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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary**  
**reintroduction of border control at internal borders**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

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

Over the last two years, the European Union has witnessed a significant increase of temporary reintroduction of border control at internal borders. Since September 2015, border controls have been reintroduced and prolonged almost 50 times (as compared to 36 cases of reintroduced border controls in the period 2006-2015<sup>1</sup>). This was due to the secondary movements of irregular migrants and the increase of cross-border terrorist threats posing a serious threat to the internal security or public policy of a number of Schengen States. These serious threats compelled some Member States to prolong reintroduced border control several times, sometimes until the exhaustion of the current legal time frames.

Already in May 2017 the Commission recognised that new security challenges have arisen in the past years, as demonstrated by repeated terrorist attacks. In this respect, whilst the current legal framework has been sufficient to address challenges faced until now, the Commission started a reflection on whether it is sufficiently adapted to address the evolving security challenges.

Based on the current Schengen rules, border controls at internal borders are possible for longer than six months when there are serious deficiencies in the external border management of a Member State, as demonstrated during a Schengen Evaluation, which put the overall functioning of the area without internal border control at risk or as a result of the non-compliance of a Member State with a Council decision identifying measures to mitigate the risks in the control of external borders jeopardising the functioning of the Schengen area (Article 29 of the Schengen Borders Code procedure, as modified by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard)<sup>2</sup>. In such cases, the Council, based on a proposal of the Commission, can recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders, for a specific period of time, not exceeding six-months periods, renewable three times<sup>3</sup>.

In situations where the serious threat to public policy or internal security is not related to deficiencies in the management of the external borders as demonstrated during a Schengen Evaluation, the reintroduction of border control at internal borders is subject to the conditions and time limits set out in Articles 25 to 28 of the Schengen Borders Code. Accordingly, border control at internal border can be carried out for up to six months - in case of foreseeable events such as international sport or political events (Article 25), or for up to two months - in cases requiring immediate action (Article 28). In the interpretation of the

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<sup>1</sup> See the list of the reintroduced border controls at internal borders [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf).

<sup>2</sup> In line with this procedure, on 12 May 2016 the Council recommended, on the basis of a Commission proposal, that five Member States most affected by the secondary movements reintroduce border controls at some of their internal borders. On 12 May 2017 the Council, authorised these five Member States for the third and last time to extend these controls until 11 November 2017.

<sup>3</sup> With the new European Border and Coast Guard Regulation which has brought new resources and tools (such as the mandatory vulnerability assessments and their follow up recommendations, and the mandatory pooling of resources) the EU border management is more resilient to new challenges, should they arise again. This should significantly limit the grounds for temporary reintroduction of border controls at internal borders in relation to the situation at the external borders.

Commission, the periods of reintroduced border control under Articles 28 and 25 can cumulate. This means that with regard to decisions on reintroduction of border controls based on different grounds, each notification is examined individually and on its own merits with the applicable deadlines applying for each particular case.

Overall, the use of temporary reintroduction of border control shows that the Member States apply this measure in a responsible manner<sup>4</sup>. The costs of a non-Schengen simulation clearly demonstrate that this is always a costly decision for the economy<sup>5</sup>.

In the past two years, the rules and procedure for prolongation of temporary internal border control proved however to be insufficiently adapted to address the increased threats to public policy or internal security. The current rules are also not promoting the use of alternative measures to mitigate serious threats. Moreover there is a need to ensure that the Member State intending to reintroduce or prolong border controls cooperates with its neighbouring Member States. Finally, there is a need to better reflect in the legal framework the obligation for Member States to assess, well in advance of the decision on the reintroduction of internal border control, if and how the available alternative measures could address the identified threat, in line with the Commission Recommendation of 12 May 2017 on proportionate police checks and cross-border cooperation in the Schengen area, which, among others encouraged Member States to give precedence to proportionate police checks over the temporary reintroduction of border control in case of a serious threat to internal security or public policy.

In light of these considerations, the Commission came to the conclusion that there is a need to update the rules concerning the temporary reintroduction of border control at internal borders.

In line with that conclusion, the objective of the proposal is:

- to ensure that the time limits applicable to the temporary border control at internal borders enable Member States to take, when necessary, the measures needed to respond to a serious threats to internal security or public policy;
- to introduce better procedural safeguards in order to ensure that the decision on temporary border control at internal borders or their prolongation is based on a proper risk assessment and is taken in cooperation with the other Member States concerned;
- To that end, it is proposed that:
- the time limit for temporary reintroduction of border control at internal borders for the foreseeable duration of the serious threat is increased up to one year (instead of six months) and the limit for the length of prolongation periods is increased from up to 30 days to up to 6 months.

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<sup>4</sup> Between 2006 i.e. the date of adoption of the Schengen Borders Code and 2015, i.e. at the wake of the migratory crisis, border controls have been reintroduced 36 times and hardly ever have been prolonged, lasting normally only for a few days or weeks.

<sup>5</sup> According to the Commission analysis of direct economic cost of non-Schengen i.e. the situation where the border controls have been reintroduced for a longer period of time delays at the borders would have a substantial impact on cross-border transport (notably through road), tourism, public administrations and cross-border workers and travellers. For those categories, the direct costs are estimated to range between €5 and €18 billion per year (or 0.06%-0.13% of GDP), depending on the time spent due to delays. The medium-term indirect costs of non-Schengen may be considerably higher than those direct estimates, as the impacts on intra-community trade, investment and mobility would be unprecedented if rolling-back Schengen puts at risk the economic integration.

- Member States will prepare and submit a risk assessment assessing how long the identified threat is expected to persist and which sections of the internal borders are affected, and demonstrating that the prolongation of internal border control is a last resort measure; if border controls are prolonged for more than six months, the Member State will also explain retrospectively how border control contributed to address the identified threat; in order to guarantee the quality of such risk assessments, the relevant Agencies (European Border and Coast Guard and Europol) will be involved by the Commission.
- a better follow up to the opinion of the Commission expressing concerns on the necessity or proportionality of border controls and the consultation procedure involving the Commission, Member States and, as now proposed, relevant Agencies, is put in place; the need for cooperation with the neighbouring Member States affected by the intended border controls will be better ensured in the existing consultation procedure.
- a new possibility is introduced to extend internal border controls by a maximum period of two years where the serious threat to internal security or public policy persists beyond the one-year deadline, provided that it can be attributed to the same grounds (e.g. threat related to the operation of a cross-border terrorist network) and that commensurate exceptional national measures are taken within the territory to address the threat (such as the state of emergency).

In the context of these amendments, the proposal also clarifies the wording determining the deadline applicable under Article 29 of the Schengen Borders Code.

The proposal does not change the grounds for the temporary reintroduction of border control at internal borders as envisaged by the Schengen Borders Code.

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

The proposal modifies the general deadlines for temporary reintroduction of border control at internal borders as set out in Article 25, namely, in case of foreseeable events/threats, while preserving the current principle of temporary reintroduction of border control and safeguards applicable thereto, with, on one hand, the Commission having the power (and the duty, in cases beyond six months) to take a stance on the necessity and proportionality of the intended checks and, on the other, the 'consultation procedure' as referred to in Article 27(5) of the Schengen Borders Code, now to be reinforced by the participation of the relevant Agencies having the expertise to assess the information submitted by the Member State concerned in the notification and the risk assessment. Moreover, the criteria for the temporary reintroduction of border control at internal borders set out in Article 26 of the Schengen Borders Code will continue to apply.

The proposal strengthens the principle that reintroducing controls at internal borders must be a last-resort measure. Under Article 23 of the Schengen Borders Code, Member States remain entitled to carry out police checks within the territory, including in the border area, which in some cases can be an effective alternative to the temporary reintroduction of internal border control. The requirement to present a risk assessment demonstrating that the intended reintroduction or prolongation of border controls is a last resort measure should further encourage Member States to consider the use of alternative measures such as reinforced police measures. In that respect, the proposal will further support the implementation of the Commission Recommendation on proportionate police checks within the territory<sup>6</sup>, where the

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<sup>6</sup> C(2017) 3349 final.

Commission specifically encouraged Member States to give precedence to police checks over the temporary reintroduction of border controls at internal borders.

The proposed changes are consistent with Article 72 TFEU as they do not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 29 of the Schengen Borders Code will continue to offer the only possibility to prolong border controls at internal borders in case of serious deficiencies in the management of the external borders by a Member State as demonstrated by a Schengen Evaluation. This possibility has been recently reinforced by relevant provisions in the European Border and Coast Guard Regulation, where the lack of proper follow-up from the side of a Member State to a negative vulnerability assessment or the lack of request from a Member State for sufficient support from the European Border and Coast Guard Agency to respond to a specific and disproportionate pressure at its external borders putting at risk the functioning of the Schengen area, could justify temporary reintroduction of border controls at internal borders (Article 19(10) of the Schengen Borders Code).

- **Consistency with other Union policies**

Pursuant to Article 26 of the Schengen Borders Code which continues to apply, any decision on temporary reintroduction or prolongation of internal border control should take into account, in particular, the likely impact of such measure on the free movement of persons within the area without internal border control. In this context, it should be recalled that Directive 2004/38/EC<sup>7</sup> does not contain a right to be free from security checks on the occasion of crossing the borders at which controls are carried in line with the Schengen Borders Code. Therefore, the updating of the maximum period of border control at internal borders does not per se imply a negative impact on the freedom of movement; only the abusive use of such possibility could affect the freedom of movement.

To mitigate such risk, it is proposed that besides the existing possibility for the Commission to voice at any moment its concerns related to the necessity or proportionality of border controls (their reintroduction or prolongation), there will be now an obligation on the Commission to issue an opinion whenever border controls are carried out for longer than six months. The consultation procedure contains a further safeguard as it should now also involve the relevant Agencies. The proposed text for the consultation procedure, which would be led by the Commission, clarified that the views of the Member States affected by such controls are duly taken into account.

The proposal contributes to enhancing security within the Schengen area by giving Member States a legal possibility to prolong, where necessary, internal border control to respond to a serious threat to public policy or internal security that justifies such controls.

Updating the Schengen legal framework in light of experience in facing up to new challenges in order to preserve its capacity to respond appropriately to persistent serious threats to public policy or internal security, offering additional time that might be necessary to address them, is fully in line with the Commission's work set out in the European Agenda on Migration and the European Agenda on Security.

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<sup>7</sup> 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 L158/77 of 30.4.2004.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The proposal is based on Article 77 (2)(e) TFEU.

The proposal amends 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)**

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 proposal modifies the existing provisions of Chapter III of the Schengen Borders Code related to the temporary reintroduction of border control at internal borders, in a limited manner, with a view to respond to the recent experience in the last years where a number of Member States prolonged several times the initial periods of reintroduced border control at internal borders.

The proposal also reinforces the obligations of Member States vis-à-vis neighbouring Member States, affected by the intended reintroduction or prolongation of border control, as the efficiency of the current provisions in this regard proved to be limited.

The objective of defining the scope, duration and procedure for exceptionally prolonging temporary controls at specific section(s) of the internal borders, taking into account the responsibilities of the Member States with regard to public order and internal security as well as the need to limit controls at internal borders to what is strictly necessary, so as to preserve the area without controls at internal 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 the proposed measures, in accordance with the principle of subsidiarity.

- **Proportionality**

The proposed changes in the rules on temporary reintroduction of border control at internal borders are proportionate to the objective of protecting public policy and ensuring internal security in the area without internal border controls.

The proposal fully recognises that under the Schengen rules the temporary reintroduction of border control and its subsequent prolongation must remain an exception, subject to specific rules common for the members of the Schengen area.

The proposal is responding to the identified shortcoming in the existing rules as regards persistent threats to public policy and internal security which have been experienced by some Member States in recent years (such as cross-border terrorist threats, secondary movements of irregular migrants that justified the temporary reintroduction of internal border control). Based on this experience, it appears that even the practice accepted by the Commission to combine the maximum time limits for border control at internal borders based on Article 28 (events requiring immediate actions) and Article 25 (foreseeable events) may prove to be insufficient to address certain long-lasting threats.

To that end, the proposal:

1) Extends the general deadline for foreseeable events up to one year.

This maximum deadline is expected to be applied if threats to public policy or internal security cannot be addressed within a few months; this possibility should not affect the average length of border control reintroduced based on the most frequent grounds related generally to sport or high level political events. To recall, within these limits set out by the Schengen Borders Code the decision on the actual duration of the temporary reintroduction of border controls under Article 25 or 28 of the Schengen Borders Code is in hands of the Member State. However, as the scope and duration of the temporary reintroduction of border control at internal borders should not exceed what is strictly necessary to respond to the serious threat, the Commission can oversee the actual length of such controls and may issue an opinion in this respect; in case of concerns related to the necessity or proportionality of the reintroduced border controls, or when border control at internal borders is carried out for more than six months, the Commission is obliged to issue an opinion.

Furthermore, any possible abuse of the updated timeframe will be also addressed under the general powers of the Commission as the guardian of the Treaties.

Moreover, any reintroduction or prolongation of border controls will be subject to risk assessment which should look into the expected length of the threat and the border sections affected, assess the available measures and explain why the chosen one is considered to be the best to address the identified threat. After six months of effective border control, the risk assessment should also provide an analysis of how the previous prolongation(s) contributed to remedying the identified threat.

2) The proposal also introduces a possibility exceptionally to prolong internal border control if the same threats persist beyond one year but only if the serious threat to public policy or internal security invoked to justify the prolongation of border control is specific enough and corresponds to commensurate exceptional national measures, in particular a state of emergency. In order to ensure the extraordinary nature of such further prolongation, a specific possibility to go beyond the general deadlines in the Schengen Borders Code would require an opinion by the Commission followed by a recommendation of the Council setting where appropriate, the conditions for cooperation between the Member States concerned and which would constitute a prerequisite for any prolongation. The recommendation could concern periods of up to six months, and could be prolonged no more than three times for up to six months each time, under the same procedure.

- **Choice of the instrument**

The proposal concerns the amendment of a Regulation. As the proposal complements the existing provisions of Title III, Chapter II concerning the temporary reintroduction of border control at internal borders of this Regulation, no other instrument than a Regulation would be appropriate.

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

- **Impact assessment**

The proposed amendment allows for some controlled flexibility within the existing rules, without altering the logic of the exceptional reintroduction of border control at internal borders. This justifies a simplified analysis of the available options. There is therefore no need for a fully-fledged impact assessment.

- **Fundamental rights**

The proposed amendment respects the fundamental rights and principles set out in the Charter of Fundamental Rights of the European Union, in particular the freedom of movement and residence (Article 45). The safeguards of Article 3a, Article 4 and Article 7 of the Schengen Borders Code continue to apply.

#### **4. BUDGETARY IMPLICATIONS**

The proposed amendment has no implications for the EU budget.

#### **5. OTHER ELEMENTS**

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

Article 25 is modified as follows:

- The maximum deadline for temporary reintroduction of border control in case of foreseeable events posing a serious threat to public policy or internal security, as set out in paragraph 4 first sentence of this provision is prolonged from 6 months to 1 year. In line with that, in order to make the length of renewable periods under this provision more proportionate to the overall maximum duration of border controls, paragraphs 1 and 3 are also modified and provide for the extension of possible renewable periods from 30 days to 6 months.
- The purpose of this modification is to take into account the persistent serious threats to public policy or internal security (such as cross-border terrorist threats or secondary movements of irregular migrants that justify temporary reintroduction of internal border control), which, as demonstrated over the last few years, may require more time to deal with.
- Paragraph 2 is amended in order to insert the reference to the new Article 27a.
- An extraordinary possibility of prolonging border control at internal borders beyond the maximum deadline is added in paragraph 4. Accordingly, where a serious threat to public policy or internal security persists beyond one year, the border controls can be exceptionally prolonged for renewable periods of up to six months, and for a maximum period of two years, subject to the conditions and following the procedure set out in a new Article 27a.
- The purpose of this modification is to make the updated rules more resistant to the new challenges.

Article 27 is modified as follows:

- In paragraph 1 which is defining the elements of the intended reintroduction of border control (which, based on Article 25(3), are also applicable to prolongations), a new point aa) is added introducing a new obligation for the Member States to prepare and share a risk assessment. Such risk assessment should assess the expected length of the threat and the affected border sections and demonstrate that border controls are a last resort measure. It should also report in detail on the coordination with the neighbouring Member States concerned by such temporary border control at internal borders. In order to ensure the quality of this data, the Commission is required to involve the relevant Agency, depending on the threat underpinning the intended reintroduction or prolongation of border control (i.e. either the European Border and Coast Guard Agency or Europol).



The purpose of adding this new element is to underline the last resort character of border controls as a measure to address serious threats to public policy or internal security, which should be used only if other measures are considered not sufficient to attain the same results.

This objective is reinforced by the specific obligation imposed on the Member States going beyond the six months period of border controls, to retrospectively demonstrate that the reintroduced border control contributed to addressing the identified threat.

The amended provision also underlines the need of coordination with the neighbouring Member States affected by the intended border control.

In this context, in point e) wording is added to clarify that the coordination with the neighbouring Member States concerned should take place before the decision on reintroduction or prolongation of border controls at internal borders.

Furthermore, the last sentence of this paragraph is modified to highlight that the cooperation with the neighbouring Member States will be subject to the particular attention from the Commission, which may enquire more on that.

- In view of the specific procedure of prolonging border control beyond one year, the circumstances under which the Commission is required to issue an opinion, as specified in paragraph 4, are modified accordingly. Following this modification, the Commission or any Member State may issue an opinion but in case of concerns related to the necessity or proportionality of the intended border controls or when border control at internal borders is carried out for more than six months, the Commission is obliged to issue an opinion. This obligation is reinforced and updated to take into account the new obligation related to preparing the risk assessment and the role of the Agencies in assessing it.
- Paragraph 5 which is setting out the details of the consultation procedure between the Commission and the Member States, is also updated to reflect the involvement of the Agencies. Accordingly, the Agencies are expected to participate in this process. The other modifications reflect changes in previous paragraphs giving more visibility to the check of necessity and proportionality of the intended border controls. Finally, the proposed modifications aim at ensuring that the temporary reintroduction or prolongation of border control at internal borders is accompanied in practice by coordination measures between the Member States concerned by such controls.

As mentioned already above, a new Article 27a is added with a view to determining the conditions and procedure to be followed in case of a serious threat to public policy or internal security which exceeds one year.

- Paragraph 1 explains that border controls can be exceptionally prolonged beyond one year where a serious threat to internal security or public policy is sufficiently specific and persists beyond one year. This provision should be read in the light of Recital 8 which gives more guidance how the specificity of the threat can be demonstrated. Thus, also taking into account the criteria for the temporary reintroduction of border control as set out in Article 26, border controls could be exceptionally prolonged beyond one year to support the exceptional measures taken at national level to address the persisting serious threat to public policy or internal security (such as the state of emergency).

- Paragraph 2 refers to procedural provisions of Article 27 which should continue to apply (conditions related to the content of a notification, rules on sharing information with the European Parliament and the Council, the right to classify some information).
- Paragraph 3 and 4 set up the procedure to be followed. Accordingly, such extraordinary prolongation can be recommended by the Council, taking into account the opinion of the Commission (which is compulsory, in view of the modification in Article 27(4) as described above, and as reflected in paragraph 3 of Article 27a).

The prolongation can be recommended three times, for periods of up to six months each time, following the same procedure. In view of the fact that the need of further prolongation of border controls at internal borders beyond one year is likely to be motivated by grounds which touch on national executive and enforcement powers, and should be corroborated by commensurate exceptional national measures, it is proposed that the recommendation of the Council should not depend on a proposal of the Commission which, given these circumstances, would risk relying on very limited information. The opinion of the Commission should however be duly taken into account by the Council.

In line with the previous provisions requiring more involvement of the neighbouring Member States, it is also proposed that the Council in its recommendation determines, where appropriate, the conditions of cooperation between the Member States concerned.

Article 2 of the Regulation contains standard conditions on entry into force and scope of application.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal 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 point (e) of Article 77(2) 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) In an area where persons may move freely, the reintroduction of border control at internal borders should remain an exception. The reintroduction of internal border control should be decided only as a measure of last resort, for a limited period of time and to the extent that controls are necessary and proportionate to the identified serious threats to public policy or internal security.
- (2) The identified serious threats can be addressed by different measures, depending on their nature and scale. The Member States have at their disposal also police powers, as referred to in Article 23 of 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)<sup>8</sup>, which, subject to some conditions, can be used in the border areas. The Commission Recommendation on proportionate police checks and police cooperation in the Schengen area<sup>9</sup> provides guidelines to the Member States to that end.
- (3) In accordance with the provisions of Title III, Chapter II of the Schengen Borders Code, internal border control can be temporarily reintroduced as a last resort measure in case of a serious threat to public policy or internal security for a limited period of up to six months - for foreseeable events (Article 25), and for a limited period of up to two months - for cases requiring immediate action (Article 28). These time frames proved to be sufficient to tackle the serious threats related to the most frequent foreseeable events such as international sport or high level political events.
- (4) However, experience has shown that certain serious threats to public policy or internal security, such as cross-border terrorist threats or specific cases of secondary movements of irregular migrants within the Union that justified the reintroduction of border controls, may persist well beyond the above periods. It is therefore needed and justified to adjust the time limits applicable to the temporary reintroduction of border

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<sup>8</sup> OJ L 77, 23.3.2016, p.1.

<sup>9</sup> C(2017) 3349 final of 12.05.2017.

control to the current needs, while ensuring that this measure is not abused and remains an exception, to be used only as a last resort. To that end, the general deadline applicable under Article 25 of the Schengen Borders Code should be extended to one year.

- (5) In order to guarantee that these internal border controls remain an exception, Member States should submit a risk assessment concerning the intended reintroduction of border control or prolongation thereof. The risk assessment should, in particular, assess for how long the identified threat is expected to persist and which sections of the internal borders are affected, demonstrate that the prolongation of border controls is a last resort measure and explain how border control would help in addressing the identified threat. In case of internal border control going beyond six months, the risk assessment should also demonstrate retrospectively the efficiency of the reintroduced border control in addressing the identified threat and explain in detail how each neighbouring Member State affected by such prolongation was consulted and involved in determining the least burdensome operational arrangements.
- (6) The quality of the risk assessment submitted by the Member State will be very important for the assessment of the necessity and proportionality of the intended reintroduction or prolongation of border control. The European Border and Coast Guard Agency and Europol should be involved in that assessment.
- (7) The power of the Commission to issue an opinion under Article 27(4) of the Schengen Borders Code should be modified to reflect the new obligations on the Member States related to the risk assessment, including the cooperation with Member States concerned. When border control at internal borders is carried out for more than six months, the Commission should be obliged to issue an opinion. Also the consultation procedure as provided for in Article 27(5) of the Schengen Borders Code should be modified in order to reflect the role of the Agencies (European Border and Coast Guard Agency and Europol) and focus on the practical implementation of different aspects of cooperation between the Member States, including the coordination, where appropriate, of different measures on both sides of the border.
- (8) In order to make the revised rules better adapted to the challenges related to persistent serious threats to public policy or internal security, a specific possibility should be provided to prolong internal border controls beyond one year. Such prolongation should accompany commensurate exceptional national measures also taken within the territory to address the threat, such as a state of emergency. In any case, such a possibility should not lead to the further prolongation of temporary internal border controls beyond two years.
- (9) The reference to Article 29 in Article 25(4) should be modified with a view of clarifying the relation between the time periods applicable under Article 29 and Article 25 of the Schengen Borders Code.
- (10) The possibility to carry out temporary internal border controls in response to a specific threat to public policy or internal security which persists beyond a year should be subject to a specific procedure.
- (11) To that end, the Commission should issue an opinion on the necessity and proportionality of such prolongation and, where appropriate, on the cooperation with the neighbouring Member States.
- (12) In view of the nature of such measures, which touch on national executive and enforcement powers regarding serious threats to public policy or internal security,

implementing powers to adopt recommendations under this specific procedure should exceptionally be conferred on the Council.

- (13) The Council, taking account of the Commission's opinion, may recommend such extraordinary further prolongation and where appropriate determine the conditions for cooperation between the Member States concerned, with a view to ensuring that it is an exceptional measure, in place only for as long as necessary and justified, and consistent with the measures also taken at the national level within the territory to address the same specific threat to public policy or internal security. The Council recommendation should be a prerequisite for any further prolongation beyond the period of one year and hence be of the same nature as the one already provided for in Article 29.
- (14) Since the objective of this Regulation, namely allowing the prolongation in exceptional cases of reintroduced border controls at specific section(s) of the internal borders for the time period necessary for a Member State to adequately respond to a persistent threat of a cross-border nature, is to complement the current rules on temporary reintroduction of border controls at internal borders, it cannot be achieved by Member States acting alone; an amendment of the common rules established at Union level is necessary. Thus, 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.
- (15) 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.
- (16) 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/EC<sup>10</sup>; 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.
- (17) This Regulation constitutes a development of the provisions of the Schengen acquis, in which Ireland does not take part, in accordance with Council Decision 2002/192/EC<sup>11</sup>; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (18) 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

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<sup>10</sup> 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).

<sup>11</sup> 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).

development of the Schengen acquis<sup>12</sup>, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC.<sup>13</sup>

- (19) 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<sup>14</sup> which fall within the area referred to in Article 1, point A of Decision 1999/437/EC<sup>15</sup> read in conjunction with Article 3 of Council Decision 2008/146/EC.<sup>16</sup>
- (20) 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<sup>17</sup> 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/EU<sup>18</sup>.
- (21) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (22) Regulation (EU) No 2016/399 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

Regulation (EU) No 2016/399 is amended as follows:

- (1) Article 25 is replaced by the following:

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<sup>12</sup> OJ L 176, 10.7.1999, p. 36.

<sup>13</sup> 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, 10.7.1999, p. 31).

<sup>14</sup> OJ L 53, 27.2.2008, p. 52.

<sup>15</sup> 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, 10.7.1999, p. 31).

<sup>16</sup> 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).

<sup>17</sup> OJ L 160, 18.6.2011, p. 21.

<sup>18</sup> 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).

*"1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days, or for the foreseeable duration of the serious threat if its duration exceeds 30 days, but not exceeding six months. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.*

*2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 27a, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 27a, 28 or 29.*

*3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 26 and in accordance with Article 27, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods corresponding to the foreseeable duration of the serious threat and not exceeding six months.*

*4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed one year.*

*In the exceptional cases referred to in Article 27a, the total period may be further extended by a maximum length of two years in accordance with that Article.*

*Where there are exceptional circumstances as referred to in Article 29, the total period may be extended by a maximum length of two years, in accordance with paragraph 1 of that Article."*

(2) Article 27 is amended as follows:

(i) In paragraph 1, a new letter (aa) is added as follows:

*"(aa) a risk assessment assessing how long the identified threat is expected to persist and which sections of the internal borders are affected, demonstrating that the prolongation of border control is a last resort measure and explaining how border control would help address the identified threat. Where border control has already been reintroduced for more than six months, the risk assessment shall also explain how the previous reintroduction of border control has contributed to remedying the identified threat.*

*The risk assessment shall also contain a detailed report of the coordination which took place between the Member State concerned and the Member State or Member States with which it shares internal borders at which border control has been performed.*

*The Commission shall share the risk assessment with the European Border and Coast Guard Agency and Europol, as appropriate."*

(ii) In paragraph 1, letter (e) is replaced as follows:

*"(e) where appropriate, the measures to be taken by the other Member States as agreed prior to the temporary reintroduction of border control at internal borders concerned."*

(iii) The last sentence in paragraph 1 is replaced by the following:

*"Where necessary, the Commission may request additional information from the Member State(s) concerned, including on the cooperation with the Member States affected by the planned prolongation of border control at internal borders as well as additional information needed to assess whether this is a last resort measure."*

(iv) Paragraph 4 is replaced by the following:

*"4. Following notification by a Member State under paragraph 1 and with a view to consultation provided for in paragraph 5, the Commission or any other Member State may, without prejudice to Article 72 TFEU, issue an opinion.*

*Where the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders or where it considers that a consultation on some aspects of the notification would be appropriate, it shall issue an opinion to that effect.*

*Where border control at internal borders has already been reintroduced for six months, the Commission shall issue an opinion.*

(v) Paragraph 5 is replaced by the following:

*"The information referred to in paragraph 1 and any Commission or Member State opinion referred to in paragraph 4 shall be the subject of a consultation led by the Commission. Where appropriate, the consultation shall include joint meetings between the Member State planning to reintroduce border control at internal borders, the other Member States, especially those directly affected by such measures and the relevant Agencies. The proportionality of the intended measures, the identified threat to public policy or internal security as well as the ways of ensuring implementation of the mutual cooperation between the Member States shall be examined. The Member State planning to reintroduce or prolong border control at internal borders shall take the utmost account of the results of such consultation when carrying out border controls.*

(3) A new Article 27a is added:

**Specific procedure where the serious threat to public policy or internal security exceeds one year**

*"1. In exceptional cases, where the Member State is confronted with the same serious threat to public policy or internal security beyond the period referred to in Article 25(4) first sentence, and where commensurate exceptional national measures are also taken within the territory to address this threat, the border control as temporarily reintroduced to respond to that threat may be further prolonged in accordance with this Article.*

*2. At the latest six weeks before the expiry of the period referred to in Article 25(4) first sentence, the Member State shall notify the other Member States and the Commission that it seeks a further prolongation in accordance with the specific procedure laid down in this Article. The notification shall contain the information required in Article 27(1)(a) to (e). Article 27 paragraphs 2 and 3 shall apply.*

*3. The Commission shall issue an opinion.*

*4. The Council, taking due account of the opinion of the Commission, may recommend that the Member State decide to further prolong border control at internal borders for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months. In its*



*recommendation, the Council shall at least indicate the information referred to in Article 27(1) (a) to (e). Where appropriate, it shall determine the conditions for cooperation between the Member States concerned."*

*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*