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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**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

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

The proposal contains a targeted amendment to Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) in order to increase security within the area without internal border control. This proposal replies to the call expressed in the Council conclusions of 9 and 20 November, which invited the Commission to "present a proposal for a targeted revision of the Schengen Borders Code to provide for systematic controls of EU nationals, including the verification of biometric information, against relevant databases at external borders of the Schengen area, making full use of technical solutions in order not to hamper the fluidity of movement".

The proposal intends to oblige Member States to carry out systematic checks on persons enjoying the right of free movement under Union law (i.e. EU citizens and members of their families who are not EU citizens) when they cross the external border against databases on lost and stolen documents as well as in order to verify that those persons do not represent a threat to public order and internal security. This obligation shall apply at all external borders i.e. at air, sea and land borders, both at entry and exit. However, where a systematic consultation of databases on all the persons enjoying the right of free movement under Union law could lead to disproportionate impact on the flow of traffic at the border, Member States may carry out only targeted checks against databases provided that a risk assessment shows this does not lead to risks related to internal security, public policy, international relations of the Member States or a threat to the public health.

While Member States are obliged to check third country nationals systematically on entry against all databases, the current provisions do not provide that on exit, checks for public order and internal security reasons have to be carried out in a systematic way. The amendment will align the obligations to check systematically also on exit that a third country national does not present a threat to public policy and internal security.

This proposal is a response to the increase of terrorist threats in Europe as manifested by the attacks in Paris, Copenhagen and Brussels, but should address all potential risks to internal security.

The terrorist threat is not limited to one Member State and does not only result from external factors. The phenomenon of foreign terrorist fighters remains a major source of concern. The number of EU citizens traveling to Syria and Iraq to support terrorist groups is continuously increasing. It is estimated that up to 5 000 EU citizens departed to the conflict zones¹ and most probably joined ISIS forces. Many of the perpetrators of recent terrorist attacks, starting from Charlie Hebdo in January 2015, stayed or were trained abroad in the areas controlled by the terrorist organisations. Detecting and preventing travel to and from conflict zones [with the intention to support terrorist organisations] has been identified as a priority already in 2014. The European Commission has consistently supported the strengthening of the Schengen framework by issuing recommendations to enhance border checks within the current legal framework. In this context, following the Statement on terrorism of the informal European Council of 12 February 2015 and the Presidency Conclusions of the March 2015

¹ See Europol, TE-SAT 2015

Council² the Commission again underlined the possibility and the need to reinforce checks on the persons enjoying the right of free movement under Union law and to carry out such checks on a systematic basis for persons falling under a specific risk assessment. The Practical Handbook for Border Guards has consequently been adapted in June 2015³.

In addition, as announced in the European Agenda on Security, in June 2015 the Commission also finalised a first set of common risk indicators for foreign terrorist fighters, to be used by border guards to help them when conducting checks⁴.

The phenomenon of foreign fighters demonstrates that in order to ensure a high level of security within the area without controls at internal borders, systematic checks must be carried out also on persons enjoying the right of free movement under Union law.

This proposal also reinforces the need to verify biometric identifiers as contained in Council Regulation (EC) No 2252/2004. The latter Regulation introduced the facial image and fingerprints as security elements in the passport of EU citizens in order to render them more secure and establish a reliable link between the holder and the passport. Therefore, in case of doubts about the authenticity of the passport or on the legitimacy of the holder, border guards should verify these biometric identifiers.

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

The proposed amendment will ensure that:

- 1) travel documents of persons enjoying the right of free movement under Union law are checked systematically against the relevant databases on stolen, misappropriated, lost and invalidated documents in order to ensure that such persons do not hide their real identity and
- 2) persons enjoying the right of free movement under Union law are also systematically checked for internal security and public policy reasons against relevant databases.

Such combination of systematic checks of documents and persons sections of the relevant databases will also enable synergies in the architecture of the system which currently are not possible due to the asymmetry between possible systematic checks on documents and non-systematic checks for security reasons. The proposed amendment is in line with one of the purposes of border checks, namely to prevent any threat to the internal security and public policy of the Member States.

In addition, the proposal will extend the obligation to check also on exit that third country nationals are not a threat to public policy and internal security.

- **Consistency with other Union policies**

After the proposed amendment the Schengen Borders Code will remain consistent with the freedom of movement as guaranteed by the Treaty and as further detailed in Directive 2004/38/EC.

² Outcome of the Council Meeting 3376th, 7178/15 (OR. en) PRESSE 21 PR CO 13

³ C(2015) 3894 final

⁴ The list is based on travel trends, patterns and specific characteristics of those persons, and was compiled using contributions from Member States, the European External Action Service, Europol and Frontex.

The measures that will be taken at external borders as a consequence of this amendment, which consist in checking databases for reasons of security, do not affect the free movement rights which EU citizens and their family members derive from the treaty and from Directive 2004/38/EC, which do not contain a right to be free from security checks on the occasion of crossing external borders.

As far as the measures are concerned which border guards can take on the basis of the results of the checks of the databases ('hits'), the provisions of Chapter VI of Directive 2004/38/EC allow Member States to restrict the free movement rights of EU citizens and their family members on grounds of public policy or public security, provided that they respect the material and procedural safeguards set out therein, as interpreted by the Court of Justice of the European Union. In case of a positive hit, the rules to be followed are those referred to by the Court of Justice in the judgment C-503/03 *Commission v Spain*, which are also set out in detail in the SIRENE Manual.

Given that consulted databases function on the basis of a hit/no-hit basis and that the mere consultation of the database is neither registered nor further processed, the systematic checks on persons enjoying the right to free movement under Union law will affect personal data rights only to a limited extent, which is justified by the security objectives pursued.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Article 77 (2)(b) of the Treaty on the Functioning of the European Union is the legal basis for the proposal.

This proposal amends Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) which was based on the equivalent provisions of the Treaty establishing the European Community, namely Articles 62(1) (internal borders) and (2)(a) (external borders) respectively.

• Subsidiarity

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 objective of the present proposal is to amend the Schengen Borders Code to provide for systematic controls of persons enjoying the right of free movement under Union law at the external borders against relevant databases, making full use of technical solutions while not hampering the fluidity of cross border movement.

Controls at the external borders are carried out in the interest of all the Member States which have abolished internal border control (recital 6 of the Schengen Borders Code); they should help to prevent any threat to the Member States' internal security. Therefore such controls need to be performed in accordance with common rules.

Accordingly, the objective of establishing common rules concerning the scope and type of checks carried out at the external borders 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 measures, in accordance with the principle of subsidiarity.

- **Proportionality**

The content of the consulted databases is limited to aspects relevant for the internal security; all the grounds triggering an alert in the Schengen Information System are connected to preserving internal security in the Schengen States given the absence of internal border checks. Thus, carrying out checks against relevant databases in a systematic way also with regard to the persons enjoying the right of free movement under Union law does not go beyond what is necessary to pursue one of the objectives of the controls at the external borders.

The proposal makes a distinction between external air borders and other external borders, to take into account the passenger flow and infrastructure at the different types of external borders. Where, for instance on account of the infrastructure and passenger flow, a systematic check may lead to a disproportionate impact on the flow of traffic at the border, the systematic checks against databases could be dispensed with at land and sea borders provided that a risk assessment shows this does not lead to risks related to internal security, public policy, international relations of the Member States or a threat to the public health. The risk analysis should be communicated to the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereafter: Frontex) and should be the subject of regular reporting to the Commission and to Frontex. The application of these provisions by the Member States can then be the subject of risk and vulnerability analysis carried out by Frontex. The Commission will also pay particular attention to possible relaxations of systematic border checks at certain land and sea crossing points in its bi-annual reporting on the functioning of the Schengen area.

As far as checks on third country nationals on exit are concerned, the current margin of not checking them systematically for public order and internal security reasons will be abolished and the rule will thus be aligned to the existing one at entry, namely an obligation to systematically check against databases. In accordance with Annex VII, point 5.2. Schengen Borders Code, cross border workers who are well known to the border guards owing to their frequent crossing of the border at the same border crossing point and who have not been revealed by an initial check to be the subject of an alert in the SIS or in a national data file remain subject only to random checks. Thorough checks shall be carried out on those persons from time to time, without warning and at irregular intervals.

- **Choice of the instrument**

The proposal concerns the amendment of a Regulation, there are no indications that a different instrument than a Regulation would be appropriate.

3. RESULTS OF CONSULTATIONS

The question of systematic consultation of relevant databases with regard to EU citizens and other persons enjoying the right of free movement under Union law when crossing an external border is on the agenda since spring 2014 following the terrorist attack at the Jewish museum in Brussels and the ensuing discussion on the fight against foreign terrorist fighters.

In order to ensure internal security efforts had already been made in the course of the last year and a half to take appropriate, immediately effective and more efficient measures within the existing EU acquis. The Commission, in close cooperation with the Member States, elaborated recommendations in order to improve border checks at external borders moving towards an intensified consultation of the relevant databases, where appropriate based on a risk assessment systematically. In the aftermath of the Charlie Hebdo attacks and the subsequent call of the Council of 12 March 2015, Common Risk Indicators to better target checks have been developed and disseminated to the border guards. In June 2015, the Practical Handbook for Border Guards was adapted to take into account the recommendations mentioned above⁵.

The issue was also discussed at several occasions in the Frontiers Working Party in 2014 and 2015. In October 2015 the Luxemburgish Presidency enquired about developments in this area⁶.

The proposal is a direct reply to the call of the Council of 20 November 2015 to amend the Schengen Borders Code further to the terrorist attacks in Paris on 13 November 2015.

- **Fundamental rights**

The proposed amendment respects the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union, the right to respect of private and family life (Article 7), the protection of personal data (Article 8) and the freedom of movement and residence (Article 45). The safeguards of Article 3a of the Schengen Borders Code continue to apply.

4. BUDGETARY IMPLICATIONS

The proposed amendment has no implications for the EU budget.

OTHER ELEMENTS

- **Monitoring, evaluation and reporting arrangements**

The proposed amendment concerns the Schengen Borders Code the implementation of which is evaluated through the Schengen Evaluation mechanism in accordance with Council Regulation (EU) No 1053/2013⁷ (Art 37a SBC), without prejudice to the Commission's role as guardian of the Treaties (Art. 17(1) TEU).

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

The proposed amendment introduces to the current Article 7(2) the obligation to carry out systematic checks on persons enjoying the right of free movement under Union law (i.e. EU citizens and members of their families who are not EU citizens) against databases on lost and stolen documents as well as in order to verify that the persons do not represent a threat to public order and internal security. This obligation shall apply at all external borders i.e. at air, sea and land borders. However, where a systematic consultation of databases on all the

⁵ C (2015) 3894 of 15.6.2015.

⁶ 12540/15

⁷ 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 of 6.11.2013, p. 27)

persons enjoying the right of free movement under Union law could lead to disproportionate impact on the flow of traffic at the border, Member States may carry out only targeted checks against databases provided that a risk assessment shows this does not lead to risks related to internal security, public policy, international relations of the Member States or a threat to the public health.

The risk analysis should be communicated to Frontex and should be the subject of regular reporting to the Commission and to Frontex. The Commission will pay particular attention to possible relaxations of systematic border checks in its bi-annual reporting on the functioning of the Schengen area.

This proposal also reinforces the need to verify biometric identifiers as contained in Council Regulation (EC) No 2252/2004. This Regulation introduced the facial image and fingerprints as security elements in the passport of EU citizens in order to render them more secure and establish a reliable link between the holder and the passport. Therefore in case of doubts on the authenticity of the passport or on the identity of the holder, border guards should verify those biometric identifiers.

The proposed amendment also removes the margin left to Member States not to check third country nationals on exit and thus aligns Article 7(3) b) and c) with the existing obligation to systematically check third country nationals against databases on entry.

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amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external 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) 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) Control at external borders remains one of the main safeguards of the area without controls at internal borders. It is carried out in the interest of all Member States. One of the purposes of such controls is to prevent any threat to the Member States' internal security and public policy, irrespectively of the origin of such threat.
- (2) The phenomenon of foreign terrorist fighters, many of whom are Union citizens, demonstrates the necessity to strengthen the checks at external borders with regard to Union citizens.
- (3) The documents of persons enjoying the right of free movement under Union law should therefore be checked systematically against relevant databases related to stolen, misappropriated, lost and invalidated travel documents in order to avoid that persons hide their real identity.
- (4) Border guards should for the same reason also systematically check persons enjoying the right of free movement under Union law against relevant national and European databases in order to ensure that they do not represent a threat to internal security or public policy.
- (5) Technological developments allow in principle to consult relevant databases without delaying the process of crossing the border, as the controls on documents and persons can be carried out in parallel. It is therefore possible without negative effect on persons travelling in good faith to strengthen checks at external borders to better identify those persons who intend to hide their real identity or who are subject to relevant alerts for security reasons or for arrest. Systematic checks should be carried out at all external borders. However, if systematic checks at land and sea borders were to have a disproportionate impact on the flow of traffic at the border, Member States should be allowed not to carry out systematic checks against databases but only if based on a risk analysis assessing that such a relaxation would not lead to a security risk. Such risk assessment should be transmitted to the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

established by Council Regulation (EC) No 2007/2004⁸ and be the subject of regular reporting both to the Commission and to the Agency.

- (6) With Council Regulation (EC) No 2252/2004⁹, the Union introduced the facial image and fingerprints as security elements in the passport of Union citizens. These security features have been introduced in order to render the passports more secure and establish a reliable link between the holder and the passport. Member States should therefore verify these biometric identifiers, in case of doubts on the authenticity of the passport or on the identity of its holder.
- (7) This Regulation is without prejudice to the application of Directive 2004/38/EC of the European Parliament and of the Council¹⁰.
- (8) Member States are obliged to check systematically third country nationals against all databases on entry. It should be ensured that such checks are also carried out systematically on exit.
- (9) Since the objective of this Regulation, namely reinforcing the checks against databases at external borders in reply in particular to the increase of the terrorist threat concerns one of the safeguards of the area without internal border control and as such concerns the proper functioning of the Schengen area, it cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level, 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.
- (10) 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.
- (11) This Regulation constitutes a development of the provisions of the Schengen *acquis*, in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC¹¹; the United Kingdom is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (12) This Regulation constitutes a development of the provisions of the Schengen *acquis*, in which Ireland does not take part, in accordance with Council Decision

⁸ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p.1).

⁹ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29.12.2004, p.1).

¹⁰ 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 (OJ L 158, 30.4.2004, p. 77).

¹¹ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (OJ L 131, 1.6.2000, p. 43).

2002/192/EC¹²; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

- (13) 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 development of the Schengen *acquis*¹³, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC¹⁴.
- (14) 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*¹⁵ 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 2008/146/EC¹⁶.
- (15) 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*¹⁷ 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/EU¹⁸.
- (16) As far as the use of Schengen Information System is concerned this Regulation constitutes an act building upon, or otherwise relating to, the Schengen *acquis* within, respectively, the meaning of Article 3(2) of the 2003 Act of Accession and Article 4(2) of the 2011 Act of Accession.
- (17) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

¹² 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).

¹³ OJ L 176, 10.07.1999, p.36

¹⁴ 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, 10.07.1999, p.31).

¹⁵ OJ L 53, 27.2.2008, p. 52.

¹⁶ 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).

¹⁷ OJ L 160, 18.6.2011, p. 21

¹⁸ 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).

- (18) Regulation (EC) No 562/2006 of the European Parliament and of the Council¹⁹ should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 562/2006 is amended as follows:

- (1) Article 7 is amended as follows:

(a) paragraph 2 is replaced by the following:

"(2) On entry and on exit, persons enjoying the right of free movement under Union law shall be subject to the following checks:

- (a) verification of the identity and the nationality of the person and the validity and authenticity of the travel document, by consulting the relevant databases, in particular:

- (1) the Schengen Information System;
- (2) the Interpol database on stolen and lost travel documents;
- (3) national databases containing information on stolen, misappropriated, lost and invalidated travel documents

- (b) verification that a person enjoying the right of free movement under Union law is not considered to be a threat to the internal security, public policy, international relations of any of the Member States or to public health, including by consulting the relevant Union and national databases, in particular the Schengen Information System.

Where there is doubt on the authenticity of the travel document or on the identity of its holder, the checks shall include the verification of the biometric identifiers integrated in the passports and travel documents issued in accordance with Council Regulation (EC) No 2252/2004*.

Where, at external land and sea borders, the checks referred to in points a) and b) of the first subparagraph would have a disproportionate impact on the flow of traffic, Member States may carry out those checks on a targeted basis based on an assessment of the risks related to internal security, public policy, international relations of any of the Member States or a threat to public health.

Each Member State shall transmit its risk assessment to the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Regulation (EC) No 2007/2004 and report every three months to the Commission and to that Agency on the application of the checks carried out on a targeted basis.

* Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29.12.2004, p.1)."

¹⁹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p.1).

(b) In paragraph 3(b), point (iii) is replaced by the following:

"(iii) verification that the third-country national concerned is not considered to be a threat to public policy, internal security or international relations of any of the Member States, including by consulting the relevant Union and national databases, in particular the Schengen Information System;"

(c) In paragraph (3)(c), point (iii) is deleted.

Article 2

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

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President