



Brussels, 23.10.2015
C(2015) 7100 final

COMMISSION OPINION

of 23.10.2015

**on the necessity and proportionality of the controls at internal borders reintroduced by
Germany and Austria**

pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)

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1. INTRODUCTION

- (1) Pursuant to Article 3(2) of the Treaty on European Union (TEU), the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
- (2) On the basis of the precursor provision of Article 77 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament and the Council adopted Regulation (EC) No 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
- (3) Recital (1) and Article 1 of the Schengen Borders Code mark as objective of this regulation ensuring the absence of controls on persons crossing internal borders.
- (4) Article 20 of the Schengen Borders Code provides that internal borders may be crossed at any point without a border check on persons irrespective of their nationality being carried out.
- (5) Chapter II of Title III of the Schengen Borders Code regulates the temporary reintroduction of border control at internal borders.
- (6) Article 23 contains the general framework for the temporary reintroduction of border control at internal borders, and notably contains, in its first paragraph, a *serious threat to public policy or internal security* in a Member State as substantive precondition for the exceptional reintroduction of border control at all or specific parts of a Member State's internal borders for a limited period.
- (7) Article 23a contains the criteria for the temporary reintroduction of border control at internal borders, underlining that this decision can only be taken as last resort, and obliging the Member State concerned to assess the extent to which the measure is likely to adequately remedy the threat to public policy or internal security, as well as the proportionality of the measure in relation to that threat. In the latter assessment, the Member States should take into account on the one hand the likely impact of any threats to its public policy or internal security and, on the other hand, the likely impact of such measure on free movement of persons within the area without internal border control.
- (8) Article 24 contains the procedure for the temporary reintroduction of border control, to which Article 25 adds the specific procedure for cases requiring immediate action.

- (9) Article 24(4) refers to the possibility for the Commission to issue an opinion, notably with regard to the necessity and proportionality of the reintroduction of controls at internal borders. Article 25(3) second subparagraph provides that the provisions of Article 24(4) shall apply *mutatis mutandis* in the event of the prolongation of a reintroduction of controls at internal borders in cases requiring immediate action. The present opinion is based on those provisions.
- (10) Article 26 provides the specific procedure for exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control which have been identified in an evaluation report regarding a Member State. The specific provisions contained in Article 26 are not considered in this opinion, as they are not relevant at this moment in time.
- (11) This opinion concerns the decisions on the reintroduction of border control at internal borders and ensuing prolongation thereof by Germany and Austria. Similar decisions by the Slovenian authorities are mentioned to give the context to the situation but there is no need to assess them from the perspective of the necessity and proportionality as controls are no longer being carried out by Slovenia at the internal border with Hungary. The subsequent decision by the Hungarian authorities of 16 October on the reintroduction of border control at its internal border with Slovenia as of 17 October for 10 days will be assessed in a separate opinion.

2. FACTS

Germany

- (12) On 13 September 2015 the Commission received a notification from the German authorities informing about the reintroduction of border controls at German internal borders, with a special focus on the land border with Austria, for a period of 10 days. The decision was motivated by the extraordinary influx of persons entering the German territory. In the assessment of the German authorities this spontaneous and uncontrolled inflow constituted a serious threat to the internal security and public policy and the temporary reintroduction of border controls was intended to provide appropriate assistance to the arriving persons including more structured procedures, especially in terms of registration. On 22 September, i.e. 10 days after the initial reintroduction of controls at internal borders Germany informed about the prolongation of this measure in line with Article 25(3) for another 20 days. In the assessment of Germany the serious threat to the internal security and public policy persisted as the pressure at its internal borders did not decrease. On 9 October, the German authorities communicated a second prolongation for further 20 days, as of 13 October, on similar grounds as the previous ones. At the same time the German authorities indicated their intention to continue – depending on the further development of the situations, any subsequent prolongation of the reintroduced border controls on the basis of Art 23 and 24 Schengen Borders Code.
- (13) After the first prolongation, the Commission approached the German authorities with a request for additional information and figures demonstrating the proportionality and necessity of the decision to prolong the reintroduction of border controls. In particular, the Commission requested any data on the number of persons trying to enter territories via the relevant internal borders' section to seek international protection, as well as any available data regarding both the threat to public policy and

internal security and the organisation of the internal border controls on persons and their impact on the free movements of persons.

- (14) On 1 October 2015 the German authorities informed that in 2015 and up to 22 September some 527 000 third country nationals, mainly from Syria had been registered as asylum seekers, as compared to 239 000 asylum seekers registered in 2014. Only between 5 and 29 September 2015, approximately 247 000 refugees entered Germany. On average 5 000 to 10 000 persons entered Germany daily via the German-Austrian border alone, which thus remains in the main focus. Many of these persons have not been registered and screened in any other European country. While there is no direct evidence so far that jihadist group have exploited the movement of refugees with the specific aim of infiltrating Germany, in view of the large number of people entering the country, it is possible that among these persons there could also be people with links to crime, members of militant groups or lone extremists. For all those reasons, Germany considered it necessary to continue carrying out controls at the internal border to ensure the well-ordered procedure for registration and screening of third-country nationals. Moreover, the sheer number of arriving persons puts at stretch the available resources with cases of outbreaks of violence among the residents in reception centres. Finally, the freedom of movement has been affected only to the extent necessary on grounds of security. Although some restrictions are possible on cross-border rail connections with Austria (the direct train connection between Salzburg and Munich has been suspended since 17 September), there has been no limitation of border crossing possibilities, with the introduction of designated specific crossing points.
- (15) After the second prolongation, the Commission equally requested the German authorities to provide further detailed information. As regards the possible continuation on the basis of Article 23 and 24 of the Schengen Borders Code, the Commission recalled the need to receive a notification on the basis of Art. 24 (1) of the Schengen Borders Code, including the date and the duration, the names of the authorised crossing-points and where appropriate the measures to be taken by other Member-States. On 13 October, the German authorities reiterated their arguments mentioned above concerning the security threats caused by the big number of persons arriving who have not been registered or screened in any other European country and updated the previously provided data by indicating that from 1 January to 13 October 2015, Germany had registered roughly 641500 third-country nationals requesting asylum, out of which 64 000 were registered in the first two weeks of October alone. More specifically, between 5 September and 13 October roughly 386 000 persons entered Germany and in average 5 000 to 10 000 persons continue to cross the German-Austrian land border every day. In addition, the German authorities highlight the increased strain on the overall resources and capacities of the police leading to a shift of priorities with the result that other law enforcement tasks are no longer fulfilled to the same extent. The German authorities stressed that German security authorities were receiving warnings about persons who may had had contacts to or fought with militant groups in crisis regions. Finally, the German authorities reiterate that although there may be restrictions on cross-border transport, border checks are regional and limited to the level required to ensure security.

Austria

- (16) On 15 September 2015 the European Commission received a notification from the Austrian authorities informing about the reintroduction of border controls at its internal borders as of 16 September 2015 for the period of 10 days. The reintroduced

controls concerned the internal borders, with a particular focus on the land borders with Hungary, Italy, Slovenia and Slovakia. The decision was motivated by the fact that the enormous migration stream to and through Austria threatened the internal security and public policy. On 25 September the Austrian authorities informed of the prolongation of this measure in line with Article 25(3) with effect as of 26 September 2015 for another 20 days, as the situation at the borders continued unabated. Only over the weekend 18-21 September 33 000 migrants entered the territory of Austria. In response to that the Austrian authorities had to mobilise all available resources to ensure appropriate reception conditions and medical care, posing an immense challenge for all actors involved.

- (17) The Commission addressed a similar request to the Austrian authorities as the one referred to in point 13 with regard to the German authorities.
- (18) On 2 October 2015 the Austrian authorities replied that over the period between 5 September and 1 October 2015 at the South-East land borders of Austria 194 467 persons were apprehended among whom 7 080 persons requested international protection in Austria. This big number of persons entering Austria is deemed to demonstrate the necessity of the reintroduction of border controls at Austria's internal borders. The Austrian authorities also underlined the mobilisation of different resources, from army to NGOs, to cope with the challenges related to providing necessary assistance to the arriving persons. Moreover, the analysis of the situation in the broader region indicated that the rush of refugees towards Austria would continue unabated.
- (19) Austria stressed that the reintroduction has only had a limited impact on free movement and justifies this by referring to the number of refusal of entry, i.e. 329 refusals of entry at the border sections with Hungary and Slovenia. At the same time the other land borders, as well as the international airports, have not been subject to additional controls so far. The decisions on suspending some train connections or temporarily closing certain motorway sections were taken as exceptional measures, to protect the physical integrity of the arriving persons and of the local population (e.g. traffic accidents caused by pedestrians walking on rail tracks or on motorways) but were no border control measures.
- (20) On 15 October, the Austrian Government notified the Commission its decision to prolong border control at internal borders for another 20 days. It justifies its decision by referring to the continuous apprehensions of third country nationals at the south eastern border of Austria. Between 5 September and 8 October 238 485 person have been apprehended of which 9 017 applied for international protection. Austria considers the prolongation necessary for maintaining law and order, safeguarding internal security and avoiding continuous overstressing of police force, rescue services and public infrastructure, and for allowing the organs of the Austrian federal police force to perform their tasks at internal borders. At the same time the Austrian authorities indicated their intention to continue – depending on the further development of the situations -, any subsequent prolongation of the reintroduced border controls on the basis of Art 23 and 24 Schengen Borders Code.

Slovenia

- (21) On 16 September 2015 the European Commission received a notification from the Slovenian authorities informing about the reintroduction of border controls at its internal borders as of 17 September 2015 for a period of 10 days. The checks concerned the internal land border with Hungary. The Slovenian authorities

advanced that the situation involving uncontrollable migration flows in the region, coupled with the reintroduction of border control at internal borders by Germany and Austria presents a serious threat to Slovenia's national security. On 25 September Slovenia informed about the prolongation of this measure in line with Article 25(3), with effect as of 27 September, for another 20 days, given that the situation in the area has not changed significantly in terms of irregular migration nor have countries in the region introduced measures which would indicate that the situation would change.

- (22) The Commission addressed a similar request to the Slovenian authorities as the ones referred to in points 13 and 17 with regard to the German and Austrian authorities.
- (23) In their reply of 5 October 2015, the Slovenian authorities referred to the overall situation in the region, with the continued pressure on the external Hungarian and internal Austrian borders, as demonstrated by the illegal entry into Austria of 33 000 persons over a very short period of time. Those numbers, along with the parallel measures taken by the neighbouring countries, notably the prolongation of controls at internal borders by Austria as well as the intention of the Hungarian authorities to put up a fence and analysis of the security situation were considered to justify maintaining controls at the internal borders for another 20 days, as a significant part of the migration flow could be diverted to the Slovenian border; revoking them would result in even further increase of the pressure on the internal borders. During the initial 10 days of reintroduced border controls, at the border with Hungary 1 918 checks on vehicles and 5 615 checks on persons were performed. In 15 cases the entry was refused and there were 39 SIS hits and one Interpol hit. In 80 cases repressive measures were used and the police identified six cases of document fraud. In the period from 17 to 26 September 2015 three persons applied for international protection. As far as the impact of the reintroduced border controls on free movement of persons is concerned, the Slovenian authorities added that the controls had not affected the normal traffic flow capacity, with the smooth border crossing of bona fide travellers assured, as demonstrated by the lack of complaints in this regard.
- (24) On 16 October 2015, the Slovenian Government informed the Commission that it does not intend to prolong border control at internal borders after 16 October.

3. OPINION

- (25) The current opinion builds on the information provided in the notifications of the reintroduction of border controls at internal borders by Germany and Austria, the subsequent notifications of the prolongation of the reintroduced border controls at internal borders by these two Member States and the information advanced by the national authorities in reply to the letters from the Commission referred to in points 12 and 17, as well as on other information available to the Commission.
- (26) The Commission appreciates the decision of the Slovenian authorities to discontinue border controls at its internal border with Hungary as of 16 October.
- (27) Hereafter follows the analysis of the necessity of the reintroduction of controls at internal borders as well as of the proportionality of the controls which have been carried out in Germany and in Austria.

Germany

- (28) The German decision on the reintroduction of controls at internal borders was motivated by the serious threat to the internal security and public policy caused by

the extraordinary influx of persons seeking international protection, crossing the borders of Germany in a spontaneous manner, often without necessary documents and/or without adequate recording in Eurodac upon their first arrival in the EU.

- (29) The reintroduction of the border controls by Germany was intended to maintain the control over the extraordinary number of arriving persons by means allowed under national and EU law in relation to the fact that most of those persons had not been registered in another EU Member State and the non-registration of those persons led to a security deficit given their sheer number. This objective was pursued in particular by streamlining this spontaneous inflow according to the reception capacities.
- (30) As to the possibility advanced by the German authorities that also radicalised persons might be hiding among the bona fide asylum seekers entailing risks related to organised crime and terrorist threats, the Commission considers that this would need to be further substantiated to be considered in itself as constituting a serious threat to public policy and internal security e.g. by quantifying the warnings on persons who may have had contacts to or fought with militant groups in crisis regions. This possibility does nevertheless underscore the need to register all the persons concerned, something which could not otherwise be achieved in the current, extraordinary situation.
- (31) It needs to be acknowledged that the increasing strain on the police forces has led to a shift of priorities and is limiting the capacity to fulfil other law enforcement task to the same extent.
- (32) According to the available information the reintroduction of border controls by Germany did not impinge on the rights of the persons seeking international protection.
- (33) While in 2013 the legislators agreed¹ that the migratory flows cannot per se justify the reintroduction of checks at internal borders, in the opinion of the Commission the sheer number of persons entering the territory of Germany in view of seeking international protection indeed led to a threat of public policy and internal security and thus justified the application of the extraordinary measures available under the Schengen Borders Code. The provided information regarding the continuous daily influx of persons seeking international protection into Germany confirms this.
- (34) Taken into account the above, the German decision on the reintroduction of controls at internal borders and its subsequent prolongations provided an adequate response to the identified threat to the internal security and public policy, consisting of the uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons and the risk related to organised crime and terrorist threats. Those decisions were therefore necessary.
- (35) Those measures are also considered proportionate in view of streamlining the procedure for registration and reception of those persons arriving with the intention to seek international protection. The borders affected by the checks correspond to the identified migratory routes and threats, with the focus on specific land border sections. The type of controls affects the normal traffic flows only to the necessary

¹ Pursuant to Recital 5 of Regulation No 1051/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 amending Regulation (EC) No 562/2006 'Migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.'

extent, with targeted controls being carried out. The temporary suspension of the direct train connection between Salzburg and Munich does not seem to be disproportionate given that Munich can be reached by other transport means or indirect train connections, however such a suspension should be limited in time to the strict necessary.

- (36) Finally, the Commission has not received so far any complaints from citizens about the way border controls are carried out in practice. It appears that Germany made efforts to limit the negative effects on the bona fide travellers and the normal traffic flows by carrying out only targeted checks. The overall number, location and frequency of the controls do not seem to impede on the freedom of movement in the areas concerned.

Austria

- (37) The Austrian decision on the reintroduction of controls at internal borders was motivated by the serious threat to the internal security and public policy due to the extraordinary influx of persons seeking international protection, crossing the borders of Austria in a spontaneous manner, often without necessary documents or without adequate recording in Eurodac upon their first arrival in the EU.
- (38) The reintroduction of the border controls was intended to maintain the control over the extraordinary number of arriving persons by means allowed under national and EU law in relation to the fact that most of those persons have not been registered in another EU Member State and the non-registration of these persons led to a security deficit given their sheer number and the claims that put on reception and transportation infrastructure.
- (39) According to the available information the reintroduction of border controls by Austria did not impinge on the rights of the persons seeking international protection.
- (40) While in 2013 the legislators agreed² that the migratory flows cannot per se justify the reintroduction of checks at internal borders, in the opinion of the Commission the sheer number of persons entering the territory of Austria in view of transiting and seeking international protection would indeed appear to have led to a threat to public policy and internal security and would thus appear to have justified the application of the extraordinary measures available under the Schengen Borders Code. The provided information regarding the daily influx of persons into Austria confirms this.
- (41) Taken into account the above, the decision on the reintroduction of controls have provided an adequate response to the identified threat to the internal security and public policy, which consisted of the uncontrolled influx of exceptionally large numbers of undocumented/improperly documented persons. The decision was therefore necessary.
- (42) The Austrian decisions to prolong the reintroduction of controls at internal borders by each time 20 days were necessary in light of the continuing threat to public policy and internal security by the continuing arrival of a very large number of persons. The Austrian authorities need to deal with this high number of arrivals, and this, irrespective of whether the persons stay on Austrian territory, can indeed, at least for a certain period of time, cause a serious threat to public policy and internal security.

² See footnote 1.

- (43) It needs to be acknowledged that the reintroduction of border control may contribute to avoid a continuous overstressing of police forces, rescue services and public infrastructure.
- (44) The Austrian measures are also at the current moment in time to be considered proportionate. The borders affected by the checks correspond to the identified migratory routes and threats, with the focus on specific land border sections. The type of controls affects the normal traffic flows only to the necessary extent, with targeted controls being carried out.

4. CONCLUSION

- (45) In light of the above, the Commission is of the opinion that the initial reintroduction of controls at internal borders by Germany and Austria, as well as the prolongations thereof, were in compliance with the Schengen Borders Code.
- (46) The Commission underlines that the present opinion does not prejudice the question whether any further prolongations would be necessary and proportional. The Commission recalls that in accordance with Article 25 (4) Schengen Borders Code, the total period during which border controls can be maintained at internal borders pursuant to Article 25 shall not exceed two months. The Commission also recalls that any continuation of border controls under Article 23 and 24 Schengen Borders control requires a prior notification in accordance with Article 24 (1) Schengen Borders Code.

Done at Brussels, 23.10.2015

For the Commission
Dimitris AVRAMOPOULOS
Member of the Commission

