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2017/0095 (NLE)

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 States<sup>1</sup>.

Threats were due to serious deficiencies in ensuring efficient border control at parts of the Union's external border, which put the overall functioning of the Schengen area at risk. In accordance with Article 29 of the Schengen Borders Code, a coordinated approach at EU level was adopted through a Recommendation by the Council<sup>2</sup>, on a proposal from the Commission<sup>3</sup>, to the five Schengen States most affected (Austria, Germany, Denmark, Sweden and Norway) to maintain proportionate temporary border control at limited sections of their internal borders.

The triggering of Article 29 of the Schengen Borders Code and the adoption of a coordinated approach at EU level to temporary border control were among the initiatives envisaged by the Back to Schengen Roadmap<sup>4</sup>, which aimed at creating conditions for lifting all internal border controls and returning to a normally functioning Schengen area as soon as possible.

The Council initially recommended the maintenance of proportionate temporary internal border control for a period of six months. The Council prolonged, in accordance with Article 29, twice its Recommendation<sup>5</sup>, for three months each time, for the same five Schengen States. At the same time, the Council noted the improvement of the overall situation due to the various measures taken. Therefore, the reintroduced border control was submitted to stricter conditions and a detailed monthly reporting obligation for the Schengen States concerned was imposed.

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

The Recommendations adopted by the Council are without prejudice to the additional tools available to all Member States, including the five Schengen States concerned, under the

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<sup>1</sup> Chronologically, Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark.

<sup>2</sup> 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, 8.6.2016, p.8-11).

<sup>3</sup> 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.

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

<sup>5</sup> Council Implementing Decision (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 306, 15.11.2016, p.13-15) and Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 36, 11.2.2017, p.59-61).

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 deficiencies in the management of the external border. For example, during this period, France, which was not concerned by the Recommendations, reintroduced and maintained border control at all its internal borders for reasons related to persistent terrorist threats. Sweden notified the reintroduction of temporary border controls at all internal borders for the period from 7 until 15 April 2017 following the terror attack in Stockholm.

The Commission is fully aware that 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 route<sup>6</sup>, through the 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 attacks in Berlin, Stockholm or Paris. 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 the 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 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 by the five Schengen States concerned, as well as on all the information at its disposal, the Commission can conclude that the controls have remained within the conditions set by the Recommendation. Like in the previous periods, 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 Commission notes that the five Schengen States indicated in their reports the need to continue internal border controls. However, the Commission also notes the concerns expressed by Slovenia about the necessity of border controls at the Austrian-Slovenian border as Slovenia considers that the circumstances have changed markedly since the introduction of temporary internal border control.

The reports provided by the Schengen States under the Recommendation of 7 February 2017 confirm the trend that emerged with the reports provided under the Recommendations of 12 May 2016 and 11 November 2016 (in terms of numbers of asylum applications received or refusals of entry following the controls), and thus the continued progressive stabilisation of the situation.

The number of irregular arrivals in the European Union via the Greek external border continues to be low also during the period of the Recommendation of 7 February 2017,

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<sup>6</sup> Communication from the Commission to the European Parliament, the European Council and the Council, " Migration on the Central Mediterranean route - Managing flows, saving lives", JOIN(2017) 4 final of 25 January 2017.

despite a slight increase in the past couple of weeks possibly due to milder and more favourable weather conditions. The ongoing operationalisation and steady rolling out of the European Border and Coast Guard Agency<sup>7</sup> combined with the continued implementation of the EU-Turkey Statement of 18 March 2016 continue to represent key steps in managing the situation.

Yet, further efforts are needed to ensure that the European Border and Coast Guard Agency's capabilities are fully in place to protect the external borders of the Union by completing the tools at the Agency's disposals for the running of operations, in particular the resources of the mandatory rapid reaction pools. The ongoing exercise on vulnerability assessments must also be completed, with first recommendations to the relevant Member States addressing as a matter of priority the most urgent vulnerabilities expected for end of May and results of a first simulation exercise for the end of October 2017. Following the approval by the Council of a negotiating mandate for a status agreement to be concluded with two EU neighbouring countries, negotiations with Serbia have started in April 2017. The EU is waiting for the former Yugoslav Republic of Macedonia to start the negotiations as soon as possible.

From 15 March 2017 the application of the existing Dublin rules in Greece is gradually being restored. Further efforts are needed over the coming months to embed in practice the implementation of the Commission's recommendation<sup>8</sup> to ensure the full participation of Greece in the Dublin system, irrespective of the ongoing work on improving those rules.

Moreover, there are still a significant number of irregular migrants and asylum seekers in Greece (approximately 60 000). The hotspots and camps in Greece remain overcrowded due to slow processing; progress in relocation and return remains insufficient to help significantly decreasing these numbers and relieving pressure from the Greek national authorities. The situation on the Western Balkans Route has shown a certain stabilisation of movements over the past weeks; however this can also quickly change with milder weather conditions. Member States along the route continue taking measures aimed at addressing possible extraordinary migratory flows and building border fences.

Therefore, the overall situation still remains fragile and the Member States concerned remain exposed to the risk related to irregular movements; additional efforts are necessary in order to further stabilise the situation.

### Way forward

Despite the continuous progress achieved, the conditions identified in the Roadmap "Back to Schengen" in order to allow lifting the current internal border controls are not entirely fulfilled today.

As in the previous period, the numbers of migrants present 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 a risk of irregular movements.

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<sup>7</sup> See Third Report from the Commission to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard, COM(2017) 219 final of 3 May 2017.

<sup>8</sup> Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, C(2016) 8525 final.

Moreover, as already explained above, the rolling out of the European Border and Coast Guard Agency requires a few more months in order to allow the Agency to be able to fully build its capabilities and fulfil its role in protecting the EU external borders.

Furthermore, to help in addressing the backlog in processing asylum applications in Greece, relocations and returns from Greece and other Member States must be significantly stepped up. The Commission therefore urges Member States to meet the set targets of relocation by September 2017 to ensure that all eligible candidates are relocated.

As all the above 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 control as an exceptional measure for a further proportionate period.

It is for these Schengen States to decide whether to prolong internal border controls taking into account that such controls should be used only as a last resort measure. In order to effectively follow up to its commitment to work with these Schengen States to gradually phase out temporary internal border controls by improving other measures alternative to border controls that could be used to effectively remedy the identified threats, the Commission adopts, in parallel to this Recommendation, a Recommendation on proportionate police checks and police cooperation in the Schengen area. In this text, the Commission addresses recommendations on how all Schengen States can use more and better their police powers across their territory as well as in the border area and on main European transport routes. The Recommendation also invites the Schengen States to step up cross-border police cooperation efforts and proportional police checks within the territory including in the border area. In this context, given that the Schengen States may need to carry out operational preparations concerning resources, redistribution of tasks, acquisition of modern technology equipment, or simply a change of the current paradigm and habits to adapt to new circumstances a reasonable amount of time is needed for its implementation, the Commission recommends that it should be implemented as soon as possible and at the latest within six months.

Pending the implementation of this Recommendation, the five Schengen States concerned are expected to assess each time whether intensified police checks would not address the situation of the identified threats before reintroducing or maintaining internal border controls.

Based on the factual indicators available at this stage, including the estimation of time necessary for the full rolling out of the European Border and Coast Guard Agency and the period needed for the implementation of the Recommendation on proportionate police checks and police cooperation in the Schengen area as well as the upcoming milder weather conditions that may increase the number of irregular arrivals in the EU and subsequent secondary movements, the present and final<sup>9</sup> prolongation of temporary internal border control based on the persistence of exceptional circumstances should not exceed six months.

### Scope of the proposal

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<sup>9</sup> See Article 29 (1) of the Schengen Borders Code, which provides that an initial period of reintroduction of controls at internal borders may be prolonged no more than three times.

The five Schengen States currently carrying out temporary internal border control pursuant to the Council Recommendation of 7 February 2017 should be permitted to continue doing so for six months under strict conditions.

Given the continuous stabilisation of the situation and the objective of gradually phasing out temporary internal border controls, the Schengen States concerned should first assess whether the identified serious threats to public order or internal security can be adequately addressed by way of stepping up police checks within the territory, including in border areas, as recommended by the Commission Recommendation of 3 May 2017 on proportionate police checks and police cooperation in the Schengen area, and only reintroduce/prolong border controls at the internal borders concerned as a measure of last resort. The examination of the possibility to use other measures should regularly take place and their use should be preferred as a measure of a lesser impact on the free movement within the Schengen area. The Schengen States concerned should consider which are the most appropriate tools, including police checks, and inform of the reasons for opting for border controls as a last resort measure in their notifications to the other Member States, the European Parliament and the Commission.

The requirements under the Recommendation of 7 February 2017 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 Schengen 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 Recommendation of 7 February 2017 will continue to apply. After each month of implementation of the present Recommendation, the Member States concerned should promptly report to the Commission and to the Council 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.

In order to gradually phase out temporary internal border controls, the Commission will also monitor and take into account the progress made in implementing the Recommendation on proportionate police checks and police cooperation in Schengen area by the Schengen States concerned.

- **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 Schengen 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.

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**

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)<sup>10</sup>, 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 an initial period of six months, in order to address the serious threat to public policy and internal security in these States by - deficiencies in external border control in Greece and the subsequent secondary movements of irregular migrants entering via Greece and who move to other Schengen States. This period was prolonged by the Council on a proposal from the Commission twice, respectively on 11 November 2016 and on 7 February 2017, for further periods of three months at a time.
- (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 Recommendations of 11 November 2016 and 7 February 2017 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 stabilisation of the situation in these States, in terms of number of refusals of entry and asylum applications received during the controls.
- (5) However, despite this progress, the conditions identified in the Roadmap "Back to Schengen" in order to allow lifting all internal border control and returning to a

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<sup>10</sup> OJ L 77, 23.3.2016, p. 1.



normally functioning Schengen area are still not entirely fulfilled. An important number of irregular migrants is still present in Greece and along the Western Balkans route, part of whom are not registered. The risk of irregular secondary movements within the Schengen area of these migrants remains.

- (6) In its Communication "Back to Schengen – A Roadmap", the Commission identified the various policies to be put in place to return to a fully functioning Schengen area. The process of rolling out of the European Border and Coast Guard Agency is ongoing. However, further contributions from Member States are needed to complete its resources and allow it to fully play its role in securing the external borders of the Union. Recommendations following the first vulnerability assessments have not been issued yet. The status agreements with Serbia is currently being negotiated.
- (7) After more than one year, the implementation of the EU-Turkey Statement of 18 March 2016 continues to deliver tangible results, as was confirmed in the fifth progress report.<sup>11</sup> Yet arrivals continue to outpace the number of returns from Greece to Turkey which leads to additional pressure on the Greek islands. Progress on other elements of the Statement needs to continue. The implementation of the Statement thus needs to be constantly monitored. The same applies to the situation along the Western Balkans Route and the implementation of 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 justified, as a last resort measure, to allow a further and final prolongation of the temporary border control 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) The Council takes note of the Commission Recommendation on proportionate police checks and police cooperation in the Schengen area that would also contribute in gradually phasing out temporary internal border controls with the objective of lifting all internal border control and returning to a normal functioning of the Schengen area as soon as possible by giving precedence to the use of police checks to adequately address the serious threats to public policy or internal security. The Council takes note that the Commission recommends that all Schengen States implement the recommended measures as soon as possible and at the latest within six months.
- (11) Based on the estimation of the remaining time necessary to implement the pending measures aiming at ensuring adequate protection of the EU external borders and adequate security within the Schengen area, this prolongation should not exceed six months as from the date of adoption of the present Implementing Decision.
- (12) 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.

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<sup>11</sup> Fifth Report from the Commission to the European Parliament, the European Council and the Council on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 204 final of 2 March 2017.

- (13) Before opting for such border controls, the Member States concerned should examine whether other measures alternative to border controls and impeding less the free movement of persons and goods could not be used to effectively remedy the identified threat. In the Commission Recommendation on proportionate police checks and police cooperation in the Schengen area, the Commission calls upon the Schengen States to use their police powers across the territory, including in the border area and on the main routes in a more effective way and give precedence to police checks. However, pending the implementation of that Commission Recommendation, the Schengen States concerned should inform of the outcome of the reflection on the most appropriate tools and the reasons for opting for border controls as a last resort measure in their notifications.
- (14) 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 controls should take these views into account when examining and reviewing the necessity of such checks, with the objective of progressively reducing them.
- (15) 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.
- (16) The Council 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 six 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. When it provides the same security results, the use of police powers should be preferred as a measure with a lesser impact on the free movement of persons and goods. 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 and the Council every month.

Done at Brussels,

*For the Council*  
*The President*