions and procedure set out in Article 29 if the exceptional circumstances persist.

¹ Chronologically, Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark.

² Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 151/8).

³ Commission proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, COM(2016)275 final of 4 May 2016.

⁴ Communication from the Commission to the European Parliament, the European Council and the Council of 4.3.2016, "Back to Schengen – A Roadmap", COM(2016) 120 final.

⁵ Following the Recommendation of 11 November 2016, all five Schengen States concerned notified the Commission that they would carry out the recommended temporary internal border control.

This Recommendation is without prejudice to additional possibilities available to all Member States, including the five affected Member States, under the general rules for temporary reintroduction of internal border control in the event of another serious threat to public policy or internal security, not linked to the serious deficiencies in the management of the external border. For example during the period of application of the Recommendation of 12 May 2016, France, not concerned by this Recommendation, notified the reintroduction and subsequent maintenance of border controls at its internal borders based on grounds related to foreseeable events and terrorist threats⁶.

In addition, as is recognised by Article 23 of the Schengen Borders Code, Member States can carry out police checks in border areas, as long as those do not have an effect equivalent to border checks. The available intelligence and increased level of threat can justify the intensification of such checks, including on key transport networks with cross-border police cooperation, which can be instrumental in responding both to uncontrolled secondary movements and terrorism. With a view to returning to a normal functioning of Schengen and gradually phasing out the current temporary internal border controls, the Commission encourages Member States to make use of this possibility.

It should also be highlighted that neither carrying out police checks in border areas nor reintroduced border controls can provide full security on their own, as demonstrated by the recent terrorist attack in Berlin. Therefore the increased and effective cooperation at all levels of relevant services among Member States fighting terrorism (exchange of intelligence, police cooperation and use of EU databases) remains fundamental in ensuring full security in the Schengen area.

In the meantime, a series of measures proposed by the Commission for better managing the external borders of the Union and protecting the Schengen area have been implemented or are being implemented⁷. The border control-related measures include inter alia the operationalisation of the European Border and Coast Guard, the establishment of the hot-spots and the upcoming systematic checks against relevant databases for all people crossing the external border. The external borders of the EU are today better protected and equipped to react to a new crisis due to the newly established European Border and Coast Guard. The Commission will continue to closely cooperate with the European Border and Coast Guard Agency and ensure that all obligations foreseen by the European Border and Coast Guard Regulation are met. Those measures should lead to a much better protection of the EU external border, which is an indispensable prerequisite to the lifting of the temporarily reintroduced internal border controls and the restoration of a normally functioning Schengen area⁸.

The Commission is fully aware that future migratory flows at any EU border section may pose a serious threat to public policy or internal security in one or several Member States. For this reason actions are taken at different border sections at sea and on land to take coordinated action, including through additional efforts on the Central Mediterranean route⁹, through the

⁶ Euro 2016/Tour de France, state of emergency following the Nice attack.

⁷ Commission proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard, COM(2015)671 final; Commission proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015)670 final.

⁸ Communication from the Commission to the European Parliament, the European Council and the Council "Back to Schengen – A Roadmap", COM(2016)120 final.

⁹ See Communication from the Commission to the European Parliament, the European Council and the Council "On Central Mediterranean route", JOIN(2017) 4 final.

Partnership Framework, and by taking additional action on the relevant sections of the external borders. The Commission also recognises that new security challenges have arisen in the past years, as demonstrated by the very recent terrorist attack in Berlin. In this respect, whilst the current legal framework has been sufficient to address challenges faced until now, the Commission is reflecting on whether it is sufficiently adapted to address evolving security challenges.

The Commission is committed to continue working in order to ensure that the tools already in place are fully used as well as on the necessary new initiatives in order to further stabilise the situation, mindful of the fact that the disadvantages of prolonged internal border controls, namely the high economic costs and the obstacles to the free movement of citizens, have to be balanced against the results obtained by the internal border controls carried out so far.

Current situation

Based on the monthly reports submitted to the Commission by the Schengen States concerned and on all the information at its disposal, the Commission can conclude that the controls have remained within the conditions set by the Recommendation. The controls have been carried out only when necessary, they have remained proportionate, targeted, limited in their intensity and impeding as little as possible the crossing of the respective internal borders by the general public.

The information provided by the Schengen States in their reports confirms the trend that emerged with the reports under the Recommendation of 12 May 2016 (reduction in the number of persons to whom entry is refused, as well as in the number of asylum applications received) and thus the progressive stabilisation of the situation.

It is true that the number of arrivals of irregular migrants and asylum seekers in the European Union also continued to decrease during the period covered by the Recommendation. Yet, while the launch and operationalisation of the European Border and Coast Guard Agency and the continued implementation of the EU-Turkey Statement of 18 March 2016 represent key steps in managing the situation, an average of 81 persons continue arriving daily in the Greek islands.

Moreover, there are still a significant number of irregular migrants and asylum seekers in Greece (between 50 000 and 60 000, out of which 16 000 are on the islands). The Hotspots and camps in Greece remain overcrowded due to insufficient progress in processing, relocations and returns and, based on previous experience, the risk of secondary movement of these irregular migrants to other Member States remains. In addition, the situation in the Western Balkans remains fragile with, for instance, 7 000 migrants currently in Serbia. It follows that the overall situation still remains fragile and further efforts remain necessary in order to continue reducing the numbers. The consequences of the exceptional migratory circumstances that constitute a serious threat to public policy and internal security and put at the risk the functioning of the whole Schengen area thus persist.

Way forward

Despite the important progress achieved, the conditions set out in the Roadmap "Back to Schengen" in order to allow lifting all internal border controls and returning to a normally functioning Schengen area are not entirely fulfilled.

In particular, at this stage, the number of migrants remaining in Greece may be still of concern and may justify maintaining appropriate measures. The situation along the Western Balkans route remains fragile and the Member States most affected by the secondary movements of irregular migrants coming from Greece remain exposed to the risk related to the irregular movements.

The European Border and Coast Guard Agency has entered into force in record time and is being rapidly rolled out¹⁰, including to allow to assist Greece at the Northern Greek external border as of February 2017. The cooperation between the European Border and Coast Guard Agency and third countries is also advancing: the Commission has submitted to the Council a request for a negotiating mandate for a status agreement to be concluded with two neighbouring third countries (Serbia and former Yugoslav Republic of Macedonia). This process of rolling out the European Border and Coast Guard is ongoing and needs further efforts.

Furthermore, the application of existing Dublin rules in Greece will only be progressively restored starting as of mid-March and further efforts are needed to ensure full participation of Greece in this system in line with the Commission's recommendations, irrespective of the ongoing work on improving these rules. In addition, the emergency relocation schemes already in place since September 2015 must continue to deliver concrete results in terms of numbers of relocated persons. Finally, returns of persons not having the right to stay in the European Union must be further stepped up.

As those elements point towards the persistence of exceptional circumstances, the Commission considers it justified to allow Austria, Germany, Denmark, Sweden and Norway to prolong the current internal border controls as an exceptional measure for a further proportionate period. Based on the factual indicators available at this stage, the prolongation should not exceed three months. The Commission will continue to work with these Member States to gradually phase out temporary internal border controls.

Scope of the proposal

The five Member States currently carrying out temporary internal border control pursuant to the Council Recommendation of 11 November 2016 should be permitted to continue doing so for three months under strict conditions.

However, given the progressive stabilisation of the situation and the objective of gradually phasing out temporary internal border controls, the Member States concerned should first consider whether other measures, in particular police checks near the border in a manner compatible with Article 23 of the Schengen Borders Code, can sufficiently address the threats identified¹¹ and only introduce effective border checks at the internal borders concerned as a measure of last resort. Accordingly, the Member States that decide to maintain internal border control pursuant to the present Recommendation should, before opting for continuation, examine all available alternative measures to border controls. These Member States should

¹⁰ See Communication on operationalisation of the European Border and Coast Guard, COM(2017) 42

¹¹ The Court of Justice has ruled that the four little Roman figures (i) to (iv) in Article 23 lit.a of the Schengen Borders Code (Regulation 2016/399) are just an example, they are not a straightjacket prescribing the only possible police measures of Member States in a border area (case Adil, C-278/12 PPU, point 65). This judgement concerns national legislation or practice which is limited to border areas. Where the police powers are applicable across the territory of the Member State without distinction, the chance that their application falls foul of the ban on measures equivalent to border checks is smaller.

inform of the outcome of this examination in their notification on the maintenance of internal border controls to the other Member States, the European Parliament and the Commission.

The requirements under the Recommendation of 11 November 2016 concerning the weekly review by the Member States concerned of the necessity, frequency, location and time of controls, adjustment of the controls to the level of the threat addressed, and phasing them out wherever appropriate, remain in place for this Recommendation. The Member States concerned should also continue regularly consulting with the relevant Member State(s) with a view to ensuring that internal border controls are only carried out at those parts of the internal border where it is considered necessary and proportionate in accordance with the Schengen Borders Code.

The detailed reporting obligation introduced by the Council Recommendation of 11 November 2016 will continue to apply. After each month of implementation of the present Recommendation, the Member States concerned should promptly report to the Commission on the outcome of the controls carried out and on the assessment concerning the continued necessity of such controls, when applicable. This report should at least include the total number of persons checked, the total number of refusals of entry following the checks, the total number of return decisions issued following the checks and the total number of asylum applications received at the internal borders where the checks take place.

The Commission will closely monitor the application of the Recommendation and the situation on the ground.

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

This recommendation serves to implement the existing provisions in the policy area.

- **Consistency with other Union policies**

This recommendation has links with the Union's internal market and migration and asylum policy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 29 of 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).

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

Article 29 of Regulation (EU) No 2016/399 specifies that the Council shall adopt a recommendation for temporary internal border control on the basis of a Commission proposal.

Action at Union level is required where the overall functioning of the area without internal border controls is put at risk.

- **Proportionality**

The present proposal does not go beyond what is necessary to achieve the objective pursued.

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

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

n.a.

- **Stakeholder consultations**

Given the urgency of the proposal, a stakeholder consultation was not feasible.

- **Collection and use of expertise**

n.a.

- **Impact assessment**

In view of the limited time frame envisaged and considering the data submitted by the Member States concerned and those available concerning the situation in Greece, a fully-fledged impact assessment was not prepared.

- **Regulatory fitness and simplification**

n.a.

- **Fundamental rights**

The protection of fundamental rights was taken into account during the drafting of the proposal.

4. BUDGETARY IMPLICATIONS

The proposed measure has no implications for the EU budget.

5. OTHER ELEMENTS

n.a.

COUNCIL IMPLEMENTING DECISION

setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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)¹², and in particular Article 29 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) In accordance with Article 29 of the Schengen Borders Code, the Council adopted on 12 May 2016, on a proposal from the Commission, an Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk.
- (2) The Council recommended that five Schengen States (Austria, Germany, Denmark, Sweden and Norway) maintain proportionate temporary border control at a limited number of their internal border sections, for a period of six months, in order to address the serious threat to public policy and internal security in these States by the combination of deficiencies in external border control in Greece and the secondary movements of irregular migrants entering via Greece and who may intend to move to other Schengen States. This period was prolonged by the Council on a proposal from the Commission for another three months on 11 November 2016.
- (3) Under Articles 25 and 29 of the Schengen Borders Code, the initial period recommended by the Council can be further prolonged if the exceptional circumstances persist.
- (4) The Recommendation of 11 November 2016 required that the Schengen States concerned report monthly to the Commission on the outcome of the controls carried out and on the assessment concerning the continued necessity of such controls, when applicable. The Commission received such reports from all the Schengen States concerned. The information contained in these reports demonstrates that the controls have remained within the conditions set by the Recommendation. It also confirms a progressive stabilisation of the situation in these States, with a continuous reduction in the number of persons to whom entry is refused, as well as the number of asylum applications received.
- (5) However, despite this progress, the conditions set out in the Roadmap "Back to Schengen" in order to allow lifting all internal border controls and returning to a normally functioning Schengen area are still not entirely fulfilled. An important number of irregular migrants still remains in Greece and, based on trends observed in

¹² OJ L 77, 23.3.2016, p. 1.

the past, the Member States most affected by the secondary movements of irregular migrants coming from Greece remain exposed to the risk related to their irregular movements.

- (6) In its Communication "Back to Schengen – A Roadmap", the Commission identified the different policies to be put in place to return to a fully functioning Schengen Area. The European Border and Coast Guard Agency is now swiftly becoming operational, allowing it to provide assistance to Greece at the Northern Greek external border as of February 2017.
- (7) Another element identified in the Back to Schengen Roadmap is the implementation of the EU-Turkey Statement. The fourth progress report¹³ confirms the trend of a steady delivery of results, albeit in the face of many challenges. This implementation nevertheless needs to be constantly monitored. The same applies to the cooperation agreed upon in the Statement of the Western Balkans Route Leaders meeting.
- (8) The exceptional circumstances constituting a serious threat to public policy and internal security and putting at risk the overall functioning of the Schengen area therefore still persist.
- (9) In light of the facts above, it appears therefore justified, as a last resort measure, to allow a further prolongation of the temporary border controls at the internal borders concerned by the Schengen States currently carrying out such controls, namely Austria, Germany, Denmark, Sweden and the associated country Norway, in accordance with Article 29 of the Schengen Borders Code.
- (10) Based on the factual indicators available at this stage, this prolongation should not exceed three months as from the date of adoption of the present Implementing Decision.
- (11) The Member States that decide to continue carrying out internal border control under the present Implementing Decision should notify the other Member States, the European Parliament and the Commission accordingly.
- (12) Before opting for such controls, the Member States concerned should examine whether other measures alternative to border controls could not be used to effectively remedy the identified threat, such as the exercise of police powers in a manner compatible with Article 23 of the Schengen Borders Code, and decide to reintroduce border controls at the internal borders concerned only as a measure of last resort, when such less restrictive measures for cross-border traffic cannot sufficiently address the threats identified. The Member States concerned should inform of the outcome of this reflection and the reasons for opting for border controls in their notifications.
- (13) The controls under the present Implementing Decision should continue to be carried out only to the necessary extent, limited in their intensity to the absolute minimum necessary and adjusted to the circumstances. Accordingly, it can be envisaged that any further decrease of the flow should lead to suspending the controls at given border sections. Only targeted controls, based on constantly updated risk analysis and intelligence, should be carried out, in order to optimise the benefit of the controls and limit their negative effects on free movement. The Schengen States affected by these controls at the relevant border sections should be admitted to regularly express their views on their necessity; the Schengen State having decided to reintroduce such

¹³ Fourth Report on the Progress made in the implementation of the EU-Turkey Statement (COM(2016) 792).

controls should take these views into account when examining and reviewing the necessity of such checks, with the objective of progressively reducing them.

- (14) At the end of each month of implementation of the present Implementing Decision, a complete report on the results of the checks carried out should be promptly sent to the Commission, together with an assessment of their continuous necessity when applicable. This report should include the total number of persons checked, the total number of refusals of entry following the checks, the total number of return decisions issued following the checks and the total number of asylum applications received at the internal borders where the checks take place.
- (15) The Council takes note that the Commission has announced that it will continue working with the Schengen States concerned to gradually phase out temporary internal border controls with the objective of returning to a normal functioning of the Schengen area as soon as possible.
- (16) The Council also takes note that the Commission has announced that it will closely monitor the application of this Implementing Decision.

HEREBY RECOMMENDS:

1. Austria, Germany, Denmark, Sweden and Norway to prolong proportionate, temporary border controls for a maximum period of three months, starting from the day of adoption of this Implementing Decision, at the following internal borders:
 - Austria at the Austrian-Hungarian land border and Austrian-Slovenian land border;
 - Germany at the German-Austrian land border;
 - Denmark in the Danish ports with ferry connections to Germany and at the Danish-German land border;
 - Sweden in the Swedish harbours in the Police Region South and West and at the Öresund bridge;
 - Norway in the Norwegian ports with ferry connections to Denmark, Germany and Sweden.
2. Before deciding on further prolongation of such controls based on this Recommendation, the Member States concerned should exchange views with the relevant Member State(s) with a view to ensuring that internal border controls are carried out only where it is considered necessary and proportionate. Furthermore, the Member States concerned should ensure that internal border controls are only carried out as a last resort measure when other alternative measures cannot achieve the same effect, and only at those parts of the internal border where it is considered necessary and proportionate, in accordance with the Schengen Borders Code. The Member States concerned should notify the other Member States, the European Parliament and the Commission accordingly.
3. Border control should remain targeted, based on constantly updated risk analysis and intelligence, and limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security. The Member State that carries out internal border control pursuant to the present Implementing Decision should review weekly the necessity, frequency, location and time of controls, adjust the intensity of the controls to the level of the

threat addressed, phasing them out wherever appropriate, and report promptly to the Commission every month.

Done at Brussels,

*For the Council
The President*