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WORKING DOCUMENT

on the proposal for a Regulation of the European Parliament and of the Council
on the Temporary reintroduction of border controls at internal borders
COM(2017)0571 - C8-0326/2017 - 2017/0245(COD)

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Tanja Fajon

Introduction

The aim of this working document is to set out the background for deliberations of the Rapporteur on the Commission's proposal to amend the Schengen Borders Code¹ *as regards the rules applicable to the temporary reintroduction of border controls at internal borders* and in view of preparation of the draft report, to outline - for discussion - some initial views.

Background

On 27 September 2017, the European Commission proposed to amend the Schengen Borders Code in order to allow Member States to reintroduce internal border controls where there is a serious threat to public policy or internal security in a Member State, for a period of possibly up to five years. The current rules allow Member States to reintroduce internal border controls for a period six months or, in exceptional cases, maximum of two years. In addition to the proposed extension of the time periods, the Commission proposed additional procedural safeguards, most notably in the form of risk assessments, designed to ensure that the reintroduction of such internal border controls is a measure of last resort.

In the explanatory memorandum of its proposal the Commission claims that since September 2015 *“the secondary movements of irregular migrants and the increase of cross-border terrorist threats [...] compelled some Member States to prolong reintroduced border control several times, sometimes until the exhaustion of the current legal time frames”*. It seems therefore that this proposal of the Commission was made to legalise existing practices of Member States which are not in line anymore with the current provisions of the Schengen Borders Code.

As recalled in Recital 23 of the current Schengen Border Code, the existing well-established legal framework of the Schengen *acquis* operates under the presumption that *“the reintroduction of internal border control should remain an exception and should only be effected as a measure of last resort, for a strictly limited scope and period of time, based on specific objective criteria and on an assessment of its necessity which should be monitored at Union level.”*

It is also important to stress, that the Member States currently maintaining controls at all or parts of their internal borders have justified their decisions mainly based on the risk of secondary movement following the irregular cross-border movements since 2015. As part of the 2013 Schengen Governance Package the EU Co-legislators agreed that *“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”*.²

¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

² Recital 5 of Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances.

Views of the Rapporteur

Undoubtedly there is a strong case to be made that irregular migration into the Union - and the knock-on effects on the Schengen area without internal border controls - is the result of a failed Common European Asylum System for dealing with those seeking international protection and a failure to reform that system.

The current practice of some Member States maintaining their internal border controls, in the view of the Rapporteur, may be disproportionate, unjustified and inadvertent and may even amount to abuse.

The Rapporteur regrets that no impact assessment has been produced to accompany the changes proposed to the Schengen Borders Code currently under examination. As part of better law-making legislative proposals should be preceded by an impact assessment and, given the difficulties experienced in maintaining the current rules, such an assessment would have been very welcomed for this proposal.

The Rapporteur therefore strongly rejects the attempts of the Commission to legalise currently illegal practice of Member States as regards internal border controls and will reflect that in the draft report. The Rapporteur considers that the main objective of any changes to the Schengen Borders Code, concerning the rules on the reintroduction of internal border controls, should be to render the legal framework clearer. Changes should ensure that the use of internal border controls responds to actual needs, are proportionate and limited in time, while guaranteeing Member States the flexibility they need to face genuine threats. The new rules should not provide incentives for the introduction of internal border controls without a clear and objective need, nor for periods longer than necessary.

The Rapporteur would like to clarify and streamline the legal framework and the applicable rules to ensure improved transparency and make possible misuses of those rules more obvious. In that respect, clear-cut rules should better enable the Commission to exercise its powers as “guardian of the Treaty”, in particular when considering possible infringement procedures against Member States not complying with their obligations.

Suggested amendments

The existing structure of chapter II of the Schengen Borders Code does not allow for a straightforward reading of the applicable rules. The Rapporteur therefore recommends revisiting the current layout to ensure coherence, clarity and better implementation of the rules in practice.

Unlike at present, the structure of the articles should follow a certain rationale of complete and separate parts with logical components. The actual content of Article 25 should be brought more in line with the title “general framework” and should set out the main horizontal principles governing temporary reintroduction of border controls at internal boarder for foreseeable events. It should not set out part of the procedure to be followed.

For better clarity it is also important to distinguish in substance and in procedures between the rules regulating the internal border controls reintroduced for reasons requiring immediate action (governed by Article 28) and circumstances putting the overall functioning of the area without internal border controls at risk (governed by Article 29).

The content of Article 26 setting out criteria for the assessment of the temporary reintroduction of internal border controls should be appropriately expanded in order to ensure that the Member States must demonstrate that the reintroduction of border control is in fact a last resort measure.

Articles governing the procedures for the temporary introduction of border controls for foreseeable events should follow, laying down specific rules and safeguards for the initial introduction of controls and their prolongations.

In that spirit, Article 27 should provide for the procedure of initial reintroduction of border controls of up to 2 months, with a possibility of a prolongation of up to an additional four months. Article 27a should set out the procedure and additional safeguards for further prolongation of border controls for a maximum period of up to six months. The Rapporteur believes that the total maximum period of border controls for foreseeable events under both articles should not exceed one year.

In the opinion of the Rapporteur, extending the periods for the reintroduction of internal border control - as proposed by the Commission - would not encourage Member States to limit the envisaged measures to what is strictly necessary and proportionate to the threat.

Furthermore, the Rapporteur is in favour of introducing a sliding scale of obligations with additional procedural safeguards each time the border controls are prolonged.

Requirements for the first-time prolongation beyond the initial two months should include - similarly to what the Commission proposed - an obligation for Member States to provide a detailed risk assessment, and an enhanced involvement of the Member States affected by the possible reintroduction of internal border controls.

For the subsequent prolongation of border controls beyond six months, no prolongation should be possible without a formal Council procedure “authorising” the extension. It is the view of the Rapporteur that prolonged controls on internal border might have heavy repercussions on the right to free movement set out in the Treaties, therefore the EU has an overriding interest in being involved in any “limiting” of that right by individual Member States. In addition, unannounced checks, should be at the disposal of the Commission in order to verify the application of the rules in practice, in particular in cases of prolongation of controls for longer periods.

No possible misunderstanding should continue to persist in the regulation as to the fact that the procedure established under Article 29 applies in very specific circumstances, which are clearly distinct from the grounds considered in Articles 25, 27 and 28. Therefore, it should not be possible to invoke Articles 25, 27 and 28 to arbitrarily prolong border controls reintroduced under Article 29 once all possibilities provided for by the latter provisions are exhausted.

For the purpose of transparency and accountability the public should be more aware of what is happening. While respecting the requirements of confidentiality linked to public policy or internal security, more opportunities should be provided to have open discussions, at national or European level, on the implications of controls at internal borders within the Schengen area. These considerations are directly linked to the analysis of the role that the European Parliament could play in the process.

The Rapporteur also considers that improved information to and involvement of the European Parliament are highly desirable, including by ensuring that it receives all documents relevant for democratic scrutiny of the decisions impacting on the area without internal border controls.

The Parliament should, whenever possible, be associated with the procedure, including through consultation, for which it may be allowed to nominate an observer. In that regard, the Parliament could also use hearings and/or a structured dialogue with the EU Institutions and the Member States concerned in order to achieve that goal.