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Delegations will find attached document SWD(2021) 462 final.

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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT REPORT**

*Accompanying the document*

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL**

**amending Regulation (EU) 2016/399 on a Union Code on the rules governing the  
movement of persons across borders**

{COM(2021) 891 final} - {SEC(2021) 440 final} - {SWD(2021) 463 final}

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## Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
API	Advanced Passenger Information
ECDC	European Centre for Disease Prevention and Control
ECRIS-TCN	The European Criminal Records Information System – Third Country Nationals
EES	Entry/Exit System
ETIAS	European Travel Information and Authorisation System
eu-LISA	EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
EURODAC	European Asylum Dactyloscopy Database
Europol	European Union Agency for Law Enforcement Cooperation
FRA	Fundamental Rights Agency
Frontex	European Border and Coast Guard Agency (EBCG)
PNR	Passenger Name Record
SAC	Schengen Associated Countries: Iceland, Liechtenstein, Norway and Switzerland
SBC	Schengen Borders Code
Schengen Handbook	Practical Handbook for Border Guards - ANNEX to the Commission Recommendation C(2019)7131
SIS	Schengen Information System

TFEU	Treaty on the Functioning of the European Union
VIS	Visa Information System
WHO	World Health Organisation
YEA	Your Advice Europe

## 1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

The **Schengen area** without controls at internal borders (the “Schengen Area”) is one of the most significant achievements of European integration. It comprises an area where European Union (EU) citizens and non-EU citizens legally staying in the territory as well as goods and services can circulate freely. Schengen is a key element for the functioning of the Single Market and its creation has brought significant social and economic benefits to European societies.

As illustrated by a 2018 EUROBAROMETER survey<sup>1</sup>, Europeans value Schengen very much, in particular the easier trade and travel, and the absence of passport control. This is confirmed by the high number of complaints and queries following the introduction of measures at internal borders in response to COVID-19 (see section 2.1.1).

### 1.1. Brief overview of the Schengen area

The Schengen area stems from the 1985 **Schengen Agreement** and the 1990 Schengen Convention<sup>2</sup>. Originally conceived as intergovernmental cooperation, it became a fully-fledged Community policy thanks to the Treaty of Amsterdam and Treaty of Lisbon. **At present**, the Schengen acquis relating to the area without controls at internal borders applies to all Member States except Ireland<sup>3</sup> and to four Schengen Associated Countries (SAC).

The Schengen area is supported by a significant body of measures to compensate for the absence of controls at internal borders and ensure a high level of security. The **Schengen acquis** has developed over years and has been recently further reinforced in the areas of external borders (external border management, common visa policy), and compensatory measures (police cooperation, return policies and the Schengen Information System (SIS)). A robust monitoring mechanism<sup>4</sup> ensures the proper implementation of measures, both at the external borders and within the Schengen area.

At the core of the Schengen project is the **abolition of checks** at internal borders which, according to the Schengen Borders Code<sup>5</sup> (SBC), can be crossed at any point and time. To that end, Member States must remove obstacles to a fluid traffic flow at land borders, in particular speed limits not based on road-safety considerations.

The abolition of checks at internal borders implies that **measures having an effect equivalent to border checks** are also prohibited (Article 23(1) SBC). While no criteria are laid down in the law as to when measures have such equivalent effect, Article 23(1) SBC (and the relevant case-law<sup>6</sup>) provides a non-exhaustive list of checks within the territory that are considered admissible, suggesting that in particular measures exclusively linked to the fact

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<sup>1</sup> [https://ec.europa.eu/home-affairs/news/what-do-europeans-think-schengen-area-results-special-eurobarometer-schengen\\_en](https://ec.europa.eu/home-affairs/news/what-do-europeans-think-schengen-area-results-special-eurobarometer-schengen_en)

<sup>2</sup> OJ L 239, 22.9.2000, p. 13 and OJ L 239, 22.9.2000, p. 19 respectively.

<sup>3</sup> Ireland and the United Kingdom until Brexit opted in to participate only in police and judicial cooperation in criminal matters (thus not on external border control or rules concerning the internal borders).

<sup>4</sup> Council Regulation (EU) No 1053/2013 (OJ L 295, 6.11.2013). For full reference, see Annex 16.

<sup>5</sup> Regulation (EU) 2016/399 (OJ L 77, 23.3.2016, p. 1–52). For full reference, see Annex 16.

<sup>6</sup> See in particular Judgment of the Court of Justice of 22 June 2010, Melki and Abdeli, joined cases C-188/10 and C189/10, ECLI:EU:C:2010:363, judgment of the Court of Justice of 19 July 2012, Adil, ECLI:EU:C:2012:508, C-278/12 PPU.

that a person is crossing the border are proscribed. However, the Member States continue to be able to carry out any other measures related to the exercise of police powers under national law.

Moreover, Member States may **temporarily reintroduce border checks** at their internal borders as a last resort measure, for a limited period of time, and in response to a serious threat to internal security or public policy, on the basis of the rules set out in Chapter II of Title III of the Schengen Borders Code. This possibility has been used extensively in the last six years (i.e. since the migratory crisis of 2015 and increased terrorist threats), impacting the exercise of the freedoms guaranteed by the Treaties.

## 1.2. A New Strategy for Schengen

In her **State of the Union 2020** address, President von der Leyen announced a new strategy for the future of Schengen with a view to restoring the four freedoms “in full and as fast as possible”<sup>7</sup>. The idea of a new approach to Schengen replied to the challenges that the Schengen area has been confronted with in the past years: an extraordinary high level of migration in 2015, an increased threat from terrorism and COVID-19. This idea echoed in the Joint Declaration of the EU Home Affairs Ministers of 12 November 2020<sup>8</sup>. In the **Pact on Migration and Asylum**<sup>9</sup>, the Commission announced the establishment of a dedicated **Schengen Forum** in order to stimulate more concrete cooperation and to re-build trust between all relevant stakeholders of the Schengen area. The Forum, organised for the first time on 30 November 2020, gathered representatives of the Member States and of the European Parliament who agreed that Schengen needs to be made stronger and more resilient. The situation at the internal borders was also recalled in the European Parliament’s **Resolution** of 20 January 2021 on monitoring the application of Union law 2017, 2018 and 2019<sup>10</sup>. This Strategy should build on the efforts of the Commission to restore Schengen and to make it stronger, and is part of the wider exercise of making Europe more resilient, in the aftermath of the pandemic.

The upcoming Schengen Strategy will steer the process of reinforcing Schengen governance. It is to be accompanied by two initiatives: one to review the **Schengen Borders Code**, with conclusions to be drawn from the negotiations on the Commission’s proposal of 2017 (hereafter the “2017 proposal”)<sup>11</sup>, and a proposal to reform the **Schengen evaluation mechanism**<sup>12</sup> in order to make it a fully effective tool for evaluating the functioning of Schengen and implementation of the follow-up recommendations. The Strategy will also take stock of the initiatives and measures that are currently being implemented in the management of the external borders. This concerns in particular the measures related to the new IT architecture at the external borders (Entry Exit System (EES) European Travel Information

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<sup>7</sup> State of the Union Address by President von der Leyen at the European Parliament Plenary, 16 September 2020, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655).

<sup>8</sup> Joint statement by the EU home affairs ministers on the recent terrorist attacks in Europe, 13 November 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/11/13/joint-statement-by-the-eu-home-affairs-ministers-on-the-recent-terrorist-attacks-in-europe/>.

<sup>9</sup> COM/2020/609 final. For full reference see Annex 16.

<sup>10</sup> Report on monitoring the application of Union law 2017, 2018 and 2019, 17 December 2020, (2019/2132(INI)), [https://www.europarl.europa.eu/doceo/document/A-9-2020-0270\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2020-0270_EN.html).

<sup>11</sup> COM(2017)571 final. For full reference see Annex 16.

<sup>12</sup> PLAN/2020/8679.



and Authorisation System (ETIAS) and Interoperability)<sup>13</sup>. Finally, it will announce additional initiatives to reinforce security in the EU (e.g. on cross-border police cooperation), to complement the Commission's continued efforts to make full use of the Schengen Information System and to increase the capacities of Europol<sup>14</sup>.

The revision of the Schengen Borders Code will particularly take into account the lessons learnt from the lack of sufficient support among Member States for the 2017 proposal. The 2017 proposal aimed at extending the time-limits applicable for reintroduction of internal border controls in exchange for stronger procedural safeguards. It provided for an increase of the time-limit for the temporary reintroduction of border control at internal borders in case of foreseeable threats to up to one year with prolongation periods of up to 6 months. In contrast, a new consultation procedure was foreseen, in which the Commission would have had the power to take a stance on the necessity and proportionality of the checks<sup>15</sup>.

This Impact Assessment assesses the options for making Schengen stronger and more resilient, including a fresh way forward on the Schengen Borders Code (the reform of the Schengen Evaluation Monitoring Mechanism is subject to a separate report). It is based on a consultation process launched at the Schengen Forum in November 2020 and continued through technical workshops in January and February 2021 with Member States, representatives of the European Parliament and stakeholders, as well as a public consultation carried out between 19 January and 16 March 2021<sup>16</sup>.

## **2. PROBLEM DEFINITION**

### **2.1. What is/are the problems?**

Over the last six years, Schengen has been exposed to a number of challenges: an extraordinary migratory pressure in 2015 which exposed the deficiencies in the management of some external borders, terrorist attacks and, most recently, COVID-19. According to Eurostat<sup>17</sup>, in 2015, 1,255,600 first time asylum seekers applied for international protection in the Member States of the European Union (EU), a number more than double that of the previous year. To compare, in 2018 there were 699,000 applications lodged in the EU, including 631,000 first time applications<sup>18</sup>. The terrorist threat, while always present, has become very prominent in Europe since the attack on Charlie Hebdo six years ago, in January 2015, and the growth of the so-called Islamic State in Syria (yet, this development can be linked with Schengen only in a limited manner - see Annex 7). Finally, the fast spread of the

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<sup>13</sup> EES Regulation (EU) 2017/2226 (OJ L 327, 9.12.2017), ETIAS Regulation (EU) 2018/1240, OJ L 236, 19.9.2018), Interoperability Regulation (EU) 2019/817 (OJ L 135, 22.5.2019, p. 27).

<sup>14</sup> (SIS) COM(2020)791final and Europol COM(2020)796final respectively.

<sup>15</sup> See Annex 17.

<sup>16</sup> Public consultation "Temporary checks at internal borders – amending the Schengen Borders Code": <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12827-Amendment-of-the-Schengen-Borders-Code/public-consultation>.

<sup>17</sup> Eurostat Newsrelease "Asylum in the EU Member States Record number of over 1.2 million first time asylum seekers registered in 2015", 4 March 2016: <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6>.

<sup>18</sup> European Commission "Statistics on migration to Europe": [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe\\_en#developmentsin20192018](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#developmentsin20192018).

COVID-19 pandemic caused between March and October 2020 an excess of deaths amounting to almost 300,000 in the EU, compared with the same period in 2016 – 2019<sup>19</sup>.

In response to these developments, some Member States decided to reintroduce border checks at some or all of their internal borders (see Table 1 below). While at first such decisions responded to clearly identifiable events, in particular major sports events, and for a certain period of time have been even recommended by the Council<sup>20</sup> (see Annex 7), now they often appear to be permanent precautionary measures. At the same time, measures agreed to protect the external borders in relation to COVID-19 are applied in an incoherent manner by a number of Member States, thus increasing the problems for the Schengen area as a whole. Although reintroducing border checks is a legitimate measure to address serious threats to internal security and public policy and may help the implementation of other legitimate measures (for instance travel restrictions), the geographical scope and duration of these border checks have had a heavy impact on the free movement of persons and the free circulation of goods, two fundamental freedoms guaranteed by the Treaties. The scale of this impact is outlined in section 2.1.3. The impact has been particularly visible at the land borders, affecting in particular the multiple economic and social ties in cross-border regions and the 150 million persons living in these regions.

Despite a number of initiatives taken by the European Commission (in particular the Recommendation of 12 May 2017 on proportionate use of police checks and police cooperation in the Schengen area<sup>21</sup> and the Recommendation of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on a temporary reintroduction of border control at internal borders in the Schengen area<sup>22</sup>, the proposal for an amendment to the Schengen Borders Code tabled in 2017 and high level discussions, as at the Schengen Forum on 30 November 2020) and a number of resolutions of the European Parliament<sup>23</sup>, these border checks have not yet been lifted.

**Table 1 - Overview of border checks at internal borders September 2015 - May 2021\*, based on notifications received from Member States**

COVID-19 related (state of play April 2021)	Migration and terrorism (long-lasting border checks in place since 2015/2016)
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<sup>19</sup> Eurostat “Excess mortality in 2020: especially high in spring and autumn”, 20 January 2021, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210120-1>.

<sup>20</sup> Serious deficiencies identified at the Greek external border in 2016 led to the adoption of four Council Recommendations that, based on Article 29, called on five Member States (Austria Germany, Sweden, Denmark and Norway) to temporarily reintroduce border checks at their internal borders between May 2016 and November 2017

<sup>21</sup> C(2017)3349. For full reference see Annex 16.

<sup>22</sup> Commission Recommendation (EU) 2017/1804 For full reference see Annex 16.

<sup>23</sup> E.g. European Parliament resolution of 24 November 2020 on the Schengen system and measures taken during the COVID-19 crisis (2020/2801(RSP)), European Parliament resolution of 19 June 2020 on the situation in the Schengen area following the COVID- 19 outbreak (2020/2640(RSP)), European Parliament resolution of 17 September 2020 on COVID-19: EU coordination of health assessments and risk classification, and the consequences for Schengen and the single market (2020/2780(RSP)), European Parliament resolution of 30 May 2018 on the annual report on the functioning of the Schengen area (2017/2256(INI)).

<b>Austria</b> (9 January 2021 - 28 April 2021)	<b>Austria</b> 16 September 2015 – 11 November 2021
<b>Belgium</b> (27 January 2021 – 18 April 2021)	
<b>Denmark</b> (13 March 2020 – 11 November 2021)	<b>Denmark</b> 4 January 2016 – 11 November 2021
<b>Finland</b> (19 March 2020 – 30 April 2021)	
<b>France</b> (1 May 2021– 31 October 2021)	<b>France</b> 13 November 2015 – 31 October 2021
	<b>Germany</b> 13 September 2015 – 11 November 2021
<b>Hungary</b> (1 September 2020 – 22 May 2021)	
<b>Iceland</b> (18 March 2021 – 16 April 2021)	
<b>Norway</b> (16 March 2020 – 10 May 2021)	<b>Norway</b> 26 November 2015 – 11 May 2021
<b>Portugal</b> (31 January 2021 – 30 April 2021)	
<b>Spain</b> (31 January 2021– 1 May 2021)	
	<b>Sweden</b> 12 November 2015 – 11 May 2021

\* This table does not take into account the border checks that were reintroduced but had again been lifted by April 2021.

For more information concerning the reintroductions of border checks at internal borders, see Annex 6.

Based on the experience of the last six years in the Schengen area, including the recent crisis situation related to COVID-19, two problems can be identified:

- **Problem 1:** Border checks at internal borders which are long-lasting and applied against an abstract threat or used as a first aid measure (and as such are often disproportionate and inadequate to address the threats they are supposed to tackle) become an unjustified hurdle to exercising the freedom of movement for persons and goods;
- **Problem 2:** Discrepancies in the application of the measures at the external borders, such as travel restrictions for non-essential travel to the EU by third country nationals, undermining the trust between Member States and increasing the incentives for some to reintroduce internal border checks, thus putting the overall functioning of Schengen at risk.

The existence of these problems is linked with the following specific issues:

### **Specific issues of effectiveness concerning Problem 1:**

- Use of border checks at internal borders as a first aid measure without sufficient mitigating measures;
- Persistence of border checks at internal borders, while compensatory measures that would interfere less with the movement of goods and persons across borders are not or under-used.

### **Specific issues of relevance concerning Problem 2:**

- Travel restrictions for non-essential travel to the EU at the external borders are only set out in a Council Recommendation which is legally not binding.

## **Box 1 – Problem definition**

**PROBLEM 1 (Section 2.1.1)** Border checks at internal borders which are long-lasting and applied against abstract threats or are used as a first aid measure (and as such are often disproportionate and inadequate to address the threats they are supposed to tackle) become an unjustified hurdle to persons and goods moving in the Schengen area.

### **a) Use of border checks at internal borders by Member States as a ‘first aid measure’;**

- Examples of difficulties (at the outset and in relation to evolving circumstances)
- Perspective of the cross-border regions
- Effectiveness and efficiency of border checks in addressing threats to public health
- Response time to mitigate impacts – unavailability of mitigating measures from the outset

### **b) Long-term hurdles for persons and goods to move freely in the Schengen area**

- Underuse of compensatory measures

**PROBLEM 2 (Section 2.1.2)** Discrepancies in the application of travel restrictions at the external borders undermining the trust and impacting the credibility vis-a-vis third countries.

## **IMPACTS OF THE PROBLEMS (Section 2.1.3)**

### **2.1.3.1 Impacts of the long- lasting border controls**

- Specific impacts on the air travel industry
- Impacts on the cross-border regions
- Impacts on the administration
- Impacts on border management capacity

### **2.1.3.2 Impacts related to COVID-19**

*1.2.1. Border checks at internal borders which are long-lasting and applied against abstract threat or used as a first aid measure (and as such are often disproportionate and inadequate to address the threats they are*

*supposed to tackle) become an unjustified hurdle to persons and goods moving in the Schengen area*

This problem refers to a number of situations over the last 6 years where Member States have decided to temporarily reintroduce border checks at their internal borders, for different reasons. Since September 2015, border checks at the internal borders have been reintroduced more than 250 times. Even if, per se, border checks are without prejudice to the right of free movement, in practice they do have an impact on the way EU citizens can exercise this right. In some cases, they can also serve to implement other measures affecting the freedom of movement, in particular travel restrictions.

### **Box 2 – Absence of checks at internal borders and freedom of movement**

Pursuant to Article 3(2) of the Treaty on European Union, “[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”

While the Schengen Borders Code abolishes border checks at internal borders (Article 22) and requires Member States to remove any obstacles to traffic at land borders (Article 24), the conditions for the exercise of the right of free movement and residence<sup>24</sup> (both temporary and permanent) in the EU for EU citizens and their family members are set out in Directive 2004/38/EC<sup>25</sup>.

The freedom of movement of EU citizens in the internal market is the basis for allowing the absence of internal border controls on persons in the Schengen area, but these two concepts are not equivalent in scope. Free movement of persons is also granted to EU citizens living in a Member State which does not (yet) participate in the area without internal border control. Within the Schengen area, the benefits of not being submitted to border checks are also available to third country nationals legally staying or residing in the Schengen area, but the right to travel of those third country nationals does not go that far as the right of free movement of EU citizens. In any case, the temporary reintroduction of border checks at internal borders does not affect rules governing the right of free movement as set out in Directive 2004/38/EC.

In 2020, the numerous reintroductions of border checks at internal borders intended to contain (or to help contain) the spread of COVID-19 revealed a number of specific problems which will be analysed in point a) below. Similarly, the years preceding the pandemic, where a number of Member States carried out persistent border checks at their internal borders or on some sections of these borders, provide evidence on how ineffective these checks often are. This will be analysed in point b) below.

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<sup>24</sup> This right stems from Article 21(1) of the Treaty on the Functioning of the European Union (TFEU), which provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them. Article 45 of the Charter of Fundamental Rights of the European Union also provides for freedom of movement and residence.

<sup>25</sup> Directive 2004/38/EC (OJ L 158, 30.4.2004, p. 77.) For full reference see Annex 16

*a) Internal border checks as a measure of first aid*

In the period March – June 2020, **border checks at internal borders have often been applied a first aid measure** and 17 Member States reintroduced border checks in an (unsuccessful) attempt to contain a further spreading of COVID-19. Some of them maintained or re-introduced them again even during periods where the epidemiological situation across the EU was comparable between the Member States. The identification of new variants of the virus at the end of 2020 led again to another wave of reintroductions of border checks at internal borders.

Until the adoption of sectorial guidelines by the EU with the aim to mitigate the unwanted effects of internal border controls (disruption of supply chains, disproportionate hurdles to free movement of persons, goods and services), Member States and EU citizens have been exposed to unprecedented disruptions.

Annex 8 shows the state of play as of mid-March 2020 as regards the **measures taken by the Member States to respond to COVID-19**. Table 2 below illustrates problems identified around the same time, which have been considered as hindering, in a disproportionate way, professional travel and/or the smooth transport of goods and services, as well as other rights of EU citizens. The more specific impacts of these measures on the freedoms are further explained in sections 2.1.3.1 and 2.1.3.2 below.

**Table 2 – Examples of problems at internal borders in 2020**

<b>MS/SAC</b>	<b>Problem description</b>
<b>PL-DE:</b>	The unilateral decision of Poland to reintroduce border checks led to severe congestion in the border areas, in particular in spring 2020, as many Polish citizens wanted to return to Poland. Long queues built up at border crossings and continued throughout the border closure. All this also heavily impacted on the freight traffic and therefore the delivery of essential goods.
<b>SI-IT:</b>	The decision banning inter-regional movement in Italy was not shared with Slovenia. Unaware of the fact that Italians were not allowed to move anyway, Slovenian authorities closed overnight the secondary crossing points (sometimes by installing large rocks in the middle of the street) and leaving only two international crossings open (with controls). As Slovenia is a transit country between Eastern and Western Europe, many trucks got stuck at the border. Some farmers even found their fields split in two, without the possibility to use their usual country roads. Furthermore, the fact that one of the crossing points was on a highway meant that pedestrians and cyclists were not allowed to use it.
<b>BE-NL</b>	The border was closed with containers, blocks and fences – only a few crossing points were left open for frontier workers, with the police controlling people travelling into and out of Belgium (only Belgium reintroduced border controls). There were limited justifications for crossing the border (accepted reasons were work-related or essential health of family reasons).

Based on the DG REGIO Report *The effects of COVID-19 induced border closures on cross-border regions - An empirical report covering the period March to June 2020*'

The situation has evolved since Spring 2020, and the border measures have often been lifted and introduced again. This means that people, in addition, also had to keep pace with frequent changes in the applicable rules. The public consultations provided some insights to illustrate this challenge. According to Eurostar *‘The clarity and reciprocity of border restrictions, and their joint implementation, is essential [...]’*<sup>26</sup>. *‘[B]order restriction rules have been changing and updating on a virtually daily basis. The result has been confusion for passengers, staff and within governments. Frequently governments’ own information (e.g. embassy websites) has failed to keep up and had been partial, inaccurate or missing entirely. The overwhelming majority of passengers are trying to be responsible but if the rules are not clear and simple, they struggle to comply. Eurostar staff and border forces are put in the difficult position to have to interpret rules and regularly fail to provide answers with confidence’*<sup>27</sup>.

- Perspective of the cross-border regions

The uncoordinated response has affected in particular **cross-border regions** where the socio-economic ties between EU citizens and companies based in different Member States are very strong. The sudden reintroduction of border controls also affected the local capacities to ensure essential services on both sides of the border. These problems illustrate the fact that borders should be understood in the first place not as lines separating national sovereignties, but as areas where people live together.

As reported by DG REGIO<sup>28</sup>, around 150 million Europeans live in border regions amounting to 30% of the EU population. The cross-border regions cover 40% of the EU territory and produce 30% of the EU's GDP. Therefore, any changes as regards the possibility to cross the borders without controls are socially and economically significant. The specific impacts of measures at the internal borders on the cross-border regions are described in section below 2.1.3.

According to the study by DG REGIO *‘The effects of COVID-19 induced border closures on cross-border regions - An empirical report covering the period March to June 2020’*<sup>29</sup> and the *‘20 case studies covering the period March to June 2020’*<sup>30</sup> accompanying it, the measures taken by the Member States have had a significant impact on different elements of cross-border ties. The most relevant for this Impact Assessment relate to the area without border checks at internal borders, and concern primarily cross-border workers.

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<sup>26</sup> Written contribution submitted to the Commission following the workshop of 14 January 2021.

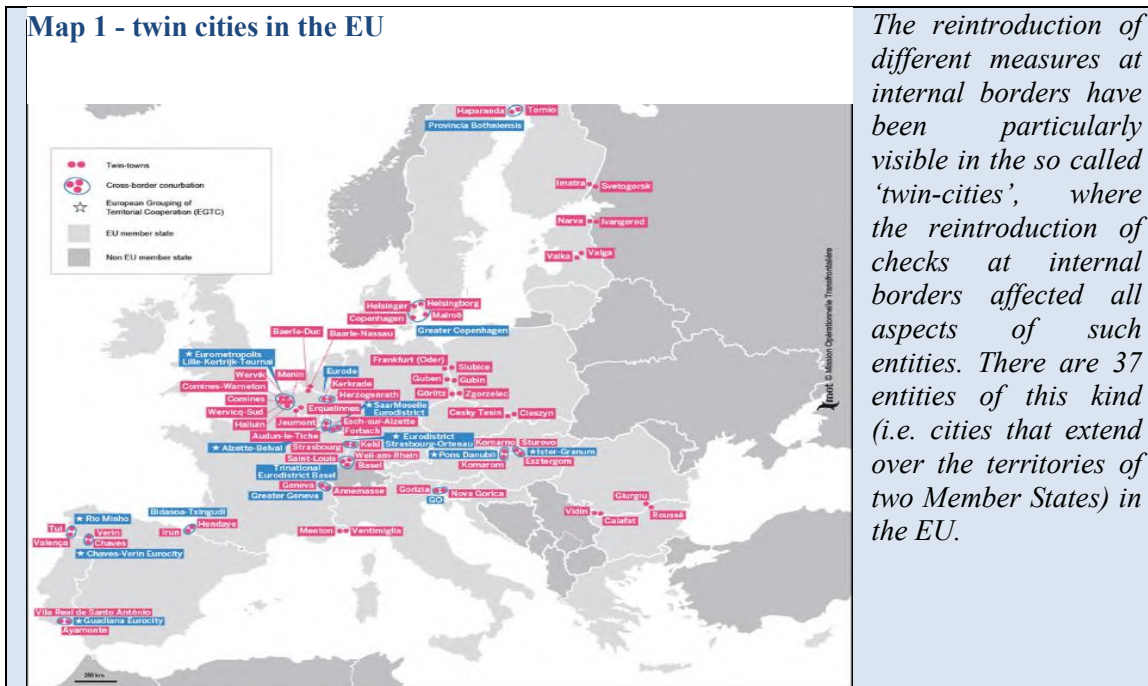
<sup>27</sup> Written contribution submitted to the Commission following the workshop of 14 January 2021.

<sup>28</sup> COM(2017) 534 final Boosting growth and cohesion in EU border regions.

<sup>29</sup> European Commission, Directorate-General for Regional and Urban Policy, “The effects of COVID-19 induced border closures on cross-border regions – An empirical report covering the period March to June 2020”, February 2021: <https://op.europa.eu/en/publication-detail/-/publication/46250564-669a-11eb-aeb5-01aa75ed71a1/language-en/format-PDF/source-search>.

<sup>30</sup> European Commission, Directorate-General for Regional and Urban Policy, “The effects of COVID-19 induced border closures on cross-border regions – 20 case studies covering the period March to June 2020”, February 2020, <https://op.europa.eu/en/publication-detail/-/publication/bf14de68-6698-11eb-aeb5-01aa75ed71a1/language-en>.

**Map 1 - twin cities in the EU**



*The reintroduction of different measures at internal borders have been particularly visible in the so called ‘twin-cities’, where the reintroduction of checks at internal borders affected all aspects of such entities. There are 37 entities of this kind (i.e. cities that extend over the territories of two Member States) in the EU.*

The adopted measures triggered a lot of discussion and local initiatives. For instance, in the High Rhine Region, the citizens’ dialogues carried out in Summer 2020 led to the conclusion that the decision-making process in the situation of crisis should include: i) close coordination with neighbouring countries, ii) maintaining local border traffic, and iii) uniform rules to minimise the number of regimes applicable in the cross-border regions<sup>31</sup>.

The cross-border regions also experienced many difficulties related to constant changes. In 2020, the Euregio Meuse-Rhine region alone received 416,000 questions from citizens and businesses. This aspect also demonstrates the need for closer cooperation. In this context, the Euregio Meuse-Rhine called for even more cross-border cooperation in the situation of crisis in order to do justice to the shared responsibility for the labour market. Furthermore, in a position paper of 21 September 2021 the Heads of State and Government of the Benelux and Baltic countries call for a closer monitoring of the Union’s border regions as a lesson learnt from the experience with the pandemic and the inclusion of a cross-border test into the policymaking process at Member State and Union level<sup>32</sup>.

- Effectiveness and efficiency of border checks in addressing threats to public health

The objective of border checks reintroduced during the pandemic at internal borders has been to enforce travel bans for non-essential travel. However, the effectiveness of travel bans in the context of an epidemiological threat is not evident. The **WHO** expressly holds that “[t]ravel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and

<sup>31</sup> See letter from Marion Dammann, President of the High Rhine Commission, Head of Lörrach District Authority (D), and Stephan Attiger, Vice-President of the High Rhine Commission, Administrator of the Canton of Aargau (CH) ARES(2020)4394367.

<sup>32</sup> Joint Benelux-Baltic position paper regarding the importance of impact assessments of EU-policies on border regions, 21 September 2021, 12663/21.



*social impact.*”<sup>33</sup> Several media outlets cite WHO officials calling on States to keep their borders open. Considering the side-effects of border closures, Michael Ryan, the WHO emergencies director, held that “[c]ontinuing to keep international borders sealed is not necessarily a sustainable strategy for the world’s economy, for the world’s poor, or for anybody else”<sup>34</sup>.

Therefore, the WHO continuously advised against travel and trade restrictions to countries experiencing COVID-19 outbreaks<sup>35</sup>. However, it recognised that “[t]ravel measures that significantly interfere with international traffic may [...] be justified at the beginning of an outbreak [of a pandemic], as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures”, but also underlined that these “must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves.”<sup>36</sup> The available studies concerning the effect of travel restrictions on the spreading of COVID-19 seem to confirm this assessment. Accordingly, following the appearance of new variants of the COVID-virus, the Council has only recommended to discourage non-essential travel but not to issue travel bans<sup>37</sup>.

- Response time to mitigate impacts – unavailability of mitigating measures from the outset

From the start of the pandemic, the Commission worked closely with the Member States to ensure a coordinated approach to border-related issues and a gradual return to free movement. It organised regular videoconferences, both at the ministerial level and technical level, bringing together experts from Member States, different Commission services and relevant

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<sup>33</sup> WHO, “Updated WHO recommendations for international traffic in relation to COVID-19 outbreak”, 29 February 2020: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>; cf. WHO “Key considerations for repatriation and quarantine of travellers in relation to the outbreak of novel coronavirus 2019-nCoV”, 11 February 2020: <https://www.who.int/news-room/articles-detail/key-considerations-for-repatriation-and-quarantine-of-travellers-in-relation-to-the-outbreak-of-novel-coronavirus-2019-ncov>.

<sup>34</sup> <https://www.thenews.com.pk/print/692882-border-closures-not-a-sustainable-strategy-who>; cf. <https://www.cbsnews.com/news/world-health-organization-borders-shut-covid-19-not-sustainable-coronavirus/>; <https://www.dailystar.com.lb/News/World/2020/Jan-31/500308-who-says-keep-borders-open-despite-coronavirus.ashx>.

<sup>35</sup> WHO, “Updated WHO recommendations for international traffic in relation to COVID-19 outbreak”, 29 February 2020: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>; cf. WHO “WHO advice for international travel and trade in relation to the outbreak of pneumonia caused by a new coronavirus in China”, 10 January 2020: <https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china>; WHO “Updated WHO advice for international traffic in relation to the outbreak of the novel coronavirus 2019-nCoV”, 24 and 27 January 2020: <https://www.who.int/news-room/articles-detail/updated-who-advice-for-international-traffic-in-relation-to-the-outbreak-of-the-novel-coronavirus-2019-ncov-24-jan> ; <https://www.who.int/news-room/articles-detail/updated-who-advice-for-international-traffic-in-relation-to-the-outbreak-of-the-novel-coronavirus-2019-ncov>; cf. WHO “Key considerations for repatriation and quarantine of travellers in relation to the outbreak of novel coronavirus 2019-nCoV”, 11 February 2020: <https://www.who.int/news-room/articles-detail/key-considerations-for-repatriation-and-quarantine-of-travellers-in-relation-to-the-outbreak-of-novel-coronavirus-2019-ncov>.

<sup>36</sup> WHO, “Updated WHO recommendations for international traffic in relation to COVID-19 outbreak”, 29 February 2020: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

<sup>37</sup> Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

EU agencies such as European Centre for Disease Prevention and Control ECDC and Frontex. All these efforts have been made despite the lack of relevant tools. These meetings, organised on an ad-hoc basis, remained thus voluntary, without any basis in the applicable law.

Furthermore, the necessary coordination instruments, such as guidelines and recommendations that resulted from these discussions were adopted on an ad hoc basis, which can be considered a good basis for ‘mitigating measures’ to be applied whenever several Member States reintroduce border checks at their internal borders.

**Table 3 – Measures adopted by the Commission in 2020\***

Date of a measure	Measure adopted by the Commission in 2020
16 March 2020	Guidelines for border management measures to protect health and ensure availability of goods and essential services (COM(2020) 1753 final).
16 March 2020	Communication: COVID-19: Temporary restriction on non-essential travel to the EU (COM(2020) 115); and successive extensions.
23 March 2020	Communication on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential service (C(2020) 1897 final).
30 March 2020	Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy (COM(2020) 2050 final).
30 March 2020	Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (C(2020) 2051 final), especially regarding workers in the health care and food sectors .
3 April 2020	Guidelines on EU Emergency Assistance in Cross-Border Cooperation in Healthcare related to the COVID-19 crisis (C(2020) 2153 final).
8 April 2020	Guidance on health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships (C(2020) 3100 final).
13 May 2020	Guidance on safely resuming travel and rebooting Europe's tourism in 2020 and beyond: Communication: COVID-19 Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls (C(2020) 3250 final),  Communication: Tourism and transport in 2020 and beyond (COM(2020) 550 final).
11 June 2020	Commission Communication recommending a partial and gradual lifting of travel restrictions to the EU after 30 June, based on a common coordinated approach (COM(2020) 399 final). This was followed by a Commission Proposal for a Council Recommendation on 25 June (COM(2020) 287 final), adopted by the Council on 30 June (Council Recommendation 2020/912).
4 September	Commission proposal for a Council Recommendation to ensure that any measures taken by Member States that restrict free movement due to the

2020	pandemic are coordinated and clearly communicated at the EU level (COM(2020) 499 final), adopted by the Council on 13 October (Council Recommendation 2020/1785).
28 October 2020	Guidance on travellers to be exempted from the temporary travel restrictions to the EU (including family members) (COM(2020) 686 final).
22 December 2020	Commission Recommendation on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom (C(2020) 9607 final).

*\* Further measures have been and are still being adopted in 2021*

In the public consultation, Member States, the European Parliament and the private sector have welcomed the coordination role assumed by the Commission in the fight against COVID-19<sup>38</sup>. Some stakeholders (primarily carriers associations) regretted the absence of contingency rules from the outset, as this, in their view, could have prevented patchwork solutions and different interpretations by Member States.

The absence of a mechanism at the EU level to deal with such emergency situations caused delays which impacted both the border regions and the entire Schengen area and should be considered as a significant part of the costs outlined below in Section 2.1.3. Moreover, also the implementation time on the ground, in the follow-up to the adoption of the different guidelines, had an impact. Still in April 2020, weeks after the European Commission had adopted its Communication on the implementation of the Green Lanes under its *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, stakeholders (the International Road Transport Union) voiced concerns related to “several hours of waiting time at some newly created intra-EU borders”<sup>39</sup>.

#### ***b) Long-term hurdles for persons and goods to move freely in the Schengen area***

Apart from the difficulties due to COVID-19, Schengen has been exposed to many other challenges over the last few years. In particular, the last six years have seen **persistent border checks at internal borders in six Member States** (France, Austria, Germany, Sweden, Denmark and Norway), that repeatedly prolonged these border checks due to different threats (migration, terrorism, shortcomings at the external borders). These border checks have been repeatedly prolonged despite the evolution of the situation: relevant circumstances have changed (change of migratory patterns removing the pressure from some border sections, evolution of terrorist threats towards ‘single wolf’ type), the intensity of specific threats has decreased considerably (with the number of irregular migrants currently at a level comparable to the period preceding 2015/2016 which, together with other measures taken in related areas, should reduce the problem of secondary movements), and counter-measures have been adopted at EU and national level to reinforce the external borders.

<sup>38</sup> Workshops organised by DG HOME on 14 and 22 January 2020.

<sup>39</sup> IRU, Open letter “Call to support the Community of supply chains and mobility networks in post COVID-19 de-confinement period”, 23 April 2020: <https://www.iru.org/system/files/Call%20for%20the%20continuity%20and%20survival%20of%20commercial%20road%20transport%20post%20C....pdf>.

Since the very beginning of Schengen<sup>40</sup>, Member States have always had the possibility to reintroduce temporary checks at internal borders. In the Schengen Borders Code, adopted for the first time in 2006, a specific procedure and time-limits depending on the character of the event posing a threat (foreseeable/non-foreseeable) were set up<sup>41</sup>.

At first, Member States used the possibility of temporary reintroduction of border checks at internal borders quite rarely – between 2006 and 2015, border checks were reintroduced by 16 Member States in only 36 situations in total, mostly in relation to international sport or other events taking place in the Member State concerned. In the vast majority of cases, the checks only lasted for a couple of days.

The situation changed in 2015, with the mass-influx of third-country nationals and the terrorist attacks in Paris. Since then, until March 2020 (i.e. the beginning of COVID-19 related reintroductions of border checks) there have been more than 250 cases of temporary reintroduction of border checks. Six of the Member States (Austria, Germany, Denmark, Sweden, Norway and France) have kept border checks continuously in place during this entire period.

The grounds and duration of all the instances of temporary reintroduction of border checks is available on the website of DG HOME<sup>42</sup> (see also Annex 6). Five Member States (Austria, Germany, Denmark, Sweden and Norway) referred to the extraordinary migratory pressure to justify the reintroductions between September 2015 and May 2016. Between May 2016 and November 2017, the prolongations followed the Recommendation of the Council<sup>43</sup> adopted in the special procedure of Article 29 of the Schengen Borders Code, in view of the persistent serious deficiencies identified at one of the external borders. However, as of November 2017 these five Member States have continued border checks based on unilateral decisions, giving secondary movements of migrants, terrorist threats and/or alleged deficiencies at the external borders as a justification. This was the case even where the data available to the national authorities indicated that the number of apprehensions of irregular migrants continuously reduced since 2015 and when the number was even lower than in the period before 2015<sup>44</sup>.

France is the only Member State which has been continuously carrying out checks at all its internal borders in view of terrorist threats or international events (e.g. Tour de France). Only recently, in the last few prolongations France has also referred to the migratory situation (and COVID-19).

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<sup>40</sup> Article 2 of the Convention Implementing the Schengen Agreement: “1. Internal borders may be crossed at any point without any checks on persons being carried out. 2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof”.

<sup>41</sup> In 2013, in one of the subsequent modifications of the Schengen Borders Code, a special procedure was added for persistent serious deficiencies at the external borders putting the overall functioning of the Schengen area at risk (Article 29).

<sup>42</sup> [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.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.pdf)

<sup>43</sup> Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, and subsequent.

<sup>44</sup> Cf. Situation Report on Human Trafficking 2019, Ministry of Interior of Austria, [https://bundeskriminalamt.at/304/files/Jahresbericht\\_Schlepperei\\_undMenschenhandel\\_2019.pdf](https://bundeskriminalamt.at/304/files/Jahresbericht_Schlepperei_undMenschenhandel_2019.pdf), p. 10.

Border checks at internal borders are not sufficient to address the underlying threats. At the same time, they are the most onerous measure to address threats to internal security or public policy. In the public consultation carried out by the Commission, all but one responding business associations and company/business organisations indicated they have suffered either from delays when transporting goods across the borders (60%) and/or from other problems (60%), due to reintroduced border controls. These checks create significant costs for the private sector but also for the national administration, which has to engage resources on a quasi-permanent basis on often large areas of internal borders (for details see Section 2.1.3). Accordingly, 63 % of EU citizens and all business associations and companies indicated in the public consultation that actions for the removal of difficulties to cross internal borders should be reinforced within the Schengen framework. 52 % of the EU citizens and 70 % of the business organisations additionally agreed that control and monitoring of Schengen States' compliance with the applicable rules should be improved<sup>45</sup>.

To be noted that the above general limitations of internal border controls cannot be considered as an argument against reintroductions of internal border controls as such. In some circumstances (e.g. beginning of COVID-19, i.e. in the circumstances different from the ones of 2015/2016) border controls at internal borders may indeed have added value. However, in all instances of the internal border controls requiring prolongation, the same challenge of phasing out from internal border controls and substituting them by other measures, remain a main challenge.

- Insufficient use of compensatory measures for the absence of border controls at internal borders

In particular thanks to progress on the technological side, a number of measures other than border checks are available to the Member States to address threats to internal security or public policy. The use of new technologies, police checks and cross-border police cooperation or Advanced Passenger Information (API) in the future (see section 2.2.3) are often able to achieve the same objectives as the border checks put in place by Member States, while being more effective in this respect. At the same time, both the impact on the circulation of persons and goods as well as the direct costs of these measures are lower when compared to border checks.

Based on the feedback received from the Member States in the consultation process<sup>46</sup>, most of the Member States have access to such measures have the possibility to deploy new technologies in the border areas or carry out police checks there. Annex 10 provides an overview of the information that has been collected, while Annex 11 provides a description of the Dutch flagship measure, the @MIGO-BORAS system. This system allows for electronic license plate recognition, verification of relevant databases and dispatching patrols of the Royal Marechaussee<sup>47</sup> to carry out spot checks.

The possibility of using such compensatory measures is reflected both in the Schengen Borders Code (Article 23) and in the 2017 Recommendation on proportionate police checks

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<sup>45</sup> Annex 2, p. 13-14.

<sup>46</sup> Written contributions following the Workshop of 14 January 2021.

<sup>47</sup> The Royal Netherlands Marechaussee is deployed from royal palaces to the external borders of Europe, and from airports in the Netherlands to theatres of war and crisis areas all over the world. See: <https://english.defensie.nl/organisation/marechaussee>.

and police cooperation in the Schengen area. While the Recommendation concerned in particular police checks and cross-border police cooperation, it also recognised the role of new technologies and called for privileging these measures over internal border checks.

In the consultation process, some Member States disagreed with the view promoted by the Commission that police checks are a valid alternative to border checks at internal borders, in particular as they do not allow for immediate refusal of entry. However, it seems telling that, for instance, the Netherlands have not reintroduced any border checks at internal borders since 2015, relying entirely on the Royal Netherlands Marechaussee forces and @MIGO-BORAS<sup>48</sup>.

On the other hand, during the Expert meetings on measures allowing for a more effective cooperation within the Schengen Area, on 14 and 22 January 2021, one representative underlined the industry's openness for new technologies, but emphasized that these should be in line with international standards, e.g. the IATA. At the same meeting, one carrier's representative acknowledged that the use of technology could facilitate the work of border services, holding that new technology solutions must be coordinated by clear rules and may not lead to delays or increased waiting time. The results of the public consultation show a high approval rate of companies for the use of compensatory measures. 80% of the business representatives agreed that border controls should be substituted by alternative measures where possible. What is more, all participating business representatives expressed their support for reasonable automated control measures<sup>49</sup>.

#### *1.2.2. Discrepancies in the application of travel restrictions at the external borders undermining the trust and impacting the credibility vis-a-vis third countries*

Following the outbreak of the COVID-19 and in the absence of adequate rules in the Schengen Borders Code, the Member States took an uncoordinated approach in particular as regards their external borders: some banned all travels from third countries while others adopted a more lenient approach. In response to such disarray amongst Member States, in March 2020, the Commission called for a **coordinated decision on applying travel restrictions on non-essential travel from third countries into the Schengen area**. The purpose of this call was to avoid some Member States letting in travellers from countries with a highly problematic epidemiological situation which could have increased the risk for the entire Schengen zone and created additional incentives for other Member States to set up internal border controls in the Schengen area, in order to prevent these persons from crossing into their territories. This call was followed by all EU Member States (with the exception of Ireland) and all Schengen Associated Countries and was later included in the 2020/912 Council Recommendation<sup>50</sup>.

However, although Member States have agreed among themselves on a list of third countries for which alone the restriction on non-essential travel could be lifted, they **have applied the Recommendation referred to above in very different ways**. Only some apply the list of countries in full, while others decided to lift the restrictions only to some or even none of the

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<sup>48</sup> <https://www.marechausseecontact.nl/pdf/factsheet-migo-boras.pdf> and Annex 11.

<sup>49</sup> Annex 2, p. 14.

<sup>50</sup> Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction.

countries on the list. Other Member States lifted the restrictions to third countries that were not on the list at all, thus putting at risk the overall functioning of the Schengen area.

The divergences in implementation are shown by state of play of 16 April 2021: 14 Member States (Croatia, Cyprus, Estonia, Finland, Greece, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Portugal, Slovenia, Spain and Switzerland) were open to non-essential travel from the listed third countries, 6 Member States (Belgium, Denmark, France, Hungary, Norway and Slovakia) were closed to any third country, while the remaining 10 Member States used the list with a considerable degree of flexibility. Furthermore, 13 Member States were open for non-essential travel from a wide group of third countries not listed in the relevant Annex to the Council Recommendation. This concerned in particular Bulgaria (18 non-listed third countries), Cyprus (16), Greece (4), Italy (5), Liechtenstein (5), Malta (6), the Netherlands (5) and Poland (6).

Furthermore, by the end of March 2021, a number of Member States were already using or planning to use proofs of vaccination or recovery as a tool to lift Covid-19 related restrictions while Council Recommendation 2020/912 still does not provide for that possibility. On 17 March 2021, the Commission made a proposal for a Regulation on an interoperable health certificate<sup>51</sup>, the so-called Digital Green Certificate, to facilitate free movement during the COVID-19 pandemic. Following the approach that restrictions to free movement “of persons who do not pose a risk to public health, for example because they are immune to and cannot transmit SARS-CoV-2, should not be restricted, as such restrictions would not be necessary to achieve the objective pursued”<sup>52</sup>, this certificate shall certify vaccination against COVID-19, negative test results and recovery from COVID-19 and be valid throughout the Union. The European Parliament approved the parliamentary scrutiny of the proposal under the urgent procedure<sup>53</sup>. However, this proposal and a second one extending the provisions to third country nationals legally staying or residing in the European Union<sup>54</sup> only regulate movements within the Schengen area, and not travel to the EU.

For instance, one Member State announced mid-March that as of 26 March, any third country national carrying a proof of vaccination or recovery from Covid-19 would be able to enter the country, irrespective of the reason of travel. Two other Member States have both concluded agreements with Israel to exempt vaccinated travellers from testing and quarantine.

As to the **application of the exemptions from the travel restrictions** provided for in the Council Recommendation (in particular travel of family members of EU citizens and residents and travel for an essential function or need), as reported by Fragomen Europe Immigration Taskforce, the application of these exemptions is often left to the discretion of the border guards who are sometimes not sufficiently aware of the changing rules and the documents that can be supplied as evidence. For instance, certain Member States require an “essential travel certificate”, to be issued by the national authorities, for entry of persons exempted from the

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<sup>51</sup> Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate), COM/2021/130 final.

<sup>52</sup> COM/2021/130 final, recital 7.

<sup>53</sup> Cf. Rule 163, Rules of Procedure of the European Parliament.

<sup>54</sup> Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to third-country nationals legally staying or legally residing in the territories of Member States during the COVID-19 pandemic (Digital Green Certificate), COM(2021) 140 final.

travel restriction. While such certificate allows travellers to face less issues at the border, difficulties are experienced when applying for the certificate at the consulate, as the latter has full discretion in determining whether the trip is considered as essential travel.

On this point, it is interesting to note that 83% of the EU citizens who replied to the stakeholders' consultation would like coordination in crisis situations to be reinforced. Similarly, being asked if a coordination at EU-level of measures applicable at the external borders of the EU in response to common threats such as a pandemic is beneficial, 90.91% of the EU citizens agreed and only 5.05% disagreed. Likewise, 90% of the business associations and company/business organisations considered the coordination at EU-level of measures applicable at the external borders of the EU in response to common threats such as a pandemic as beneficial.<sup>55</sup>

### *1.2.3. Impacts of the identified problems*

The two identified problems are: i) border checks at internal borders which are long-lasting and applied against abstract threats or are used as a first aid measure and as such become an unjustified hurdles to persons and goods moving in the Schengen area (2.1.1), and ii) discrepancies in the application of travel restrictions at the external borders undermining the trust and impacting the credibility vis-a-vis third countries (2.1.2). While the size of the recovery plan for rebuilding post-COVID-19 Europe amounting to EUR 1.8 trillion may give an indication when assessing the overall damage caused by the pandemic to the EU, there is no data available at this stage on how much of that damage has been caused by border checks. In general, data both on the intended positive effects of reintroduced border controls as well as the negative effects (also of the long-lasting abstract border checks in place for several years) are difficult to come by. One of the reasons for this lack of data is that Member States are obliged to report on the effects and side-effects of their border controls only once the checks have been lifted again (Article 33 SBC). Therefore, the six Member States which continuously prolonged the checks over the past five years have not yet had to report on the impact of the border controls.

As regards the internal border checks that were reintroduced during the COVID-19 crisis, the situation is slightly different. Member States that reintroduced border checks in response to the first wave of COVID-19 and lifted them by the end of June 2020 submitted their reports but, unfortunately, with great variations as concerns the quantity and the quality of their contents. For more information see Annex 12.

Given this lack of specific data, the efforts of calculating the cost of non-Schengen by the Commission in 2016 and by the European Parliament in 2017 remain the main point of reference to demonstrate the impacts of border checks if maintained for a longer period of time, irrespective of their ground. Therefore, this section uses them as a basis for assessing the impacts of the problems identified in sections 2.1.1 and 2.1.2, but also builds on the inputs received from stakeholders during the public consultation.

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<sup>55</sup> See Annex 2, p. 13.



### 1.2.3.1. Impacts of the long-lasting border checks at the internal borders

As outlined in the **Communication ‘Back to Schengen – a Roadmap’**<sup>56</sup>, the Commission estimated in 2016 that a full reestablishment of border controls to monitor the movement of people within the Schengen area would generate immediate direct costs for the EU economy in a range between EUR 5 and EUR 18 billion annually<sup>57</sup>. These costs would be concentrated on certain actors and regions but would inevitably impact the EU economy as a whole. While the free exchange of goods within the EU amounts to more than EUR 2,800 billion in value and 1,700 million tonnes in volume, the highest and most immediate impact of border controls would be felt by the road haulage sector, with EUR 1.7 to EUR 7.5 billion of additional direct costs each year.

**A study of 2016 commissioned by the European Parliament (see Annex 4)**<sup>58</sup> on the same topic even suggests annual costs of between EUR 6.5 billion and EUR 13 billion for the road freight sector if internal border controls were reintroduced at all internal borders. In the case of limited reintroductions by the Member States having internal border controls in place in April 2016,<sup>59</sup> the annual costs for the road freight sector are estimated to reach EUR 0.7 billion to EUR 1.3 billion annually<sup>60</sup>. Data on the specific situation of France indicated that internal border controls leading to an assumed waiting time of 30 minutes would cause a direct economic loss of EUR 62 million for both, import and export<sup>61</sup>.

According to the Roadmap, these additional costs would have a particularly harmful impact on **sectors that operate on small margins and/or where transport presents a high percentage of the costs**. Sectors indicated as potentially particularly affected were agricultural and chemical sectors as well as the transport of raw materials. In the medium term, costs of transport that are unduly increased by delays in border controls could hurt the efficient development of EU value chains and the competitiveness of the EU economy as a whole.

Moreover, the estimates of the Commission of 2016 demonstrated that with 1.7 million workers in the EU crossing a border every day to go to their jobs, the reintroduction of border checks at all internal borders would **cost commuters and other travellers between EUR 1.3 and EUR 5.2 billion in terms of time lost**<sup>62</sup>. More importantly, long waits at the border would discourage people from looking for cross-border opportunities in the labour market, reducing the pool of potential workers. This would in the medium term reduce the economic efficiency of some regions. In the case of France, the increased costs for cross-border workers would lead to a decrease in the number of workers willing to cross the border to reach their

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<sup>56</sup> COM(2016)120, for full reference see Annex 16.

<sup>57</sup> Estimated for road freight transport, cross border passenger mobility, tourism and corresponding administrative costs at the border.

<sup>58</sup> “Cost of non-Schengen: the impact of border controls within Schengen on the Single Market”, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL\\_STU\(2016\)578974\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU(2016)578974_EN.pdf).

<sup>59</sup> Austria, Slovenia, Hungary, Sweden, Norway, Denmark, plus Greece, for which, at that time, the reintroduction of temporary internal border control due to persistent serious deficiencies relating to external border control under Article 29 Schengen Borders Code was discussed.

<sup>60</sup> “Cost of non-Schengen: the impact of border controls within Schengen on the Single Market”, p. 29, 37.

<sup>61</sup> France Strategie “The Economic Cost of Rolling Back Schengen”, La Note d’Analyse No. 39, February 2016, pp. 6f.

<sup>62</sup> Slightly higher numbers “Cost of non-Schengen: the impact of border controls within Schengen on the Single Market”, p. 37: The total costs for commuters for reintroducing border controls at all internal borders range from 1.7 billion EUR to 6.1 billion EUR per year.

work place by more than 5,000 workers if the waiting time increased by 10 minutes, or by more than 10,000 workers if the waiting time increased by 20 minutes, which would equal an economic loss of EUR 150 million or EUR 300 million respectively (without accounting potential unemployment-related costs)<sup>63</sup>.

As a long-term consequence of systematic permanent border controls in the Schengen area, the trade between Member States would decrease between 10 and 20% within the **10 year period from 2016 to 2025**<sup>64</sup>. This would lead to a decrease of the Schengen area's GDP by 0.8%, equivalent to more than EUR 100 billion<sup>65</sup>. For France alone, the loss would amount to 0.5% of the GDP, equalling EUR 10 billion<sup>66</sup>.

According to another study<sup>67</sup>, the reintroduced internal border controls in the Schengen area notified to the European Commission from summer 2015 until April 2016<sup>68</sup> have reduced the trade in goods and services by 1.3% compared to 2011, which corresponds to an annual decline in trade volume of EUR 70.19 billion and a decrease of the aggregate EU real GDP by approximately EUR 12.5 billion, which equals 0.10% of the GDP. In general, the data of this study suggests, that smaller and peripheral States would be much stronger affected than the larger and/or central ones.

According to another study specifically with regard to Germany, developing the hypothesis of permanent border checks in the aftermath of the migratory crisis, the reintroduction of permanent border checks at internal borders would lead to a growth loss of EUR 77 billion between 2016 and 2025 for Germany, and EUR 470 billion in total for the EU<sup>69</sup>.

Specific data on the costs of border controls for different sectors is difficult to collect as the facilitation of border crossing along the internal borders of the EU must be carried out in a non-discriminatory manner. For instance, the Green Lanes system that was established in March 2020 in response to COVID-19 does not distinguish between different types of goods or origins and destinations of the vehicles<sup>70</sup>. Moreover, such a distinction would add an additional layer of difficulty and further delays at the border.

- Specific impacts on the air travel industry

A study by the association “Airlines for Europe” identifies the “reintroduction of border controls within the Schengen area” as one of the gaps in the full implementation of Europe's

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<sup>63</sup> France Strategie “The Economic Cost of Rolling Back Schengen”, La Note d'Analyse No. 39, February 2016, p. 5.

<sup>64</sup> “The Economic Cost of Rolling Back Schengen”, La Note d'Analyse No. 39, February 2016, p. 1.

<sup>65</sup> “The Economic Cost of Rolling Back Schengen”, La Note d'Analyse No. 39, February 2016, pp. 9f.

<sup>66</sup> “The Economic Cost of Rolling Back Schengen”, La Note d'Analyse No. 39, February 2016, p. 11.

<sup>67</sup> Gabriel Felbermayr, Jasmin Gröschl, Thomas Steinwachs “Trade costs of border controls in the Schengen area”, 27 April 2016: <https://voxeu.org/article/trade-costs-border-controls-schengen-area>.

<sup>68</sup> While the study does not list the States concerned, according to the European Commission's list of temporarily reintroduced border controls, from summer 2015 to April 2016, internal border controls during that period were reintroduced by AT, BE, DE, DK, FR, HU, MT, NO, SE and SI.

<sup>69</sup> Bertelsmannstiftung, GED Study „Departure from the Schengen Agreement Macroeconomic impacts on Germany and the countries of the European Union“, 2016: [https://www.bertelsmann-stiftung.de/fileadmin/files/BSI/Publikationen/GrauePublikationen/NW\\_Departure\\_from\\_Schengen.pdf](https://www.bertelsmann-stiftung.de/fileadmin/files/BSI/Publikationen/GrauePublikationen/NW_Departure_from_Schengen.pdf).

<sup>70</sup> Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 96 I/01, C/2020/1897.

Single Aviation Market<sup>71</sup>. The study estimates that in the period from 2016-2019, on average 145,394 air passengers were affected by internal border controls, with the total costs for air passengers caused by reintroduced internal border controls ranging between EUR 291 million (calculating with additional cost of EUR 2 per border crossing) and EUR 872 million (EUR 6 per border crossing) per year<sup>72</sup>.

The persistence of border checks creates significant challenges for the airport operators. As highlighted by ACI (Airport Council International) *“the reintroduction of border control at internal borders leads to the physical separation of an additional passenger category (passengers on Schengen internal flights subject to border control). This new passenger category is currently separated from passengers on domestic flights with no border control and from those on international flights subject to border control. ACI EUROPE believes that airports have not been designed to comply with such a requirement on a permanent basis”*<sup>73</sup>.

- Impacts on the cross-border regions

While not all regions have been affected equally<sup>74</sup>, it is clear that the economic and social impacts of persisting border checks are the most visible on a local scale. For instance, the Øresund Strait between Sweden and Denmark is crossed by 95,900 persons on a daily basis (both directions, with 42,900 persons traveling by car, 32,100 by train across the Øresund Bridge and the rest by ferries)<sup>75</sup>. According to the Oresundsinstitutet<sup>76</sup>, the measures adopted by Sweden and Denmark in 2016 at this internal border including border checks amounted to SEK 152 million, for the first half a year since the introduction of ID and border checks, or 6,600 extra hours on the train daily for those travelling over the bridge, and 332,000 fewer job opportunities in Zealand accessible at that time within a one-hour commute from Malmo Central as compared to the period before the reintroduction measures at this internal border.

The survey carried out for the County Administrative Board<sup>77</sup> demonstrated that 39% of the nearly 400 interviewed considered changing the job and seeking employment in their country of residence, while 26% considered moving to their country of employment, with only 18% not planning to stop commuting. Another study referred to by the Oresundsinstitutet indicates that 64% experienced an increase in stress, and 70% were strongly affected by not knowing when they would arrive<sup>78</sup>.

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<sup>71</sup> Airlines For Europe, Jennifer Janzen, “Study: Fully Implementing Europe’s Single Aviation Market Could Save the EU Economy €37 Bn Per Year”, April 2020: <https://a4e.eu/publications/study-fully-implementing-europes-single-aviation-market-could-save-the-eu-economy-e37-bn-per-year/>.

<sup>72</sup> ICCSAI – University of Bergamo, “Cost Of Non-Europe in Aviation”, February 2020: [file:///C:/Users/bacheli/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/a4e-study-iccsai-the-cost-of-non-europe-in-aviation-conea-2020-02-full-study.pdf](file:///C:/Users/bacheli/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/a4e-study-iccsai-the-cost-of-non-europe-in-aviation-conea-2020-02-full-study.pdf), p. 84.

<sup>73</sup> ACI input of 15 March 2021 in the public consultations.

<sup>74</sup> See the territorial economic impact of COVID-19 in the EU. A RHOMOLO Analysis: <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc121261.pdf>.

<sup>75</sup> <https://www.oresundsinstitutet.org/fact-sheet-the-effects-of-the-id-and-border-checks-between-scania-and-zealand/>.

<sup>76</sup> <https://www.oresundsinstitutet.org/>.

<sup>77</sup> Skåne’s report Utvärdering av effekter av tillämpningen av förordning om vissa identitetskontroller (‘Evaluation of the Effects of the Adoption of the Regulation of Certain Identity Checks’).

<sup>78</sup> The study by a researcher from the Royal Institute of Technology in Stockholm, with responses from 900 train commuters, and the report (in Swedish) was published by Øresundsinstitutet in June.

A Commission case study of 2017 on this specific border region confirms these effects<sup>79</sup>: the border controls introduced in 2016 have added to the already existing cross border difficulties at this specific border section. A report commissioned by the Chamber of Commerce and Industry of Southern Sweden mentioned in the study estimates that the border controls between Sweden and Denmark have led to societal costs of SEK 1.5 billion (or EUR 150 million). Two thirds of these costs related to delays in cross-border traffic, while the remaining share relates to the shrinking market potential (e.g. reduced number of potential jobs for employees; smaller pool of workers available to employers)<sup>80</sup>.

In the case of the limited reintroduction of internal border controls in the Member States having internal border controls in place in April 2016, the total annual costs for commuters would amount to between EUR 168 million and EUR 606 million<sup>81</sup>. As a concrete example for the impact on one Member State serves the data available for the commuters residing in France, the country of origin of most commuters in the EU<sup>82</sup>. 350,000 French residents cross the borders on a daily basis to work in Belgium, Germany, Luxembourg, Switzerland or Spain. Based on a value of time of EUR 10 per hour, the costs of an assumed delay of 10 minutes due to the reintroduced border controls would amount to EUR 1.7 per border crossing, accumulating to EUR 723 a year, calculating with 217 working days. For a 20 minutes delay, these cost would double, amounting yearly to over EUR 1,400 per commuting worker. The total social-economic costs for French commuting workers for an additional 10 minutes spend at border controls are estimated to amount to EUR 250 million per year, for an additional 20 minutes, it would amount to EUR 500 million<sup>83</sup>.

- Impacts on the administration

Finally, the estimates of the costs of non-Schengen referred to above indicate that between EUR 0.6 and EUR 5.8 billion of **administrative costs** would have to be paid by governments due to the need for increased staff for border controls. The costs related to the physical establishment of border controls are estimated at EUR 7.1 billion for the whole Schengen area (EUR 0.7 billion for the above mentioned seven Member States)<sup>84</sup>. Notably, the costs for the physical establishment of border controls have a higher impact on the total costs when the period of the reintroductions is shorter<sup>85</sup>. As the study assesses a scenario of a two-year reintroduction and an indefinite reintroduction, the situation experienced during the COVID-19 pandemic of Member States reintroducing border controls repetitively over short periods of time, sometimes not continuously, might be different. As these costs fall under the

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<sup>79</sup> Easing legal and administrative obstacles in EU border regions, Case Study No. 2 Labour mobility Obstacles for cross-border commuters (Denmark – Sweden).

<sup>80</sup> 3 Handelskammaren - the Chamber of Commerce and Industry of Southern Sweden (2016), Kontrollernas kostnad - ekonomiska konsekvenser av ID-kontrollerna i Öresundsregionen, <http://www.handelskammaren.com/press/nyheter/nyhet/artikel/kontrollernas-kostnad-ekonomiskakonsekvenser-av-id-kontrollerna-i-oeresundsregionen>.

<sup>81</sup> Cost of non-Schengen: the impact of border controls within Schengen on the Single Market, 2016, p. 29.

<sup>82</sup> Cf. study by MKW Wirtschaftsforschung GmbH, commissioned by the European Commission “Scientific Report on the Mobility of Cross-Border Workers within the EU-27/EEA/EFTA Countries”, p. XI: [https://ec.europa.eu/futurium/en/system/files/ged/mkw\\_workers\\_mobility.pdf](https://ec.europa.eu/futurium/en/system/files/ged/mkw_workers_mobility.pdf).

<sup>83</sup> France Strategie “The Economic Cost of Rolling Back Schengen”, La Note d’Analyse No. 39, February 2016, p. 5.

<sup>84</sup> Cost of non-Schengen: the impact of border controls within Schengen on the Single Market, 2016, p. 9.

<sup>85</sup> Cost of non-Schengen: the impact of border controls within Schengen on the Single Market, 2016 p. 26.

exclusive responsibility of the national administrations, they are not reported to the Commission.

- Impacts on border management capacity

The reintroduction of border checks at internal borders requires significant resources. In times of limited public resources, the necessary staff is normally made available by temporary reassignment from other services, leading to shortages in staff in the services of origin. For instance, an unannounced Schengen Evaluation visit to the Nice and Orly airports in 2019 revealed that these two airports lack trained border guards to control travel from third countries, while France has been carrying out border checks at the border with Italy since 2015.

#### 1.2.3.2. Impact of reintroduced checks at internal borders due to COVID-crisis

While the border checks due to the COVID-crisis cannot compare in terms of duration with the long-lasting border checks introduced by the six Member States referred to above, these border checks have been introduced temporarily by a much higher number of Member States (17). They aggravated the trend that the Single Market was hit disproportionately by the COVID-related restrictions in comparison to national GDPs. These restrictions caused major disruptions to the free flow of goods, services and people, resulting in a fall of intra-EU trade by 24% in Q2 and Q3 2020, while GDP fell by 7%<sup>86</sup>. Furthermore, due to the lack of coordination and the rapidly changing measures the costs for citizens and businesses to adapt to these changes can be estimated to be much higher than those of long-lasting border controls (see above). The lack of uniform application of measures at external borders has also led to a lack of clarity among travellers coming from third countries, leading to numerous queries via EU Delegations, overall impacting on the predictability of travel and credibility of the measures taken.

In some “**twin cities**” (see [Error! Reference source not found.](#)) measures taken at the beginning of the COVID-19-crisis prevented school children from going to school and elderly people from going to the supermarket closest to their homes as these schools and supermarkets were located on the other side of a hard border. The decision of Spain and Portugal in response to the first wave of COVID-19 to close the border, leaving open only eight border crossings<sup>87</sup> on one of the longest internal borders of the EU, led to the following comments: “*On a map, this seems fair, but this section of the border is the busiest of all the Spanish-Portuguese border, and there are three EGTCs and four Eurocities, which gives an idea of the importance, permeability and interrelationship of these territories. These Eurocities were cut off, in many cases they are simply separated by a bridge and they were completely divided.*”<sup>88</sup> Moreover, on the Galicia-Norte border, there are more than 12,000 cross-border workers who cross every day and had to make journeys of at least 50 km and, in some cases, 100 km or even more due to the border closure.

Finally, the border regions expect that, if no solution is found to this problem, the attractiveness of cross-border **employment** is going to be affected considerably. In particular, cross-border workers have come to realise during the pandemic that they are particularly

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<sup>86</sup> Annual Single Market Report 2021, SWD(2021) 351 final, p. 9.

<sup>87</sup> Only after a while a ninth crossing was reopened.

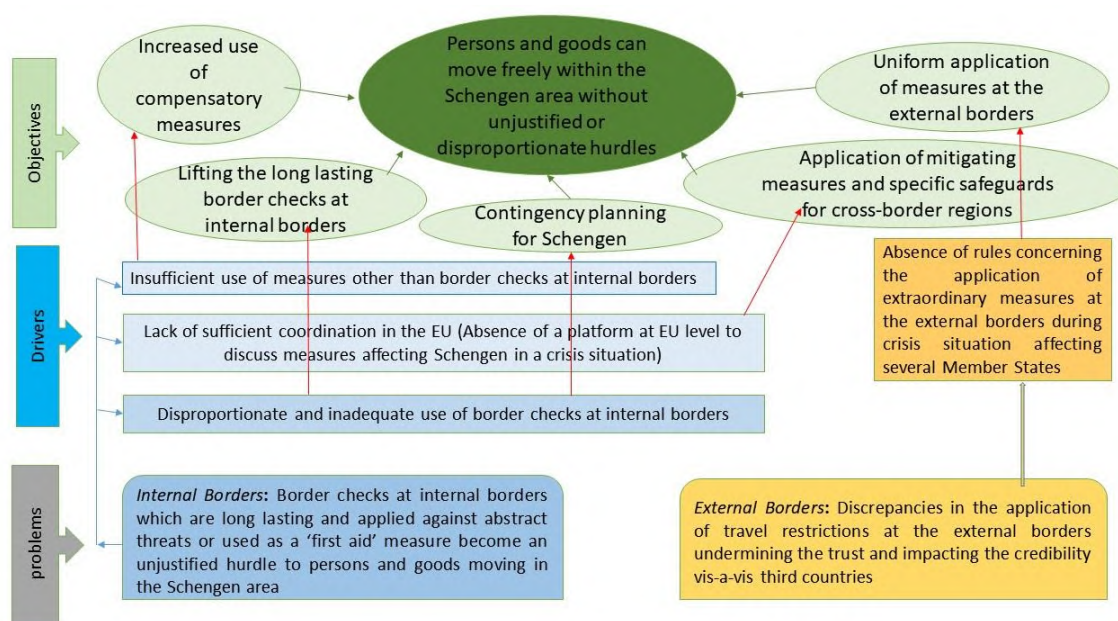
<sup>88</sup> Xosé Lago, Euroregion Galicia-Norte de Portugal.

vulnerable due to their status. Not being able to perform work cross-border raised the issue of the State competent for taxation purposes<sup>89</sup>. To address this issue, some Member States adopted temporary arrangements: for instance, Belgium and the Netherlands adopted an agreement valid from 11 March 2020 until 31 May 2020. However, the approach to this issue may differ from one cross-border region to another.

## 2.2. What are the problem drivers?

The identified problems are driven by the drivers set out in sections 2.2.1- 2.2.6 below.

**Figure 1 - Problems, Problem drivers and Objectives**



### 1.2.4. Disproportionate and inadequate use of border checks at internal borders

Article 72 of the Treaty on the Functioning of the European Union clearly states that “*This Title [Title V, Area of Freedom, Security and Justice] shall 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*”. Accordingly, Member States remain in the best position to assess if there is a threat and how to address it. In view of that, they may adopt unilateral measures, without engaging in a discussion on their effects on the rest of the EU.

This approach has been particularly visible during the COVID-19 crisis where internal border checks have been reintroduced repeatedly despite their impact on the economy and the fact that the added value of that measure in containing the spread of the virus is not proven and

<sup>89</sup> The main rule is that the right to levy tax on the employment income is attributable to the home country. In case an employee normally works in another country than the home country, the right to levy tax is primarily allocated to the country in which the work is performed. When the employee work from home the right to levy tax is no longer allocated to the country in which the work would normally be performed.

even largely contradicted by the European Centre for Disease Prevention and Control (ECDC)<sup>90</sup>.

The same approach has also manifested itself during the last six years, when some Member States prolonged border checks at their internal borders over many years despite changing circumstances and refused entry to thousands of third country nationals on the grounds of insufficient documents. Such unilateral decisions had an impact on the neighbouring Member State that remained confronted with the problem<sup>91</sup>. For more information on the evolution of these threats from the perspective of the Commission see Annex 7. The effectiveness of such controls is difficult to quantify, as Member States only have limited reporting obligations and in many cases prefer not to share comprehensive data on national security operations.

The disproportionality furthermore results from the fact that the reintroduction of internal border controls generates in the long term high costs (see 2.1.3.1), while there is an indication that alternative measures such as police checks or bilateral agreements and arrangements for the readmission of irregular migrants generate lower costs, but assuring the same results. The Dutch @MIGO-BORAS system, for example, can be used to check passing vehicles and select those to be stopped and examined without the need for a continuous physical control procedure at the border<sup>92</sup>. Any difficulties reported by some Member States as regards the application of the readmission agreements should not justify the reintroduction of internal border controls, but rather modifications in the legal framework for such agreements.

*1.2.5. Lack of sufficient coordination in the EU (absence of a platform at EU level to discuss measures affecting Schengen in a crisis situation)*

Under the Schengen rules (Article 27(5) SBC), Member States are obliged to consult with the other Member States and the Commission if they are considering reintroducing border checks unilaterally at internal borders. These **consultations** have to take place **at least 10 days before the planned date of reintroduction**. The purpose is to organise, where appropriate, a mutual cooperation between the Member States for the duration of the border checks and to examine the proportionality of the measures as compared to the underlying events, i.e. the threat to public policy or internal security.

This process is clearly not suitable for emergency situations such as the outbreak of a highly contagious disease. Indeed, the COVID-19 experience showed that Member States act on their own without consulting or even in some cases informing other Member States even

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<sup>90</sup> <https://www.ecdc.europa.eu/sites/default/files/documents/Considerations-related-to-measures-for-travellers-reduce-spread-COVID-19-in-EUEEA.pdf>

“Border closures refer to closing of international borders and aim to reduce the risk of importation from countries with high transmission by implementing travel restrictions to or from an affected area. Based on evidence from modelling studies mainly related to influenza pandemics, border closures can delay the introduction of the virus into a country but only if they are almost complete and are rapidly implemented during the early phases of an epidemic, which is only feasible in specific contexts (e.g. for small, isolated, island nations). Available evidence therefore does not support recommending border closures, which will cause significant secondary effects and societal and economic disruption in the EU.”, with reference to World Health Organization (WHO). Non-pharmaceutical public health measures for mitigating the risk and impact of epidemic and pandemic influenza, 12 May 2020: <https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf?ua=1>.

<sup>91</sup> For instance, in 2017, at one temporary authorised border crossing point at the French/Italian land border (Menton) alone, 43,994 persons have been refused entry mostly for not having the necessary travel documents.

<sup>92</sup> See Annex 11.

when confronted with the same threat. In addition, as the experience of the last year demonstrates, it is also not suitable for events affecting more than two Member States. As a result, until the *ad hoc* initiative of DG HOME to organise conferences twice a week and the activation of the Integrated Policy Crisis Response (IPCR)<sup>93</sup> at the level of the Council there was no EU structure to discuss and co-ordinate the measures adopted in line with the evolving circumstances. In particular, the diversity of the aspects at stake made the discussions on the border measures taken in response to the COVID-19 pandemic in the Council very difficult as none of the existing Council formations had a sufficiently broad scope. IPCR focused at the start of its activation under the Croatian Presidency on the health aspects, and only later started to take into account the effects of COVID-19 on other policy areas, such as border management. Therefore, the issue lies not on the efficiency of the IPCR which proved to be a useful tool but on the lack of a pre-agreed and formalised institutional answer to a health crisis.

#### 1.2.6. *Insufficient use of measures other than border checks at internal borders*

Member States have at their disposal a number of measures that can achieve the same objectives as border checks at internal borders.

Although the 2017 Recommendation on proportionate police checks and police cooperation in the Schengen area has been positively received by the Member States, it has not triggered any substantial changes. Based on the feedback from the Member States in the workshops organised in 2017 in follow-up to the Recommendation<sup>94</sup> and the recent workshop organised as a part of the public consultation process for the Schengen Strategy<sup>95</sup>, it appears that the Recommendation has not led to any legislative or operational changes, with only France stating that they have modified the rules applicable to border checks in the border areas and beyond. Even if many Member States claim that the police checks carried out on their territory comply with the Recommendation and that the rules described therein provide for sufficient flexibility<sup>96</sup>, in the absence of quantitative data from the Member States, it remains to be noted that none of the Member States carrying out border checks at internal borders since 2015 has actually lifted these checks and reinforced police checks instead (see Annex 10).

Moreover, during the public consultations, some Member States signalled the problem that the conditions of use of compensatory measures considered as alternatives to border checks (use of new technologies such as video surveillance, number plate recognition systems or drones) are not clearly specified or defined. For some, these measures should not be used *instead* of border checks at internal borders, but *in addition* to them. One Member State considered that maintaining police measures for an unlimited period of time at internal borders would be unacceptable<sup>97</sup>. Similarly, 72.66% of EU and non-EU citizens agreed that border controls at internal borders should be substituted, whenever possible, by non-systematic alternative measures, such as police checks and modern technologies<sup>98</sup>.

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<sup>93</sup> See <https://www.consilium.europa.eu/en/documents-publications/publications/ipcr/>.

<sup>94</sup> On 10 July 2017 DG HOME organised a workshop on the implementation of the Commission Recommendation on proportionate police Checks. The workshop was attended by AT, DE, DK, FR, HU, IT, NL, NO, SE, SI

<sup>95</sup> Workshops organised on 14 and 22 January. For more details see Annex 2.

<sup>96</sup> In particular AT, CZ, DE, FI, HU.

<sup>97</sup> See HU written contribution.

<sup>98</sup> Annex 2, p. 13.



Furthermore, any future developments concerning the collection of Advanced Passenger Information (API) data on intra-Schengen air connections could be challenged under the current wording of Article 23 of the Schengen Borders Code referring to compensatory measures as leading to prohibited measures having effect equivalent to border controls. To recall, for a number of Member States, API (notably in combination with Passenger Name Records (PNR)) data have a huge potential in terms of enhanced security at a relatively small expense and without interference with travel flows<sup>99</sup>. For more information on API and PNR see Annex 13.

*1.2.7. Absence of rules concerning the application of extraordinary measures at the external borders during crisis situations affecting several Member States*

The Schengen rules provide for common standards concerning border checks on persons at border crossing points and border surveillance at the external borders. These checks are based on the verification of the entry conditions for third country nationals. The idea behind these rules is that, if a borderless Schengen area is supposed to function, there must be agreement between all countries concerned and a common practice on who can enter this area.

One of the entry conditions is that the third country national should not be considered to be a threat to public health, which has to be assessed on a case-by-case basis. In March 2020, the Commission called upon the Member States to apply a temporary travel restriction to all non-essential travel from third countries in order to coordinate practices in this regard and provided a list of derogations per category of persons that should be exempted from the travel restrictions<sup>100</sup>. Council Recommendation of 30 June 2020<sup>101</sup> also provided a list of third countries whose residents should be exempted from such general travel restriction. As set out above, some Member States went beyond the scope of that annex, authorising residents from other third countries to access the European Union. For this reason, on 22 February 2021<sup>102</sup>, Commissioners Johansson and Reynders sent a joint letter to the Member States reminding them of the rules agreed in the Recommendation. Nevertheless, and as indicated above, with state of play 16 April 2021, 13 Member States were open for non-essential travel from a wide group of third countries not listed in the annex.

### **2.3. How likely is the problem to persist?**

While there are good chances to address the current COVID-19 pandemic with the world-wide vaccination programme, similar problems may occur at any moment in the future. This means that the absence of ‘ready to use’ contingency procedures and safeguards can again become a problem any time.

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<sup>99</sup> Finland believes that a lot can be done with pre-entry passenger data, such as PNR or API, also inside the Schengen area. Collecting and analyzing this information would have very little impact to free movement, but it would give a possibility to do targeted checks and improve situational awareness. Also Norway sees an opportunity in the upcoming revision of the API-Directive. Already now Norwegian authorities receives in essence API-information from ferries bound for Norway from Denmark, Sweden and Germany. The pre-arrival screening of this information is in its experience an efficient way of controlling large passenger flows while minimizing the need for physical controls.

<sup>100</sup> Communication of 16 March 2020, COM(2020) 115 final.

<sup>101</sup> Council Recommendation of 30 June, 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction.

<sup>102</sup> ARES(2021)1401158.

As regards the persistent border checks and the insufficient use of compensatory measures, the key to the evolution of the problem is the approach of Member States, which, on the one hand will not be sufficiently accountable for the choice of border checks at internal borders to address the identified threat and on the other hand may be sometimes concerned that the available compensatory measures could be considered as border checks in disguise.

Despite the efforts of the Commission over the last few years (see Box 3 below), hardly any progress has been achieved in the past. In particular, despite the efforts of the Commission to convince Member States to go back to a real Schengen area, the only (limited) step in this direction has been made by Germany that has reduced the scope of the long-lasting border checks at its internal borders, by lifting in spring 2018 such checks with regard to the air connections from Greece (that had been in place since November 2017).

### **Box 3 – Actions of the Commission since 2015**

**2015** – Opinion on necessity and proportionality of border checks at internal borders in Austria and in Germany C(2015)7100

**2016** – Back to Schengen – a Roadmap COM(2016)120

**2017** – Commission Recommendation on proportionate police checks and police cooperation in the Schengen area C(2017)3349

**2017** – Proposal on the amendment of the Schengen Borders Code COM(2017)571

**2018** – High Level meeting with the Ambassadors of the Member States having border checks at internal borders in place at that time and the Member States the most affected by such checks

**2017-2019** – Requests from DG HOME for additional information following the received notifications

**2020** – First Schengen Forum

The Commission retains the right to issue an opinion on the necessity and proportionality of any upcoming prolongations of border checks at internal borders, or even to launch infringement procedures. However, such a step does not guarantee that the core of the problem would be permanently addressed – i.e. the use of border checks rather as a first aid and not a last resort measure. Thus, without any intervention the situation at the internal borders will continue to be exposed to the changing national political climate, while a European approach which could take into account the overall interest of the Schengen area will continue to lack.

The ongoing efforts to improve the management of the external borders (operationalisation of EBCG, implementation of the new IT architecture with new systems ETIAS, EES, ECRIS-TCN and interoperability<sup>103</sup> of information systems reinforcing the relation between pertinent databases), as mentioned above and further explained in Annex 14, are expected to improve the controls at external borders and as such should help in rebuilding trust among the Member

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<sup>103</sup> Regulation (EU) 2018/1240, OJ L 236, 19.9.2018, p. 1; Regulation (EU) 2017/2226, OJ L 327, 9.12.2017, p. 20; Regulation (EU) 2019/816, OJ L 135, 22.5.2019, p.1-26; Regulation (EU) 2019/817, OJ L 135, 22.5.2019, p. 27

States. However, even a timely implementation of these new rules will not address the concerns of Member States linked to a perceived unsatisfactory level of security due to cross-border crime and terrorism. Moreover, based on the five years report on the functioning of the Schengen Evaluation Mechanism<sup>104</sup> it is confirmed that already now there are no major deficiencies in the management of the external borders.

Once the proposals accompanying the **Pact on Migration and Asylum** are adopted<sup>105</sup>, secondary movements of irregular migrants as well as ‘asylum’ shopping by asylum seekers should be better controllable than currently. Similarly, the terrorist threat should be better manageable thanks to the measures and steps identified in the **EU Security Union Strategy** as adopted in July 2020. However, it is not likely that secondary movements or terrorism will ever be entirely eradicated. Therefore, some Member States might continue to consider themselves as being more exposed to these challenges than other Member States, and hence, entitled to continue border checks at internal borders.

The planned modification of the **API Directive** and adoption of a **code for police cooperation** which are currently being explored and might lead to legislative proposals later this year<sup>106</sup>, would help to expand the available tools for compensatory measures to border checks at internal borders. These initiatives will be an important step to boost the use of alternatives to checks at internal borders. However, their adoption will provide only a partial solution as it will not tackle the differences between authorised measures related to the exercise of police powers and the use of new technologies and measures having effect equivalent to border checks at internal borders.

### **3. WHY SHOULD THE EU ACT?**

#### **3.1. Legal basis**

This impact assessment concerns the measures adopted by the EU with regard to the absence of any controls on persons, whatever their nationality, when crossing internal borders, and also the measures concerning the checks to which persons crossing external borders are subject. This means that any legislative proposal following this impact assessment would be based on Article 77 (2)(b) and (e) TFEU.

#### **3.2. Subsidiarity: Necessity of EU action**

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 conditions under which internal border checks can be reintroduced are regulated in the Schengen Borders Code. Any modification of these rules would require EU legislation.

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<sup>104</sup> See footnote 34 above.

<sup>105</sup> [https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020\\_en](https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en).

<sup>106</sup> COM(2020)605 final.

Furthermore, even where legislative action would not be considered appropriate, the integrity of the Schengen area and the fundamental right to free movement of all EU citizens require a coherent approach across the entire Schengen area, including on restrictions for non-essential travel to the EU at the external borders.

In particular, the objective of establishing a contingency planning for Schengen - including specific measures at internal and external borders - as well as limiting the number of cases of temporary reintroduction of border checks at internal borders as a truly last resort measure to the real minimum, 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 consider taking measures to address the problems identified in this impact assessment, in accordance with the principle of subsidiarity.

### **3.3. Subsidiarity: Added value of EU action**

EU action in response to the identified problems is expected to bring added value for the entire Schengen area, and therefore to its citizens, by reinforcing the overall security and trust among the Member States as the prerequisites of the area without controls at internal borders, as well as the ability of persons and goods to move freely across borders.

Such action is also expected to have tangible effects on cross-border regions which are much more advanced in terms of integration and rely on checks at internal borders being absent. As mentioned above, with 150 million persons living in cross-border regions, the measures adopted on the basis of this impact assessment are likely to have an added value in particular for this population, by protecting them from arbitrary reintroductions of border checks at internal borders as a first aid measure.

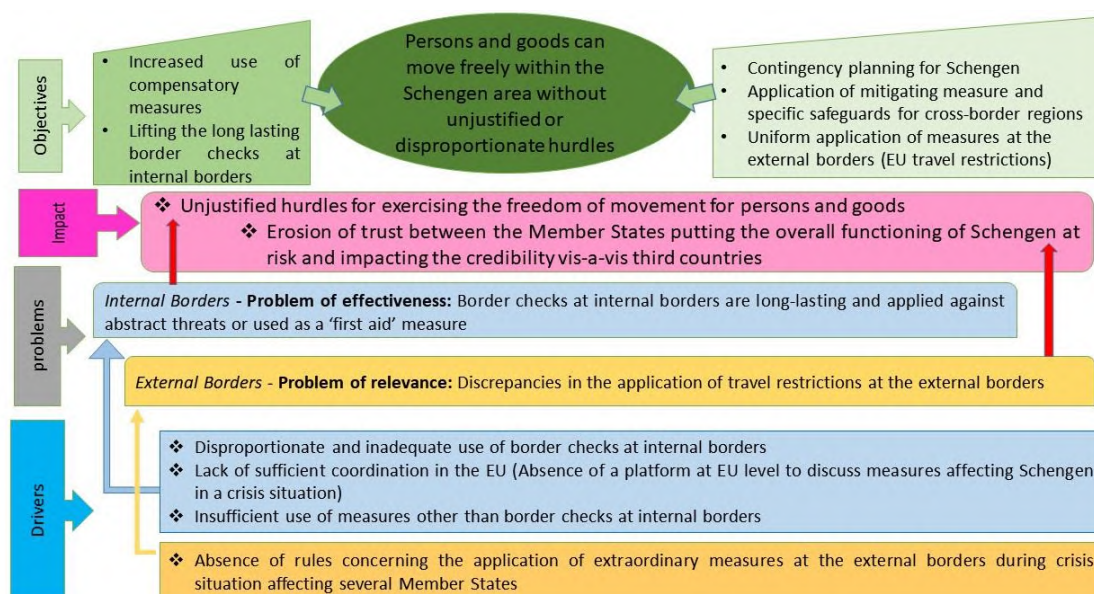
Thus, even under the assumption that the Member States are in the best position to determine the most appropriate measures to address an identified threat to internal security or public policy, the interests of these regions require a guarantee that the measures that have the strongest impact on their daily operation truly are a last resort measure.

## **4. OBJECTIVES: WHAT IS TO BE ACHIEVED?**

### **4.1. General objectives**

The general objective of any intervention is to ensure that **persons and goods can move freely without unjustified or disproportionate hurdles** within the Schengen area. To this end, identified problems, i.e. border checks at internal borders which become an unjustified hurdle to these movements (2.1.1) and non-uniform application of travel restrictions at the external borders undermining the trust and impacting the credibility vis-a-vis third countries (2.1.2), need to be addressed [Figure 2 **Error! Reference source not found.** presents the logic of intervention to attain this objective].

**Figure 2 - Intervention logic**



## 4.2. Specific objectives

The identified problems concerning i) the border checks at internal borders which are long-lasting and applied against abstract threats or used as a 'first aid measure' (2.1.1), and ii) discrepancies in the application of travel restrictions at the external borders (2.1.2) call for solutions that would have the following specific objectives:

### 1.2.8. Creation of a contingency planning for Schengen

The objective is to create a procedure to be applied specifically in response to a crisis situation affecting all or several Member States at the same time. Such a procedure should allow for discussing the identified threat(s) at EU level and, in consultation with the other Member States, selecting the most appropriate measures to address them. The contingency planning should fully recognise the role of compensatory measures which should be encouraged as much as possible and privileged over border checks at internal borders.

A contingency planning for Schengen should first and foremost ensure a better coordination among Member States in a situation of a common threat to streamline the measures taken and provide an approach as uniform as possible, in order to increase the predictability for citizens.

It should also reflect that “[t]ravel measures that significantly interfere with international traffic may [...] be justified at the beginning of an outbreak [of a pandemic], as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures”, but “must be based on a careful risk assessment, be proportionate

*to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves.”<sup>107</sup>*

#### *1.2.9. Application of mitigating measures and specific safeguards for cross-border regions*

This objective refers to the need for a quasi-automated application of safeguards, should the temporary reintroduction of border checks at internal borders be inevitable. It complements the objective concerning the creation of the contingency planning for Schengen. It should ensure that the impacts of border checks reintroduced at several border sections on the functioning of cross-border regions and, thus, on the Internal Market are limited. The mitigating measures refer in particular to the guidelines and recommendations developed in 2020 in relation to the COVID-19 crisis.

More concretely, once this objective is achieved, the good practices identified in the DG REGIO study referred to above for cross-border entities such as twin cities and cross-border workers should be used more widely (for examples see Annex 9).

#### *1.2.10. Uniform application of measures at the external borders in particular in case of a threat to public health*

This objective refers to the need for a uniform application of extraordinary measures at the external borders where such measures are adopted in response to a threat to public health. To recall, in line with Recital 6 of the Schengen Borders Code, ‘*Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations.*’ Therefore, any differences in the application of such measures at the external borders may jeopardise the trust on which the Schengen area relies. It also includes the need to ensure credibility vis-à-vis third countries and predictability of such measures for travel.

#### *1.2.11. Increased use of compensatory measures to address the identified threats*

The fourth specific objective is to ensure a high level of security within the Schengen area in a proportionate manner. To this end, less invasive measures than border checks at internal borders, such as police checks and the use of new technologies, should be privileged. Police checks in the border areas can be carried out also randomly as long as they do not become border checks in disguise.

#### *1.2.12. Lifting the long-lasting border checks at internal borders*

The fifth specific objective of any intervention would be to make the Member States concerned (see Table 1 above) lift border checks at their internal borders as soon as possible.

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<sup>107</sup> WHO, “Updated WHO recommendations for international traffic in relation to COVID-19 outbreak”, 29 February 2020: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

The costs of non-Schengen as well as the case studies mentioned earlier concerning the impact of border checks on cross-border regions demonstrate that the objective of restoring Schengen as the area without checks at internal borders remains valid and important for many EU citizens and residents.

## 5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

This Impact Assessment analyses the key policy options, including a baseline scenario, to address the problems identified in section 2 and match the objectives set out in section 4.

The policy options have been developed taking into account requests and recommendations from stakeholders, the experience with the negotiations of the 2017 proposal to amend the Schengen Borders Code (see Annex 2 and Annex 5), the new experiences from the COVID-19 crisis and the evidence available concerning the impacts on the cross-border regions. According to the DG REGIO Eurobarometer 2020<sup>108</sup>, 58% of Europeans think more influence of regional and local authorities will have a positive impact on the EU's ability to solve problems. The policy options have also been elaborated while bearing in mind the difficulty to quantify the impact of internal border controls as explained in Section 2.1.3.

The negotiations of the 2017 proposal have shown that Member States are unlikely to accept modifications of the existing time-limits for unilaterally reintroduced border controls but rather view the reintroduction of such controls as their sovereign right. Additionally, the COVID-19 crisis has demonstrated that threats to public health can require uniform rules concerning travel restrictions for non-essential travel to the European Union by third country nationals and that non-binding ad hoc measures cannot assure such a result.

As an alternative to the baseline scenario three comprehensive approaches addressing all identified problems can be envisaged:

**Option 1** proposes to adopt only soft law measures, together with the Schengen Strategy (soft law measures).

**Option 2** consists in a targeted amendment of the Schengen Borders Code, accompanied by some soft law measures (mixed option based on the targeted amendment of the Schengen Borders Code and soft law measures).

**Option 3** is more ambitious in terms of amending the existing rules. It presupposes that the decision on any measures necessary to address the identified threats would be taken at the EU level, either by requiring a prior decision of one of the EU institutions approving the reintroduction of border checks at internal borders or by simply removing the possibility to reintroduce border checks at internal borders<sup>109</sup> from the legislation, and thus imposing the use of compensatory measures (mixed option 2 based on a more fundamental amendment of the Schengen Borders Code).

### 5.1. What is the baseline from which options are assessed?

The baseline is a 'no policy change' scenario. The response to crisis situations such as a pandemic would depend on Member States and their willingness to cooperate with each other, based on the current rules in the Schengen Borders Code and other relevant EU legislation.

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<sup>108</sup> <https://cor.europa.eu/en/our-work/Pages/EURegionalBarometer-2020.aspx>.

<sup>109</sup> See Article 2(2) of the Convention Implementing Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22/09/2000.

This means that the know-how developed over the last year thanks to COVID-19 could be lost and that the EU would be exposed to a comparable lack of coordination in case of any future pandemic or any other Schengen-wide threat.

Without any action, the long-lasting border checks at some internal borders are very likely to continue, as experience shows that Member States are not considering lifting them. In particular, neither the action plan to lift these controls, contained in the 2016 Communication ‘Back to Schengen – a Roadmap’<sup>110</sup>, nor the 2017 legislative proposal to amend the Schengen Borders Code<sup>111</sup> or the Recommendations of the Commission relevant for this topic succeeded in this respect.

As mentioned in the previous sections, the data concerning migration and terrorist attacks as well as the role of border checks in containing COVID-19 demonstrate that border checks are either not justified anymore (in view of the situation at the external borders as concerns the migratory pressure) or are not the most efficient in addressing the identified threats (terrorism, pandemic).

While the Commission has the possibility to issue an opinion on the necessity/proportionality of border checks at internal borders and to launch infringement proceedings, the problem that border checks are being used as a universal remedy for any security or other type of threat would remain. Moreover, given the number of Member States concerned and the complex implications involved, launching infringement procedures without any accompanying action needs to be measured against the results expected and the complex implications involved, including in terms of the necessity to continue building trust between Member States and with the European Commission.

## **5.2. Description of the policy options**

The identified problems concerning i) the border checks at internal borders which are long-lasting and applied against abstract threats or used as a ‘first aid’ measure (2.1.1), and ii) the non-uniform application of travel restrictions at the external borders (2.1.2) can be addressed through three lines of action.

### **Option 1: Soft law**

This option proposes soft law measures drawing on the lessons learnt from the COVID-19 crisis. It also further develops the soft law tools to encourage the use of compensatory measures instead of border checks at internal borders. As such it follows the earlier approach of the Commission in the 2016 Communication ‘Back to Schengen – a Roadmap’<sup>112</sup> and the Recommendation on proportionate police checks and police cooperation in the Schengen area. This option also entails soft law measures on a better coordination of measures at the external borders in the situation of crisis. As such, it aspires to achieving all the identified objectives (see Table 4 below).

The specific objectives would be achieved through the upcoming Communication on the future of Schengen (the so-called Schengen Strategy) and, possibly, updates of the relevant Recommendations (in particular of the 2017 Recommendation on proportionate police checks).

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<sup>110</sup> COM(2016)120, for full reference see Annex 16.

<sup>111</sup> COM(2017)571, for the text of the proposal see Annex 17.

<sup>112</sup> COM(2016)120, for full reference see Annex 16.



Under this option the ‘**contingency planning** for Schengen’ (ref. **objective 4.2.1**) would build on the existing legal framework and the know-how developed in 2020 and 2021 with regard to COVID-19. In order to give more predictability to stakeholders, the Schengen Strategy would recall the rules and principles that should apply in crisis situations in the Schengen area: the reintroduction of border checks only as a last resort measures, the possibilities concerning the use and intensification of use of compensatory measures within the territory, the obligation to consult other Member States as regards the reintroduction of border checks at internal borders and of loyal cooperation between the Member States as regards border checks in general. It would also provide an overview of the guidelines and recommendations adopted in response to COVID-19 as a baseline for the **mitigating measures** that should apply when reintroducing border checks, until they are updated or new guidelines and recommendations are adopted on an ad hoc basis (ref. **objective 4.2.2**). This element is particularly relevant for bringing more predictability to the industry particularly affected by the application of new measures at or in the area of the internal borders. In addition, the Strategy would recommend specific minimum measures to the benefit of the border regions where Member States reintroduce border controls at the internal borders.

As regards a better **coordination of measures at the external borders** (ref. **objective 4.2.3**) in crisis situations, the Strategy could identify, based on the experience related to COVID-19, the type of measures that can be taken with a view to the external borders, define the categories of essential travel to the EU and stress the importance of a uniform application of any such measures in order to protect the integrity of the Schengen area. It could also look into the guidelines for the type of evidence to be presented during border checks to demonstrate the essential character of the travel and deal with questions related to the transit of passengers. In this respect, the role of the IPCR could be enshrined. The IPCR would be consulted by the Commission. In case of new a pandemic, the IPCR could serve as a forum for Member States to coordinate the measures at the EU external borders.

Finally, as regards the objective of **lifting the long-lasting border checks and better use of the compensatory measures** (**objectives 4.2.4 and 4.2.5**) in the future, the Schengen Strategy could, on the one hand, take a stance on the necessity and proportionality of checks at internal borders by those Member States that have been prolonging border checks at internal borders on the same grounds for a certain period (e.g. at least 1]year), and on the other hand, could complement the 2017 Recommendation on proportionate police checks and police cooperation in the Schengen area, by addressing some frequently asked questions from the Member States as regards the use of police checks and new technologies in the border areas.

**Table 4 – Mapping of objectives and measures under Option 1**

Objectives		Measures
Persons and	<i>4.2.1 Creation of a contingency planning for Schengen</i>	The Schengen Strategy recalls the existing rules concerning the reintroduction of border checks and calls for the use of compensatory measures instead of border checks at internal borders as well as for minimum mitigating measures, in particular for the border regions.
	<i>4.2.2 Application of mitigating measures</i>	The Schengen Strategy provides an overview of relevant guidelines/recommendations adopted in

goods can move freely [without unjustified or disproportionate limitations] within the Schengen area	<i>and specific safeguards for cross-border regions</i>	response to COVID-19. It also recalls the need of taking due account of the interests of cross-border regions when deciding on the application of specific measures.
	<i>4.2.3 Uniform application of measures at the external borders</i>	The Schengen Strategy identifies the criteria to be taken into account by the EU and Member States when deciding on travel restrictions for non-essential travel of third country nationals and derogations therefrom.  It provides also guidelines for the type of evidence that could be presented during border checks to demonstrate the essential character of the travel.  The IPCR is consulted and involved all along the implementation of the Strategy.
	<i>4.2.4 Increased use of the compensatory measures to address the identified threats</i>	The 2017 Recommendation on proportionate police checks and police cooperation in the Schengen area, is further developed in the Schengen Strategy to address some frequently asked questions from the Member States as regards the use of police checks and new technologies in the border areas.
	<i>4.2.5 Lifting the long-lasting border checks at internal borders</i>	The Schengen Strategy takes a stance on the necessity and proportionality of checks at internal borders exceeding a certain period (e.g. > 1 year).

**Overall**, this option would be a continuation of the current policy which is based on ad hoc reactions to crisis situations, while it would ensure that the know-how developed during COVID-19 is preserved and used, where appropriate, in the future. In this sense, it would respond to the calls from the **stakeholders** to ensure more predictability, but only partially. At the same time, as regards checks at internal borders this option would give another chance to make use of the existing tools, while further developing the existing compensatory measures in the form of the soft law. As such, it would respond to the call of some **Member States** to use the available tools to the fullest potential, before creating new tools<sup>113</sup>. However, this option is not likely to satisfy the other Member States which are directly affected by the long-lasting border checks at internal borders. Taking a clear position on the necessity and proportionality of the persisting border checks at internal borders in the Schengen Strategy would be also welcomed by the **European Parliament** that has been encouraging the Commission to take steps against the Member States abusing the current rules, although the Parliament is likely to expect more far-reaching action. Being addressed to the Member States, the proposed measures would not create any obligations for the **industry or citizens**,

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<sup>113</sup> [FI input: before creating new tools, we should ensure that we use the current, available tools, to their fullest potential.]

but could generate some benefits for them if Member States decided to adhere to the guidance.

### **Option 2: Mixed option (targeted amendment of the Schengen Borders Code combined with soft law)**

This option addresses the identified shortcomings as regards the reintroduction of border checks at internal borders as well as the lack of a uniform application of special measures at the external borders, such as travel restrictions for non-essential travel to the EU by third country nationals. As such it addresses the criticism concerning the current situation from the citizens, the European Parliament, as well as Member States complaining about the long-lasting checks at internal borders. It would also respond to the call from academia<sup>114</sup>. This option is expected to allow for ensuring that persons can move freely in the Schengen area without unnecessary hurdles, thanks to the limitation of the instances where border checks at internal borders are reintroduced. A targeted amendment of **the Schengen Borders Code** would concern:

- i) a new procedure of ‘contingency planning for Schengen’, applicable in case of any serious threat to several or all Member States;
- ii) creating the possibility of adopting restrictions on non-essential travel into the EU for third country nationals in a situation of a serious threat, in particular to the public health, at the external borders;
- iii) developing the concept of ‘last resort measure’ in the context of a temporary reintroduction of border checks at internal borders more in detail, compared to the current rules, including by clarifying better what measures are considered as not equivalent to border checks and therefore admissible below the threshold of Articles 25 to 29 Schengen Borders Code, and the conditions of use of new technologies at internal borders and their vicinity;
- iv) limiting the side effects of any border checks by providing for mitigating measures to be applied where appropriate as part of the obligation to ensure proportionality, and in particular as concerns border regions;
- v) introducing an obligation to prepare a risk assessment in the case of border checks at internal borders are reintroduced, and
- vi) providing the Commission with better tools to keep an overview of the decision-making process in the Member States and the actual use of reintroduced border checks (modified rules on notifications and reports on the reintroduction of border checks).

Soft law measures within the framework of the Schengen Strategy could complement these new, more specific requirements concerning the proportionality of border checks by establishing a proper **catalogue of mitigating measures** to be applied in the situation of systematic checks reintroduced at internal borders by several Member States. Specific measures should be recommended in order to limit the impacts on twin cities and border regions (e.g. to set up border control not within the cities but on their margins and to

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<sup>114</sup> Recommendations of the Meijers Committee (standing committee of experts on international immigration, refugee and criminal law) shared with the Commission and attached in Annex 4.

ensure that cross-border workers can continue to commute to their place of employment without excessive administrative burden).

This option implies legislative changes in the Schengen Borders Code to make contingency planning for Schengen more predictable and stable. **The contingency planning** (ref. **objective 4.2.1**) would consist of **a new procedure** allowing for a reintroduction of border checks at internal borders in response to any serious threat to internal security or public policy (including public health as in 2020) **affecting several or all Member States at the same time** (unlike the 2017 proposal when the Commission proposed the possibility to prolong border checks to 1 year by an unilateral decision of a Member State or 2 years by a decision of the Council, under the condition that the Member State concerned is confronted with a persisting threat and has adopted relevant commensurate measures to address this threat). While Member States would keep the right to reintroduce border checks at their internal borders, under this option any prolongation of such checks would require a decision by one of the EU institutions in order to ensure a coordinated approach once the immediate need has been taken care of. The overall duration of such border checks should, however, be limited in time.

The new procedure would be supported by additional safeguards concerning the use of **mitigating measures** (ref. **objective 4.2.2**), whenever the border checks are reintroduced by several Member States at the same time. For the sake of transparency, the guidelines and recommendations adopted in the course of 2020 in relation to COVID-19 could be gathered in the Practical Handbook for Border Guards<sup>115</sup>, in order to become a natural point of reference for border guards in a crisis situation. At the same time, the Schengen Borders Code could point (in the criteria for reintroduction of border checks) to the specific need to protect the border regions. These regions could e.g. be defined based on the approach adopted in the local border traffic Regulation 1931/2006 (for more information see Annex 15).

Finally, contingency planning would be complemented by a new provision in the case where the European Centre for Disease Prevention and Control (“ECDC”) detects the existence in one or more third countries of an [infectious] disease with epidemic potential. The provision would allow explicitly the Council to adopt a regulation, based on a proposal by the Commission, which would provide for a temporary **travel restriction on non-essential travel into the EU** for third country nationals residing in one or more third countries and exemptions from such restrictions. (ref. **objective 4.2.3**). The provision would define the categories of essential functions pursuant to which travellers who fulfil them would be allowed to get into the EU. In addition, the provision would specify that the Regulation would (i) identify the geographical areas or third countries from which travel would be subject to restrictions or exemptions of restrictions, (ii) lay down the specificities of the travel restrictions and possible exemptions, (iii) possibly define other categories of essential functions, and (iv) conditions applicable to travels into the EU, like e.g. testing or quarantine.

The Schengen Borders Code would also be amended in view of the **objectives 4.2.4 and 4.2.5**. This amendment would have as an objective to provide the Commission with better tools to assess the decisions of Member States to reintroduce border checks. It is in line with the finding of the public consultation, where the great majority of participants agreed or

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<sup>115</sup> Annex to the Commission Recommendation C(2019)7131.

tended to agree on the importance of regular and comprehensive monitoring for the implementation of common rules and standards across the Schengen area<sup>116</sup>. To that end, the provisions on the notifications and reporting obligation would also be modified, to ensure that the Commission and other Member States affected by the measures have sufficient information on the situation at the internal borders (not only post factum, once border checks are lifted, as it is the case at present). The Roadmap accompanying the Schengen Strategy and indicating the steps to be taken in order to achieve the objective of the Strategy of making Schengen stronger and more resilient, could include the milestones for lifting the current border checks at internal borders.

The Code would also be amended with a view to establishing a balance between the use of border checks and that of compensatory measures at internal borders. To that end, the amendment should bring more clarity to the concept that border control at internal borders shall only be reintroduced as a **‘last resort measure’**. In this context, the **intensification of police checks supported by new technologies** would be explicitly mentioned as a necessary element of the **risk assessment** to demonstrate that border checks are indeed the last resort measure. Moreover, the catalogue of measures that can be used in the areas of internal borders without being considered as equivalent to border checks would be reviewed, to address some recurring questions concerning police checks and to reflect the upcoming developments, in particular as regards the use of advanced passenger information (API).

This proposal would replace the one tabled by the Commission in 2017, which did not receive sufficient support in particular in the Council. That proposal, in particular provided for a specific procedure (decision by the Council) where border checks exceeded a duration of 1 year.

Taking into account the discussions in 2017 on that proposal, the new proposal would move away from a general reform of the rules governing the reintroduction of border checks at the internal borders to a more targeted approach. Thus, the contingency planning will address specifically the situation of a threat affecting several Member States or even the entire Schengen area. For all other cases of reintroduction of border checks, the new proposal will limit itself to providing more clarity as to compensatory measures and taking into account new developments in this area, in particular the 2017 Commission Recommendation on proportionate police checks and police cooperation and newly developed technologies. A more detailed description of the changes that were proposed in 2017 is contained in Annex 17.

**Table 5 – Mapping of objectives and measures under Option 2**

Objectives		Measures
	<i>4.2.1 Creation of contingency planning for Schengen</i>	The SBC is amended by adding a new procedure of ‘contingency planning for Schengen’ which applies when several or all Member States are confronted with the same kind of threat. The Member States may reintroduce border checks unilaterally but must seek the agreement of one of the EU institutions for prolongation.

<sup>116</sup> Annex 2, p. 13.

<p>Persons and goods can move freely [without unjustified or disproportionate limitations] within the Schengen area</p>	<p>4.2.2 <i>Application of mitigating measures and specific safeguards for cross-border regions</i></p>	<p>The concept of proportionality of border checks in the SBC explicitly refers to the mitigating measures;</p> <p>The Schengen Handbook contains a catalogue of mitigating measures.</p> <p>The specific interests of cross-border regions are explicitly mentioned among the criteria for the temporary reintroduction of border control at internal borders (Article 26).</p>
	<p>4.2.3 <i>Response to serious threats, in particular to a pandemic includes also uniform application of measures at the external borders</i></p>	<p>The SBC is amended to provide for a possibility of a Regulation by the Council upon a proposal by the Commission on restrictions on non-essential travel into the EU in particular in the situation of a serious threat to the public health at the external borders.</p>
	<p>4.2.4. <i>Increased use of the compensatory measures to address the identified threats</i></p>	<p>The following amendments in the SBC are proposed:</p> <p>The concept of ‘last resort measure’ is developed [to reinforce the need to use less invasive measures before reintroducing border checks at internal borders];</p> <p>All border checks at internal borders must be accompanied by a risk assessment; The non-exhaustive list of authorised measures not equivalent to border checks is reviewed;</p> <p>The conditions for the use of new technologies at internal borders and in the areas of internal borders are better explained.</p>
	<p>4.2.5 <i>Lifting the long-lasting border checks at internal borders</i></p>	<p>A Roadmap accompanying the Schengen Strategy includes milestones for lifting the long-lasting checks at internal borders;</p> <p>The SBC is amended to provide to the Commission better tools to obtain an overview over the decision-making process in the Member States and the actual use of reintroduced border checks to assess their necessity and proportionality.</p>

**Overall**, this option would make an important step towards a contingency planning for Schengen by creating a new procedure for the reintroduction of border checks in crisis situations and providing a stronger legal basis for the use of mitigating measures and travel restrictions at the external borders. In this sense, this option provides for more stability and predictability to **citizens and industry** with the new built-in safeguards that the impact on the functioning of Schengen of any measures adopted to address the crisis situation will be limited. Furthermore, those citizens and regions that have been most affected because of their

location will benefit from guarantees that their specific needs will be protected in case of a future reintroduction of internal border checks.

The expected better use of compensatory measures should assure more flexibility and better taking into account the local circumstances, thus limiting the impact on citizens. This development would be welcomed by those **Member States** which are exposed to the long-lasting border checks at the internal borders as well as by the **European Parliament**, if paired with increased monitoring that these measures are not discriminatory and respect fundamental rights. The Roadmap accompanying the Schengen Strategy would also be an important tool to restore the stability in the Schengen area. However, some Member States, in particular those carrying out border checks at their internal borders for years, can be expected to be critical about the proposed measures. This option would also respond to the call for changes coming from academia (see in this respect the Recommendations of the Meijers Committee - standing committee of experts on international immigration, refugee and criminal law - shared with the Commission and attached in Annex 4).

The proposed modifications would primarily address the Member States, including border guard authorities. The obligations for the industry will depend on the outcome of the ongoing discussion on the future of the API Directive which is outside the scope of this initiative.

### **Option 3: Mixed option 2 (more fundamental change of the SBC, combined with soft law elements)**

This option sees the borderless Schengen area as one integral space that must not be fragmented by decisions of individual Member States and in view of that proposes a strictly EU level approach where any decision on reintroduction of border checks at internal borders requires the prior approval of one of the EU institutions or **removes the possibility of a reintroduction of border checks at internal borders altogether**.

Under this option, the **contingency planning for Schengen would go much beyond the framework** currently imposed by the Schengen Borders Code with the rules applicable at the internal/external borders. The discussion and decision at EU level on the most appropriate measures (whatever their nature) to address any identified threats affecting some or all EU Member States would remove the current discretion of the Member States as regards the unilateral reintroduction of border checks at internal borders. As a result, a new approach to compensatory measures would need to be developed to ensure that their application does not lead to border checks in disguise.

As regards the application of measures at the external borders in case of public health threats, the proposed remedies would not differ from option 2 (new restrictions on non-essential travel into the EU applicable in the situation of threat to public health).

The current paradigm of measures at internal/external borders taken in response to crisis situations would need to change if a reintroduction of border checks was not an option anymore. This option is based on the assumption that the relations developed in the EU based on the freedom of movement and the Internal Market are so complex that reintroducing border checks at internal borders does not make sense anymore given that, after all, it can only help pushing the identified problem to the neighbouring Member States (and in principle only for a limited period of time). Moreover, reintroducing border checks - as checks in fixed locations - does not seem sufficiently flexible and efficient.

Establishing a strictly European approach to response to threats to internal security or public policy, by bringing any decision on reintroducing border checks at internal borders to the EU level or simply removing the possibility to temporarily reintroduce border checks at internal borders from the Schengen Borders Code, would require taking a new approach to **Schengen contingency** including the **mitigating measures** (ref. **objectives 4.2.1 and 4.2.2**). Under this option, the contingency planning for Schengen would aim at identifying the best approach in each crisis situation, irrespectively of whether it affects one or more Member States. The decision-making process would be time-framed. In the absence of the possibility to (unilaterally) reintroduce border checks at internal borders, the Member States would need to choose from different measures related to different policy areas (travel restrictions, quarantine, intensified police checks, etc.). If provided at all, the reintroduction of controls at internal borders would be subject to a truly European procedure. As a general rule, such reintroductions would be based on a decision proposed and adopted by the Commission as an implementing act following the request by a Member State.

The above modifications would be accompanied by a new Schengen tool allowing to restrict non-essential travel into the EU in case of a serious threat to public health, applicable in an uniform manner at all external borders, as presented in option 2 (ref. **objective 4.2.3**).

The prohibition of border checks at internal borders, even in a situation of a serious threat to internal security or public policy as allowed under current rules, would automatically allow for achieving the **objectives 4.2.4 and 4.2.5**.

**Table 6 – Mapping of objectives and measures under Option 3**

Objectives		Measures
Persons and goods can move freely [without unjustified or disproportionate limitations] within the Schengen area	<i>4.2.1 Creation of contingency planning for Schengen</i>	The SBC is amended to ensure that remedies to threats affecting some or all EU Member States are discussed at the EU level and a decision is taken on the most appropriate measures (whatever their nature) to address the identified threats.
	<i>4.2.2 Application of mitigating measures and specific safeguards for cross-border regions</i>	The Schengen Strategy encourages Member States to set up an exchange platform to ensure that the compensatory measures adopted by the Member States do not become equivalent to border checks at internal borders.
	<i>4.2.3 Response to the pandemics includes also uniform application of measures at the external borders</i>	The SBC is amended to provide for a possibility of a Council Regulation upon a proposal by the Commission on restrictions on non-essential travel into the EU in the situation of a serious threat to the public health at the external borders (as under option 2).
	<i>4.2.4 Increased use of compensatory measures to address the identified threats</i>	Following the amendment of the SBC prohibiting a (unilateral) reintroduction of border checks or requiring approval of one of the EU institutions for any reintroduction of border checks at internal borders, compensatory measures become the only possibility at least until the decision of the institution.



	4.2.5 <i>Lifting the long- lasting border checks at internal borders</i>	The SBC is amended to prohibit border checks at internal borders or to make these checks subject to a prior decision of one of the EU institutions.
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**Overall**, this option is the most ambitious and the one that reflects best the idea of Schengen. However, the persistent use of border checks and the failure of the negotiations on the 2017 proposal of the amendment clearly demonstrate that the EU is not ready for such a radical step. In this sense this option risks leading to firm opposition from many **Member States** as it disregards the direct link between the possibility to reintroduce border checks at internal borders and national sovereignty.

This option also suffers from the limitations resulting from the legal basis of the Schengen Borders Code, which concerns measures at the borders and only refers to other measures applicable in border areas to ensure that these are not equivalent to border checks. This means that the application of other measures than border checks cannot be directly regulated in the Schengen Borders Code. The same applies to additional safeguards to avoid that the absolute ban on border checks at internal borders is circumvented by Member States by a discretionary use of compensatory measures, which would lead to border checks in disguise. Also the exchange of information on the actual use of compensatory measures would depend on the good will of the Member States.

In this sense, the solutions proposed under this option seem to be premature and the identified objectives may have better chances to be achieved by means of developing the alternatives to border checks as such, instead of prohibiting border checks.

This option also does not necessarily remove the unpredictability for **citizens**, related to the use of measures in relation to the crossing of the border, as the full overview of the measures other than border checks cannot be guaranteed under the Schengen Borders Code.

This option could satisfy part of the **industry** (airports), while the carriers (e.g. Flexibus) might be still dissatisfied by the time losses generated by unpredictable and possibly intensive checks.

**Table 7 – Policy options and key measures**

Problem	Objective	Option 1	Option 2	Option 3
	4.2.1 <i>Creation of contingency planning for Schengen</i>	Schengen Strategy	Schengen Borders Code amendment	Schengen Borders Code amendment
Border checks at internal borders which are long-lasting and applied against abstract threats or used as a	4.2.2 <i>Application of mitigating measures</i>	Schengen Strategy	Schengen Borders Code amendment; Schengen Handbook	Schengen Borders Code amendment

‘first aid measure’ (and as such are often disproportionate and inadequate to address the threats they are supposed to tackle) become an unjustified hurdle for persons and goods to move in the Schengen area	4.2.4 <i>Increased use of compensatory measures to address the identified threats</i>	Recommendation	Schengen Borders Code amendment	Schengen Borders Code amendment
	4.2.5 <i>Lifting the long-lasting border checks at internal borders</i>	Schengen Strategy	Schengen Borders Code amendment  Roadmap/  Schengen Strategy	Schengen Borders Code amendment
Non-uniform application of travel restrictions at the external borders, where necessary, undermining the trust and putting the overall functioning of Schengen at risk	4.2.3 <i>Response to a pandemic includes also a uniform application of measures at the external borders</i>	Schengen Strategy	Schengen Borders Code amendment	Schengen Borders Code amendment

### 5.3. Options discarded at an early stage

Following the consultation of stakeholders, the Commission discarded the option of expanding carriers’ liability with regard to the intra-Schengen connections as a measure alternative to border checks at internal borders. Carriers’ liability has been set out in Article 26 of the Convention Implementing the Schengen Agreement<sup>117</sup> (CISA) and further developed in Directive 2001/51/EC<sup>118</sup>. It imposes on carriers certain obligations when transporting passengers from outside the EU into the Schengen area. In particular, it obliges them to ensure that all persons brought to the EU are in possession of relevant documents allowing for entry. It also obliges Member States to impose penalties on carriers who do not comply with this obligation. In recent years, some Member States imposed an obligation on carriers in national law to verify the documents of all passengers (for non-commercial reasons). These obligations have been part of the national measures aimed at addressing the threats to internal security or public policy, which at the same time justified the reintroduction of border checks at internal borders.

<sup>117</sup> OJ L 239, 22.9.2000, p.19. For full reference see Annex 16.

<sup>118</sup> Council Directive 2001/51/EC (OJ L 187, 10.7.2001). For full reference see Annex 16.

The decision not to look at expanding the liability of carriers has been taken in view of proportionality considerations: i) carriers' liability is linked with the subsequent border checks by the border guards. Therefore, the verification of the compliance with any new rules concerning carriers' liability at internal borders would require developing a specific system of verification; ii) the checks of documents carried out by carriers would be very limited (presence of documents/evident signs of counterfeit etc.) but would still require significant investments from the carriers<sup>119</sup>.

## 6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

### 1.3. Economic and social impacts

None of the options is expected to generate **direct costs** for the economy or the citizens compared to the baseline scenario because all the options aim at restoring the Schengen area as the area without checks at internal borders.

The analysis of the **economic benefits** of the proposed options may only rely on the assessment of the direct benefits related to how each of the options could contribute to bringing back the normality in the Schengen area by lifting the current border checks and preventing the reintroduction of border checks at internal borders in the future.

As regards the economic impacts of the considered **measures at the external borders**, some Member States particularly relying on foreign tourists may perceive them as potentially affecting their economy. However, given the overall positive impact of such measures on trust among the Member States, these potential costs would be counterbalanced by the benefits for the Schengen area (as other Member States could not justify the reintroduction of border checks at internal borders and/or travel bans within the Schengen area which equally affect the tourism industry of these Member States). In view of that, the assessment of the economic impact of the measures considered to address problem 2 (travel restrictions for non-essential travel to the EU) will depend on their effectiveness in preventing the reintroductions of border checks at internal borders due to a divergent application of the measures taken at the external borders.

The soft law measures considered under **Option 1** are not very likely to limit the duration of border checks and therefore the economic benefits of Option 1 would be rather limited. The measures proposed under this option are not likely to impact 'the national approach' of the Member States as regards taking the decision on reintroduction of border checks at internal borders in the future as explained in section 2.2.4. As the reintroduced border checks in particular affects cross-border regions, the risk of using border checks as a first aid measure could continue affecting the economic interests of these regions. Furthermore, the risk of a non-uniform application of travel restrictions at the external borders justifying possibly the reintroduction of border checks at internal borders could not be sufficiently prevented only with soft law measures (such as criteria for travel restrictions and guidelines for evidence in the Schengen Strategy) as the current experience with the implementation of Council Recommendation 2020/912 shows.

**Option 2**, with the new mechanism of contingency planning, bringing the response to crisis situations affecting several or all Member States to the EU level and reinforcing the use of compensatory measures, is likely to provide better and more reliable framework for exercising basic freedoms by preventing long-lasting border checks at internal borders in the future. As

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<sup>119</sup> For instance, written contributions of Hungary and Eurostar.

such, this option could be instrumental in limiting the negative economic impact of border checks at internal borders and thus the economic benefits of this option could be significant. Also the possibility of adopting an EU-wide travel restriction for non-essential travel applicable at the external borders in the situation of a public health threat could contribute to this objective by eliminating a likely ground for the reintroduction of border checks at internal borders.

**Option 3**, bringing any decision on reintroduction of border checks at internal borders to the EU level or abolishing border checks as such, may appear as having the biggest positive economic impact for the future, also relieving cross-border regions from carrying the bulk of a burden of measures that are meant to benefit the entire Member State. However, it also risks having the most unwanted side effects, as the non-transparent use of compensatory measures could lead to border checks in disguise. Nevertheless, the possibility to adopt EU-wide travel restrictions applicable at the external border in the event of a public health crisis could limit the need for compensatory measures and thus, also the risk of their discretionary use by the Member States.

Also as regards the **social impacts**, this analysis is focused on the benefits that each of the options can bring in terms of lifting border checks at internal borders and restoring trust between the Member States. From this perspective, the situation in the cross-border regions is of particular relevance. As underlined in the inception impact assessment and mentioned in section 2.1.3, there are 1.7 million workers in the EU crossing a border every day to go to their jobs and long waiting times at the border might discourage people from looking for cross-border opportunities on the labour market, reducing the pool of potential workers. The social benefits from the proposed measures would extend to EU citizens and all other persons legally residing in the EU. Moreover, the impact of the proposed measures on the entire EU population benefiting from the area without checks at internal borders would be positive, given that they diminish the risk of reintroduction of border checks.

**Option 1**, with no real contingency planning and a simple overview of the guidelines/recommendations building solely on the mitigating measures adopted in relation to COVID-19, is not likely to reduce the risk of reintroductions of border checks and as such is not likely to have any significant positive social impact.

**Option 2**, with the contingency planning for Schengen and the reinforced concepts of the ‘last resort measure’, should limit the use of border checks at internal borders. This option can be expected to yield more positive social impacts also due to the further development of the concept of ‘proportionality’ and a proper catalogue of mitigating measures to be included in the Schengen Handbook, which would guarantee certain minimum safeguards whenever the reintroduction of border checks is truly necessary and justified.

Finally, bringing to the EU level any decision on the use of relevant measures, including any instance of use of border checks at internal borders, as provided for in **Option 3**, could make the most visible difference, in particular for cross-border regions, provided that relevant safeguards could be developed to ensure that compensatory measures which the Member States would have to rely on instead do not become equivalent to border checks at internal borders. At the same time, bringing such decisions to the EU level or even abolishing the possibility of border checks at internal borders could significantly increase the pressure on the EU. As certain phenomena (secondary movements, cross-border criminality or even terrorist threats) cannot be eradicated completely, the EU might become an easy target for criticism driven by national debates.

## 6.2. Impacts on fundamental rights

All three considered options attempt to address problems which have an impact on the following rights: i) the right to family life of persons residing legally in the EU, ii) the right to work, to exercise the right of establishment and to provide services in any Member State, iii) the right to move and reside freely within the territory of the Member States, iv) the right to privacy and protection of personal data.

All three options considered recognise the possibility to make the exercise of the rights mentioned above more difficult, either by reintroducing border checks at internal borders or by using compensatory measures such as police checks in border areas. However, these possibilities already exist and are recognised as justified despite their impact on fundamental rights.

Thus, the impact of the specific options on fundamental rights may be measured according to the **duration** of limitations to the fundamental rights likely under each option.

From this perspective, the positive impacts of **Option 1** on the rights listed above under points i) – iii) would be the most limited, given the overall limited efficiency of this Option in achieving the identified objectives. Compared to this, **Options 2 and 3** would have both a positive impact on fundamental rights by limiting or eliminating the use of border checks at internal borders.

As compared to the status quo, in all options the overall impact on the fundamental rights of the possible increased use of compensatory measures to border checks at internal borders, such as police checks, would be positive, as it would concern a smaller number of persons, compared to border checks. However, the increased use of the compensatory measures also requires strong safeguards to protect against abuses, including where the promoted measures could become border checks in disguise. According to a study commissioned by the European Parliament, the discretionary power conceded to police officers when conducting checks on persons within the territory of a Member State in accordance with the current Article 23 of the Schengen Borders Code, has led to racial profiling and discriminatory selection of the persons being checked within the border areas.<sup>120</sup> It can therefore not be excluded that **Options 2 and 3** which are based on an increased use of compensatory measures might increase this risk.

Regarding the protection of fundamental rights in case Member States take alternative measures, none of the options provides for a list of such possible measures and thereby provides for accompanying safeguards for fundamental rights. Nevertheless, whatever alternative measures they decide to take, Member States will have to ensure that these comply with the Charter of Fundamental Rights and all other relevant international law as laid down in article 4 of the Schengen Borders Code. In addition, the alternative measures may not harm the rights of persons enjoying the right of free movement under Union law (Article 3a) of the Schengen Borders Code), and the controls should be performed in full respect of human

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<sup>120</sup> Cf. Sergio Carrera, Ngo Chun Luk “In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU”, September 2020, study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee, PE 659.506, p.72f., citing e.g. K. Brouwer, M. van der Woude, J. van der Leun, “Op de grens van het vreemdelingtoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid”, Tijdschrift voor Veiligheid, Vol. 16, No. 2/3, 2017, p. 73; T.J.M. Dekkers, ‘Selecting in Border Areas: Profiling Immigrants or Crimmigrants?’, The Howard Journal of Crime and Justice, Vol. 58, No. 1, March 2019, pp. 25-44.

dignity (article 7 of the Schengen Borders Code). Finally, supplementary safeguards against increased risk of racial profiling or other phenomena in the process of targeting checks which could impede on fundamental rights, would stem from the current anti-discrimination obligations under EU and national law. Additionally, implementing options 2 or 3 should be accompanied by increased monitoring measures, e.g. in the context of Schengen Evaluations.

As regards the right listed under point iv) above – the right to privacy and protection of personal data –, according to the public consultation, 25.25% of the responding EU citizens consider that any automated control would be an unacceptable intrusion in their private life. Moreover, it has to be stressed that all measures of considered options in the context of surveillance and monitoring technologies shall be subject to the applicable EU data protection rules, irrespectively if they concern soft law measures or legislative proposals. In this sense, all options ensure an adequate level of protection to the citizens.

### 6.3. Other impacts

The options considered do not have any measurable impacts on the **environment**. The persistence of border checks may generate increased CO<sub>2</sub> emissions caused by waiting cars at the borders, but no data are available in this regard. At the same time, the negative effects of long-lasting border checks on the cross-border mobility could compensate or counterbalance such effects by limiting the overall volume of emissions. For this reason, the impacts on the environment will not be taken into account in the overall assessment of the options.

As regards the impact on **administration**, the costs of alternative measures are difficult to calculate given that they concern the maintenance of law and order which are under the exclusive responsibility of the Member States. Therefore, the Commission does not have any data on this at its disposal.

**Option 1**, with soft law measures, does not create any new obligations for national administrations. The call for better coordination based on the know-how developed in relation to COVID-19 could lead to additional tasks in a future crisis situation. However, the positive effects of additional coordination should outweigh the burdens, as this could reduce the number of measures in place or allow for sharing the responsibility for specific actions with the authorities of the neighbouring Member States.

By maintaining the possibility to reintroduce temporarily border checks at internal borders but adding new obligations, such as a risk assessment, a standardised notification concerning the reintroduction of border checks at internal borders and an obligation to report regularly on these, **Option 2** could have the biggest direct impact on the administration. However, as the measures proposed in this option should achieve an overall reduction in the use of border checks, the additional administrative burden should be limited.

As compared to Option 2, **Option 3** - which does not require a risk assessment or reporting but presupposes that the administration would get involved in the coordination and monitoring of the compensatory measures - would have a moderate impact on the administration.

The measures concerning the external borders would have only a positive impact on national administrations which would follow a uniform approach, without having to negotiate bilateral arrangements with third countries.

Overall, the perception of the administrative impacts may vary from one Member State to another. In the Member States which in recent years have not resorted to border checks at internal borders to address crisis situations, a more European approach would not make any difference. However, for the Member States with long-lasting border checks at internal borders and which are underusing compensatory measures, the options considered may appear to increase the administrative burden, depending on the combination of the compensatory measures applied.

From the EU side, the new procedure of contingency planning for Schengen as well as a more structured approach to notifications/reporting obligations, may require some small adjustment of resources.

## 7. HOW DO THE OPTIONS COMPARE?

**Table 8 – Comparison of the three policy options**

	<i>Baseline</i>	<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
<i>Effectiveness</i>	0	+	+++	++
<i>Efficiency</i>	0	+	+++	++
<i>Proportionality</i>	0	+	+++	+
<i>Coherence</i>	0	+++	+++	+++

### 1.4. Effectiveness

All three options are expected to have an impact in terms of managing the disproportionate limitations to persons and goods moving in the Schengen area, and thus are expected to help in achieving the identified general and specific objectives. However, their effectiveness is strictly linked to the likely difference they would make compared to the baseline scenario.

Measures under **Option 1** are expected to have a low-to-moderate positive impact. This is because the legislative provisions concerning the reintroduction and application of border checks at internal borders would remain unchanged. This means that the risk of undue/disproportionate limitations could not be avoided in the future and Member States would continue having a lot of discretion both as regards the reintroduction of border checks at internal borders, and the application of mitigating measures.

**Option 2**, with the legislative modifications to the Schengen Borders Code, includes a set of measures that could have a highly positive impact. This concerns in particular a proper contingency planning for Schengen on the one hand and the development of concepts as ‘last resort’ and proportionality on the other, which are expected to influence the way the Member States decide on reintroduction and application of border checks at internal borders. Given that the possibility to reintroduce border checks at internal borders is perceived by some Member States as an aspect of their sovereignty, this option offers the most realistic approach to the problems identified, and the most effective way of achieving the objectives that have been identified.

**Option 3** may also appear to have a positive impact by eliminating the possibility of unilateral decisions on reintroduction of border checks at internal borders. However, using this option would overhaul the current Schengen architecture where the Member States keep the right to decide on the reintroduce border checks as a last resort measure. Thus this positive result would lead at the same time to reluctance of the Member States to give up a power which is considered by many as an aspect of their sovereignty. Another drawback is related to the risk

of insufficient transparency as to the measures applied by Member States to address identified threats, instead of border checks: eliminating the possibility to reintroduce border checks at internal borders unilaterally would be accompanied by eliminating the notifications to the Commission and the Council, leaving in force only the transparency obligations resulting from the ‘Strawberry Regulation’<sup>121</sup> (i.e. to inform the Commission about any obstacle to the free movement among the Member States). In this sense, Option 3 cannot sufficiently guarantee that the four freedoms guaranteed by the Treaties will not be limited in a disproportionate manner.

### 1.5. Efficiency

The analysis of the main impacts shows that all three options are expected to bring benefits compared to the baseline scenario, without generating significant costs. The socio-economic impacts are decisive in this assessment, given the lack of measurable impacts on the environment or on administration. The impacts on fundamental rights are comparable between the three options, although Option 1 may have a slightly smaller positive effect in attempting to end the long-lasting measures at the internal borders.

**Option 1** is expected to have the lowest efficiency in terms of socio-economic impacts. The proposed soft measures are not likely to prevent a discretionary use of border checks at internal borders in the future, which are generating significant costs for the economy and communities, in particular at regional level.

**Option 2** is expected to be highly efficient because it creates new obligations for the Member States and stronger tools of control for the Commission (e.g. risk assessment, regular reports concerning the reintroduced border checks) which could increase the pressures on Member States (by means of an opinion on necessity/proportionality).

**Option 3** is expected to have a moderate efficiency because of the unpredictable impact of the compensatory measures used by the Member States instead of border checks and the risk that they could become border checks in disguise.

### 1.6. Proportionality

According to the principle of proportionality laid down in Article 5(4) TEU, there is a need to match the nature and intensity of a given measure to the identified problem.

Measures proposed under **Option 1** do not impose any additional obligations on the actors. They comply with the boundary test as the continued effectiveness of the Schengen area depends on the concerted action of all the Member States.

However, the choice of the instrument (Communication of the Commission and other soft law measures such as guidelines/recommendations) does not give a sufficient guarantee that the identified objectives would be achieved. For this reason this option may raise concerns as to its proportionality.

Option 1, like Option 2, fully reflects the fact that a reintroduction of border checks at internal borders is widely considered as a legitimate measure of maintaining law and order.

**Option 2**, despite certain new obligations on the Member States related to the new provisions on contingency planning, risk assessments and reporting obligations, appears to be fully proportionate as the benefits resulting from better control over the use of border checks at

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<sup>121</sup> Council Regulation (EC) No 2679/98 (OJ L 337, 12.12.1998, p. 8–9). For full reference see Annex 16.



internal borders would outweigh these burdens. This option also complies with the boundary test as the continued effectiveness of the Schengen area depends on the concerted action of the Member States. The increased use of compensatory measures such as police checks and the use of new technologies furthermore decreases the intensity of the invasion on citizens' freedoms. As these measures can be used in a targeted manner, based on risk assessment and are subject to the number of safeguards under national law, they generally have a lesser impact on the freedom of movement than border controls which can concern all persons crossing the internal border. The proportionality of such measures is further safeguarded by the fact that the CJEU has limited the discretionary powers of Member States in carrying out border controls and police checks on their territory<sup>122</sup>.

Finally, the choice of the instrument fully corresponds to the identified objectives. Moreover, the proportionality of this option results also from the targeted character of the intervention in the Schengen Borders Code.

**Option 3**, like Option 2 can also be assessed positively as regards the choice of instrument.

However, it requires a much more significant intervention in the Schengen Borders Code compared to Option 2 and would eliminate one of the powers of the Member States dating back to the origins of Schengen cooperation (Convention Implementing Schengen Convention). It may also be perceived by some Member States as not compliant with the Treaties, as pursuant to Article 72 of the TFEU the Title referring to the area of freedom, security and justice “*shall 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*”. In this sense, it may appear as going beyond that what is necessary to address the identified problems.

### 1.7. Coherence

The three options include measures that are coherent with the overall objective of the upcoming Schengen Strategy and other initiatives in this area intended to preserve the Schengen area and to make it stronger for the future. They are complementary to the parallel initiative to reform the Schengen Evaluation Mechanism which aims, among other things, to restore trust between the Member States and allow for a quick identification of deficiencies which may put the overall functioning of the Schengen area at risk.

Furthermore, all three options take due account of the possibilities offered by new technologies which are likely to revolutionise border management once the new IT architecture is deployed throughout the Schengen area. They also fully recognise and reflect the know-how developed during the COVID-19 pandemic making an effort to integrate it as much as possible in the process of managing crisis situations.

In broader terms, by bringing more predictability to the reintroduction of border checks at internal borders, the initiative may reinforce the effectiveness of the holistic approach proposed by the Commission on security and migration management.

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<sup>122</sup> Judgment of the Court of Justice of 22 June 2010, Melki and Abdeli, joined cases C-188/10 and C189/10, ECLI:EU:C:2010:363, judgment of the Court of Justice of 19 July 2012, Adil, ECLI:EU:C:2012:508, C-278/12 PPU, judgment of the Court of Justice of 21 June 2017, A. (Europabrücke), case C- 9/16, ECLI:EU:C:2017:483.

**Table 9 – Impacts of the Options**

<i>Impacts/Options</i>	<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
	<i>Soft law changes</i>	<i>Mixed approach</i>	<i>Mixed approach 2</i>
<b>Effectiveness</b>	<p><b>Low</b> – Soft law measures would have only a limited impact on the effectiveness by building political pressure but not guarantying that previous mistakes concerning the use of border checks at internal borders would be avoided in the future.</p> <p>The effectiveness of soft law measures depends on the good will of the actors involved.</p>	<p><b>High</b> – The mixed approach, relying on a targeted amendment of the Schengen Borders Code and an operational tool for the border guards, is expected to allow for attaining the identified objectives. This option offers solutions for the Member States (the new procedure to be applied in the situation of common threat), for the Commission (new tools of control) and for EU citizens/industry who seek guarantees that the basic freedoms will not be limited without due cause, and predictability (mitigating measures linked with the proportionality of border checks, new rules on restrictions on non-essential travel into the EU at the external borders).</p>	<p><b>Moderate to High</b> – The ambitious legislative proposal, despite bringing the choice of remedies to the EU level, may fail to protect citizens and industry from a discretionary use, by Member States, of compensatory measures in a manner that could make them border checks in disguise. The risk related to that undermines the obvious advantages of lifting the decision on any reintroduction of border checks at internal border to the EU level or prohibiting them in the future as too old-fashioned and not reflecting sufficiently the overall interest of Schengen.</p>
<b>Efficiency</b>	<p><b>Low</b> – The soft law measures do not sufficiently guarantee a change in the approach to internal borders. The impacts of this option are limited in terms of assuring that the benefits of the area without check at internal borders would be restored for the citizens and the industry.</p>	<p><b>High</b> – The impact of Option 2 is high in terms of restoring the benefits of the Schengen area. This is thanks to the legislative changes allowing to ensure more efficiently the seamless conditions for exercising the basic freedoms by ensuring that border checks are truly the measure of last resort, applied for a limited period of time and that the</p>	<p><b>Moderate to High</b> – The impact of Option 3 can be high thanks to bringing to the EU level the decision on the use of border checks or simply prohibiting border checks at internal borders. However, the likely opposition of the Member States and the risk of border checks in disguise undermine the efficiency of this option.</p>

		compensatory measures are used to their full potential.	
<b>Proportionality</b>	<b>Low</b> - This option does not generate any automatic obligation for the actors. However, the soft law measures might be not proportionate in view of the scale of the problems that need to be addressed.	<b>High</b> - All measures under option 2 are proportionate to the identified problems and do not go beyond what is necessary to achieve the specific objectives.	<b>Low</b> - The measure consisting in depriving the Member States of the possibility to unilaterally reintroduce border checks or banning the reintroduction of border checks at internal border altogether may go beyond that what is necessary to address the identified problems.
<b>Coherence</b>	<b>High</b> - This option is coherent with the development of the Schengen <i>acquis</i> .	<b>High</b> - This option is coherent with the development of the Schengen <i>acquis</i> .	<b>High</b> - This option is coherent with the development of the Schengen <i>acquis</i> .

## 8. PREFERRED OPTION

### 8.1. Option 2

Option 2 (mixed approach) is considered to be the preferred option. This choice reflects the best the cumulative score of this option as regards effectiveness, efficiency and proportionality. It draws the lessons from the past and, at the same time, is sufficiently ambitious. It respects the views of the Member States concerning the role of border checks in addressing serious threats while at the same time respecting also the legitimate expectations of the EU citizens and other persons benefiting from the absence of border checks at internal borders as to preserving the Schengen area as one of the main enablers of the freedom of movement of persons and goods.

### 8.2. REFIT (simplification and improved efficiency)

According to the Commission's Regulatory Fitness and Performance Programme (REFIT), all initiatives with the objective to change existing EU legislation should aim to simplify and deliver stated policy objectives more efficiently (i.e. reducing unnecessary regulatory costs).

The analysis of impacts suggests that the preferred option should help to optimise the allocation of resources in case of crisis and to limit the costs of reintroduction of border checks at internal borders. However, it should be noted that the new obligation concerning the risk assessment, the new template for notifications of reintroductions and reporting obligations, as well as new tasks related to the use of compensatory measures, may lead to a situation where the overall burden on Member States will not be reduced, and in some cases even increased.

Additional obligations would arise for the EU institutions. This would concern creating the capacity to take substantiated decision at the EU level on the use of restrictions on non-essential travel into the EU at external borders but also to apply the contingency planning in case of need.

No impact on EU bodies and Agencies is expected.

However, these additional tasks should generate limited additional costs compared to the significant positive impact on managing the crisis situations putting the overall functioning of Schengen area at risk.

**Table 10 – Impacts on simplification and administrative burden**

	<i>Baseline</i>	<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>	<i>Preferred Option</i>
<i>On national administrations</i>	<b>0</b>	+	+	+	+
<i>On EU institutions</i>	<b>0</b>	-	+	-	+
<i>On EU bodies and agencies</i>	<b>0</b>	-	-	-	-

+++ *high*, ++ *medium*, + *low*, 0 *neutral* and - *negative*.

The cost variations for Commission and EU bodies and agencies would be limited and partially offset by other measures.

## 9. HOW WILL ACTUAL IMPACTS BE MONITORED AND EVALUATED?

The evaluation of the targeted amendment of the Schengen Borders Code as regards the temporary reintroduction of border checks at internal borders will depend on the information to be received from the Member States.

Table 11 includes a non-exhaustive list of quantitative indicators proposed to monitor the achievement of policy objectives identified in this Impact Assessment. These indicators reflect and define, in practice, the success of the policy options. However, as the proposed option concerns addressing exceptional situations, the regular measurement of the indicators is not possible.

Moreover, this unpredictability prevents setting fixed quantitative targets. However, it may be assumed that [within a year] from the adoption of the new rules the long-lasting border checks at internal borders should be lifted and the only border checks in place at that time will be carried out for a limited period of time under the current rules, or based on the new contingency planning procedure. Also, in the same period of time, the Schengen Handbook should be updated to provide an overview of relevant guidelines/recommendations to be applicable in case of temporary reintroduction of border checks at internal borders in several Member States.

The Commission website [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en) informing the public on the current border checks at internal borders in place will remain the main IT tool allowing to monitor and evaluate the situation at the internal borders. Given the limitations of the legal basis to measures at the internal borders, the Commission cannot develop a separate tool on the use of compensatory measures such as police checks in the border areas. However, the conditions of use of the compensatory measures at the internal borders (spot police checks/new technologies) will be subject to monitoring in the framework of the Schengen Evaluation Mechanism, including any possible on-spot visits at the internal borders.

**Table 11 – Success indicators**

Specific Objectives	Operational Objective	Indicators	Target
<b>4.2.1 Creation of a contingency planning for Schengen</b>	<ul style="list-style-type: none"> <li>Reintroduction of border checks/prolongation of border checks in case of the same threat in several/all Member States is discussed/decide at the EU level respectively</li> </ul>	<ul style="list-style-type: none"> <li>Number of reintroduction of border checks at internal borders</li> <li>Duration of reintroduced border checks at internal borders</li> </ul>	<p>↓ decreasing trend</p> <p>↓ decreasing trend</p>
<b>4.2.2 Application of mitigating measures and specific safeguards for cross-border regions</b>	<ul style="list-style-type: none"> <li>Default set of safeguards applicable in the situation of the same threat for several/all Member States</li> </ul>	<ul style="list-style-type: none"> <li>Number of incidents at internal borders where the reintroduced border checks affect the freedoms in a disproportionate manner</li> </ul>	<p>↓ decreasing trend</p>
<b>4.2.3 Uniform application of measures at the external borders in particular in case of a threat to public health</b>	<ul style="list-style-type: none"> <li>restrictions on non-essential travel into the EU applicable at all external borders</li> </ul>	<ul style="list-style-type: none"> <li>Number of third country nationals detected in the EU (or upon exit) who should have been subject to the temporary restrictions on non-essential travel into the EU</li> </ul>	n.a.
<b>4.2.4 Increased use of compensatory measures to address the identified threats</b>	<ul style="list-style-type: none"> <li>Less new reintroductions of border checks</li> <li>More examples of use of compensatory measures</li> </ul>	<ul style="list-style-type: none"> <li>Number of new notifications concerning the reintroduction of border checks at internal borders</li> <li>Number of best practices</li> </ul>	<p>↓ decreasing trend</p> <p>↑ increasing trend</p>
<b>4.2.5 Lifting the long-lasting border checks at internal borders</b>	<ul style="list-style-type: none"> <li>Current border checks are not prolonged</li> </ul>	<ul style="list-style-type: none"> <li>Number of prolongation of border checks</li> </ul>	<p>↓ decreasing trend</p>

## ANNEX 1: PROCEDURAL INFORMATION

### 1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

The lead DG is the Directorate-General for Migration and Home Affairs (DG HOME). The agenda planning reference is PLAN/2020/8753.

The Commission Work Programme for 2021<sup>123</sup> provides, under the heading ‘Promoting our European way of life’ a legislative initiative to amend the Schengen Borders Code.

### 2. ORGANISATION AND TIMING

The Secretariat-General set up the Inter-service Steering Group to assist in preparing the initiative on 10 December 2020. The following Directorates General representatives participated in the ISSG work: SJ, DG GROW, DG MOVE, DG RTD, DG HOME, DG JUST, JRC, DG SANTE and EEAS.

An Inception Impact Assessment was published on 8 January 2021 and was open to feedback from all stakeholders for a period of 4 weeks, until 5 February 2021<sup>124</sup>.

Within this framework, the impact assessment was subsequently prepared.

### 3. CONSULTATION OF THE RSB

On 19 April 2021, the Directorate-General for Home Affairs submitted the draft Impact Assessment to the Regulatory Scrutiny Board, in view of a hearing that took place on 12 May 2021.

The recommendations of the Board were incorporated in the Impact Assessment Report as follows:

Recommendations of the RSB	How the RSB recommendations reflect in the current Impact Assessment Report
(1) The report should begin by describing the main elements of the 2017 proposal. It should explain the lessons learnt from the negotiations and how the COVID-19 crisis has brought in new perspectives. It should also indicate the room for manoeuvre that the negotiations left for this initiative and how it is reflected in	The Impact Assessment presents the overall objective of the 2017 proposal (p. 6), the reasons why Member States did not accept modifications of the existing time-limits for unilaterally reintroduced border controls during the negotiations of the 2017 proposal (p.35) and how the COVID-19 crisis have shown how threats to public health require uniform rules, which <i>ad hoc</i> measures taken by Member States cannot ensure

<sup>123</sup> COM(2020) 690 final of 19.10.2020.

<sup>124</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12827-Temporary-checks-at-internal-borders-amending-the-Schengen-Borders-Code>

<p>the policy options.</p>	<p>(p.35).</p> <p>Reference to the lessons learnt from the discussion in 2017, can be found throughout the description of the three policy options (Sec. 5.2),</p> <p>In Section 5, the room for manoeuvre left for the new proposal of the amendment of the Schengen Borders Code is further explained and addressed in the different policy options.</p>
<p>(2) The report should provide more evidence on the effectiveness of internal border controls and alternative measures to such controls. It should explain what lessons can be drawn from past introductions of internal border controls (in particular during the COVID-19 crisis) and why existing coordination mechanisms failed. It should also clarify how it assesses the proportionality of internal border controls vis-à-vis alternative measures. The report should better explain the observed coordination deficiencies of the Integrated Policy Crisis Response mechanism during the COVID-19 pandemic.</p>	<p>Section 2.2.1 was expanded to include existing example from a Member State of a system implemented that does not require continuous physical control at the border.</p> <p>To illustrate the lessons learnt from past introductions of internal border controls and why existing coordination mechanism failed, a new annex 7 was added. It highlights three identified threats to the Schengen Area (migration, terrorism and management of the external borders), which pushed Member States to reintroduce checks at the internal borders. Section 2.1.1.2.b) was also improved and deepened to address the recommendations of the RSB.</p> <p>On the judgement of joined cases C-188/10 and C189/10, the CJEU limited the discretionary powers of Member States in carrying out border controls and police checks on their territory, safeguarding the proportionality of compensatory measures, as further developed in Section 7.3</p> <p>Section 2.2.2 was expanded to better explain the coordination deficiencies observed at the Integrated Policy Crisis Response during the Covid-19 pandemic.</p>
<p>(3) The report should describe the content of the policy options more in detail, including the preferred policy option. It should describe how the policy options will be implemented and what the different choices (sub-options) for this implementation are. In particular, it should set out how the new coordination mechanism and contingency planning would</p>	<p>Section 5.2 where policy options are presented was further expanded so as to better explain the different policy options, addressing for each and every one of them how effective enforcement would be ensured.</p>

<p>work and how the institutional decision process and its temporal framework would function. It should be clear about how effective enforcement will be ensured.</p>	
<p>(4) The report should go beyond a purely qualitative impact analysis and present quantitative data wherever possible. It should further specify the benefits of lifting internal border controls, possibly distinguishing between sectors. The report could draw from past efforts of calculating the cost of non-Schengen. It could also refer to anecdotal evidence or case studies (while clearly marking them as such), for example for the administrative costs. The report should also be more explicit about the possible risks of alternative measures for fundamental rights and explain how such risks can be contained. For the comparison of the policy options, the comparative tables should be in line with the accompanying text.</p>	<p>To address the lack of quantitative data identified in the previous report, the Impact Assessment report incorporated the results from the public consultation carried out by the Commission (Section 2.1.1.b), p. 17) and added data on the impact on intra-EU trade and GDP caused by reintroduction of checks at internal border due to the COVID-19 crisis (Section 2.1.3.2, p. 26). Moreover, the policy options (Section 5.2.) were developed taking into account data concerning migration and terrorist attacks, which demonstrate that border checks are either not justified anymore or are not the most efficient in addressing the identified threats.</p> <p>Specific quantitative data was also included to clarify the benefits of lifting internal border controls on different sectors, such as air travel industry and cross-border regions (Section 2.1.3.1, p. 21-25).</p> <p>On pages 25-26, the report outlines the requested estimation of the administrative costs of non-Schengen (between EUR 0.6 and EUR 5.8 billion) and of the physical establishment of border controls (estimated at EUR 7.1 billion), demonstrating that the physical establishment of border controls have a higher impact on the total costs when the period of reintroduction is shorter.</p> <p>The section on the impact on fundamental rights was deepened, to include the analysis on the protection of fundamental rights in case Member States take alternative measures. (Section 6.2, p. 49-50).</p> <p>For the comparison of the policy options, table 8 was updated to better reflect the accompanying text.</p>
<p>(5) Stakeholders' views should be reflected throughout the report. In particular, the report should</p>	<p>The current version of the Impact Assessment has expanded in Annex 2 the results of the stakeholders' consultation that took place between</p>



<p>transparently report diverging views and address potential concerns on the policy options, implementation choices and impacts.</p>	<p>November 2020 and February 2021.</p> <p>Moreover, the views of stakeholders are also better reflected throughout the document, allowing for a more transparent report, as follows:</p> <ul style="list-style-type: none"> <li>- Section 2.1.1.a) p. 3 presents the results of the citizen’s dialogues that took place in the High Rhine region in Summer 2020, where cross-border citizens and businesses exposed the impact of unilateral reintroduction of internal border controls and presented their conclusions on how to address situations of crisis.</li> <li>- Section 2.1.1.b) p. 19 presents the results of the Expert meetings on measures allowing for a more effective cooperation within the Schengen Area in January 2021. It also highlights the opinion of industry and carrier representatives who provided conditions that should be met for the effective use of new technology solutions in border services.</li> <li>- Section 2.1.2, p. 20, 21 shows the results of the stakeholders’ consultations, encompassing the view of EU citizens and business associations and company/business organisations.</li> <li>- Section 2.2.3, p. 29 presents the view of EU and non-EU citizens during the public consultations.</li> <li>- Section 5.2 provides how stakeholders will be impacted by each of the three policy options raised in the report.</li> </ul>
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#### 4. EVIDENCE, SOURCES AND QUALITY

The starting point for this Impact Assessment report was the DG REGIO ‘*The effects of COVID-19 induced border closures on cross-border regions - An empirical report covering the period March to June 2020*’<sup>125</sup> and the ‘*20 case studies covering the period March to June 2020*’<sup>126</sup>

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<sup>125</sup> <https://op.europa.eu/en/publication-detail/-/publication/46250564-669a-11eb-aeb5-01aa75ed71a1/language-en/format-PDF/source-search>

<sup>126</sup> <https://op.europa.eu/en/publication-detail/-/publication/bf14de68-6698-11eb-aeb5-01aa75ed71a1/language-en>

The Commission also relied on the studies on costs of non Schengen prepared by the European Parliament<sup>127</sup>, notifications of the Member States concerning the temporary reintroduction of border checks at internal borders and the reactions from the public manifested in the correspondence sent to the Commission.

To assess the impact of the different options, information on stakeholders' views through the stakeholder consultation activities, as per Table 1, Annex 2, were a main source of information.

The quality of the data on duration and grounds of decisions on temporary reintroduction of border checks at internal borders is problematic. Although it relies on direct sources (Member States concerned), the level of detail and parameters used by the Member States to demonstrate the need of border checks varies a lot and is difficult to compare. Also the use of data concerning the impact of border checks at the cross-border regions was challenging because of the fact that very little hard data is available, as regards the actual cost of border checks at internal borders in particular during COVID-19 crisis, despite the serious effort made by the Commission to collect such data, as part of the preparation of this Impact Assessment.

## **5. ANALYTICAL METHODS**

To the extent possible, the Impact Assessment relies on quantitative analysis of the data available. This concerns in particular the use of border checks at internal borders. In the absence of quantitative data on the actual reintroduction of border checks at internal borders, the Impact Assessment relies on estimates concerning the quantitative aspects of reintroduction of border checks at internal borders in the scenario of a permanent reintroduction of border checks at internal borders. As a large part of the issues at stake do not have a quantitative but rather a qualitative profile, the qualitative evidence has been used to a much larger extent, in particular to identify trends and the correlation between different factors and measure the different options' impact.

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<sup>127</sup> Directorate-General for Internal Policies Policy Department A: Economic and Scientific Policy, European Parliamentary Research Service European Added Value Unit, PE 578.974-May 2016: "Cost of non-Schengen: the impact of border controls within Schengen on the Single Market", requested by the European Parliament's Committee on Internal Market and Consumer Protection, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL\\_STU\(2016\)578974\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578974/IPOL_STU(2016)578974_EN.pdf).

## ANNEX 2: STAKEHOLDER CONSULTATION

The stakeholders' consultation took place between November 2020 and February 2021 and encompassed, primarily, targeted stakeholders by way of the Schengen Forum and **thematic workshops** divided according to the topic and stakeholders involved. It included Member States, European Parliament, carriers and NGOs. This approach appeared preferable given the very different interests and issues at stake for the different stakeholders. The Commission prepared discussion papers to steer the discussion in the different meetings.

### 1. SCHENGEN FORUM

Under the New Pact on Migration and Asylum, the Commission announced the establishment of a dedicated Schengen Forum, involving the relevant national authorities such as Ministries of Interior and (border) police at national and regional level in order to stimulate more concrete cooperation and more trust among Member States to support the well-functioning of Schengen.

The 1<sup>st</sup> Schengen Forum took place on 30 November 2020. At the forum, EU institutions and Member States provided political guidance on the future of Schengen, agreeing that there is a need of taking steps to preserve Schengen. The Conclusions of the Chair from the meeting are attached as Annex 5: Conclusions of the Chair – Schengen Forum 30 November 2020

### 2. MINUTES: EXPERT MEETINGS ON MEASURES ALLOWING FOR A MORE EFFECTIVE COOPERATION WITHIN THE SCHENGEN AREA, 14 AND 22 JANUARY 2021

**Attendance:** The meetings were attended by experts from a) NGOs and airport and airline representatives b) Members of the European Parliament and their representatives, c) Schengen Member States and Schengen Associated Countries, d) carriers' representatives and Commission services (DG HOME).

#### 2.1. Explanation of the meeting's objective (DG HOME)

In an initial statement, the chair recalled the objective of the meeting, the collection of views on the future cooperation within the Schengen Area in view of the adoption of the Schengen Strategy and a proposal for an amendment to the Schengen Borders Code (SBC). The focus lies on the main challenges facing Schengen, particularly, the current COVID-19 pandemic and the reintroduction of internal border controls by Member States, in some cases exceeding the legal time limits.

#### 2.2. Introduction to the topics

Schengen governance: Following the unsuccessful 2017 proposal for a revision of the SBC, the COVID-19 pandemic made a new approach to Schengen governance necessary. The Commission's **inception impact assessment** for the future of the SBC foresees four options: **1. No changes to the SBC** and the 2017 Recommendation on police cooperation. **2. Adoption of non-legislative measures**, probably a new Recommendation on the use on police checks and the use of new technologies. **3. Legislative amendment of the SBC on alternatives to border control**, particularly on

Article 23, regarding the use of police power. **4. Legislative abolition of internal border controls.**

COVID-19 response: The Schengen Strategy and the amendment to the SBC are also an opportunity to reflect on the COVID-19 response. Given that there is no legal basis for the Commission to act in this field, the Commission's current reaction to the COVID-19 pandemic is based on soft law, i.e. recommendations and guidelines. It is now time to **reflect on a permanent framework for future comparable cases of a common threat** for all Member States, e.g. pandemics.

### 2.3. Exchange of views

#### 2.3.1. NGOs and airport and airline representatives (14.01.2020)

##### A) Schengen governance

Regarding the introduction of internal border controls, one NGO called for **more evidence, particularly on the risk of open borders compared to the costs and the effectivity of internal border controls**. Another NGO underlined the importance of alternatives to internal border controls, holding that Member States sometimes rely on over-policing and securitization of borders. The Commission clarified in this regard that police checks, as alternative measures, may not have a similar effect as border controls.

The human rights NGOs raised **concerns about fundamental rights violations, including push-backs**, at the internal and external borders. Some of them expressly called for a **holistic approach on Schengen and the Common European Asylum System (CEAS)**. One NGO raised concerns regarding the use of bilateral readmission agreements to circumvent the applicable rules, stating that enhanced police checks could aggravate the issue. The Commission clarified that readmission agreements with other Member States are in line with the principle of non-refoulement and recalled the focus of the meeting on the internal dimension of Schengen.

Some NGOs pointed out that a new system requires **safeguards to prevent the undermining of human rights** and freedom of movement in the name of security, including a solid accountability mechanism. The Schengen evaluation mechanism (SchEval) should be strengthened, particularly regarding fundamental rights. Also more involvement of the civil society in SchEval missions at internal borders was requested by one organisation. One NGO pointed out that police checks, as alternative measures, must include the necessary **protection safeguards for persons who express the intention to seek asylum**. Another NGO noted that the **interaction between the SBC and international legal frameworks**, e.g. the law of the seas, must be taken into account. Also concerns about different **data protection** standards were raised, which the Commission clarified referring to the GDPR and the complementarity of data protection and new technologies.

The representatives of airlines and airports **opposed the idea of introducing obligations on carriers to check identity documents**. This would be a delegation of Member States' responsibility on a third party, slow down the processes and incur costs. If any such rules should apply, all types of carriers should be subject to the same measures. One representative underlined the industry's **openness for new technologies, but**

**emphasized that these should be in line with international standards**, e.g. IATA. Possible new elements of the SBC should be integrated into the EES and ETIAS.

#### B) COVID-19 response

The representatives of airlines and airports favoured **more coordination under the Commission to travel restrictions at EU level** (quarantine and testing), a common regime for vaccination and travel and coherence between intra-EU travel and travel into the EU. Given the high impact on airlines and airports, **more information and dialogue** with DG HOME, DG SANTE and DG MOVE would be appreciated. The industry fears that the worst is still ahead (cf. new virus variants, slow vaccination process) and requested forecasts and scenarios for vaccination rates in order to prepare. Furthermore, the elaboration of a specific plan for pandemics/crisis of this magnitude (cf. Council request to DG MOVE for a pandemic plan for freight), and a greater focus on intelligent solutions were proposed. The Commission clarified that the SBC and any possible amendment only applies to the possible reintroduction of checks at internal borders, not to restrictive measures such as quarantining and testing.

The **Commission's guidance on the implementation of asylum in the context of COVID-19** was welcomed by one NGO. Such guidance should also be a key element in future scenarios.

#### **2.3.2. Members of the European Parliament and their representatives (14 January 2021)**

##### A. Schengen governance

Half of those who took the floor **criticised the Commission for not enforcing the current rules on internal border controls properly** and requested stricter enforcement in the future. One participant explicitly asked about the Commission's handling of Member States that refuse to comply, referring to a monitoring mechanism. The Commission explained that the fact that **a considerable number of Member States that previously complied with the rules for decennia now stopped complying suggests that there might be a general inadequacy of the rules** for current challenges. Therefore, initiating infringement procedures might not be the solution, and the Commission needs to consider adapting the rules.

One participant criticised the **time needed to process Schengen evaluations**. The Commission pointed out that the SchEval mechanism is currently under revision and informed about the possibility to comment on the impact assessment until 1 February 2021.

Some participants called for **stricter rules on reintroductions**, particularly stronger justification requirements, a quicker involvement of the Council and a stronger role of the Commission. Another proposal was the **introduction of new safeguards with each prolongation** of internal border controls. Furthermore, the **lack of a common understanding** of border controls and the **necessity of clearer rules** leaving less room for interpretation were raised.

One participant addressed the need for **enhanced police and judicial cooperation**, while another called for more rules on police checks within the territory. Some participants asked for **clarifications regarding the difference of border controls and police checks**. The Commission pointed out that the idea was to offer Member States a stronger legislative basis for the use of police checks at the borders, allowing them to intensify police power instead of reintroducing border controls. Police checks are more flexible and easier to apply while border controls are only related to the crossing of the border.

One participant warned about the **risk of racial profiling in the context of the European databases**.

**Fundamental rights violations and push-backs** at the external and (despite the CEAS and the Dublin rules) internal borders were criticised by one participant, who called for a **coherent system**. The Commission underlined that the rules to comply with fundamental rights when applying the SBC are in place (Article 4 SBC) and that the new screening proposal includes a monitoring mechanism (despite the current opposition of a number of MS).

#### B) COVID-19 response

One participant considered that the **best interest of the whole Schengen area be given more weight** than individual interests of Member States and called for a clarification of the rules and criteria. Another participant considered that, despite some leeway, **MS should bring evidence**, as it is not clear how border controls and travel restrictions have affected or prevented the spread of the virus.

### **2.3.3. Schengen Member States and Schengen Associated Countries (14 January 2021)**

#### A) Schengen governance

A number of Member States expressed **their preference of a holistic approach to Schengen**, including e.g. the external borders, migration and the CEAS. Some Member States also highlighted the dependency of the absence of internal border controls from effective controls at the external border. In this regard, the Commission clarified that the external dimension is subject to the Pact on Migration and Asylum, not to the Schengen Strategy.

There was **broad consensus among Member States against a general abolition of the possibility to reintroduce internal border controls**, holding that **police controls are no alternative**. Some Member States also underlined the need of independency of the decision to reintroduce internal border controls. Given the general rejection of a possible abolition of internal border controls, a considerable number of Member States expressly referred to “additional measures” instead of “alterative measures”, the term used by the Commission. The idea to establish an **intermediate level between internal border controls and their absence**, e.g. in the form of intelligence driven checks police checks at the borders, was in general supported.

Some Member States underlined that **police checks and border controls must be differentiated clearly**. In this regard, also the Commission’s guidance on police checks

was mentioned. Some Member States referred to the **question of feasibility of police checks under their national law**. Also the need for clear rules was addressed. Few Member States suggested focusing on cross-border **police and criminal justice cooperation**. In this regard, the need for sufficient flexibility for regional and bilateral police cooperation was underlined.

A considerable number of Member States asked to **consider the intra-Schengen use of technology currently employed only at the external borders**. Some Member States proposed the **use of API and PNR as well as checks against EU databases at internal borders**. Further proposals included the use of PNR for police checks and intra-EU flights and a feasibility study on the use of PNR for other means of transport. In this context, the Member States underlined that the use of new or additional technologies at the internal borders would need to be in line with EU legislation, particularly the GDPR. Two Member States also proposed to **intensify the exchange of information** at the internal borders similar to the one in place at external borders.

The **Dutch AMIGO Boras System**, a camera system that recognizes license plates and additional risk indicators to identify travellers, was given major attention, with some Member States considering a possible expansion of the system within the Schengen area.

Most of the Member States that addressed **carriers' liability** in their interventions were **generally open** to such possibility, considering that it could contribute to the effectiveness of border controls. Few Member States were more sceptical, arguing that it would pose a disproportional burden to carriers. The necessity of an impact assessment was raised by two Member States.

#### B) Covid-19 response

The Member States acknowledged the overall **good cooperation at EU level**, but recognized that it started too late. While Member States agreed that the cooperation should be further strengthened, they diverged on how it should look like. Both the **ICPR Council and the Commission were considered as suitable coordinating bodies**. The essentiality of common epidemic criteria and regularly ECDC updates on the epidemic situation was also raised.

Another question on which Member States diverged was whether the cooperation should be consolidated into **secondary legislation**. While some Member States favoured a soft law approach, considering the need for flexibility and the different situations of Member States, others would prefer common legislation.

#### **2.3.4. Carriers' representatives (22 January 2021)**

##### A) Schengen governance

The carriers' organisations **welcomed the Commission's recommendations and guidelines related to internal border controls** during the COVID-19 pandemic, particularly on the green lane policy and underlined the **need for common rules** and their **harmonised application**. One representative noted that besides the transport of cargo, carriers also faced problems regarding the repositioning of personnel.

One carriers' representative acknowledged that the **use of technology could facilitate the work of border services**, holding that new technology solutions must be **coordinated by clear rules** and may not lead to delays or increased waiting time. A potential challenge would be the compliance with the GDPR, since not many companies are specialised in storing such data. The Commission pointed out that railway operators already participate in the PNR system of information sharing in some Member States. However, this information could also support police checks, which are currently considered as possible alternative to border controls.

One representative **asked for a clarification on the extent of such liability**. The Commission explained that the concept of carriers' liability regarding external borders is based on the Schengen Convention and obligates carriers to verify if passengers hold the necessary documentation (passport and visa). If carriers fail to carry out such verifications, they can be subject to sanctions, and, if a passenger is refused entry into the Schengen area, need to ensure the return transport. A possible intra-Schengen implementation of carriers' liability would include basic checks of passengers' travel documents. It would not impose any obligations on freight transport operators.

The only representative of passenger transport present was **sceptical about the introduction of an intra-Schengen carriers' liability** and pointed at the necessity to distinguish between different means of transport. **Rail staff has neither the authority nor the equipment to carry out border checks**. As negative example of a comparable obligation, the representative referred to the carriers' obligation in one Member State to check the passengers' compliance with the requirement to have a negative PCR test without the rail staff having the necessary competence nor the means to enforce such obligation. The Commission reminded about the special position of railways in the context of carriers' liability.

#### B) COVID-19 response

Carriers saw a **need for further harmonisation of the COVID-19 response** and the rules governing border controls, particularly on the **interpretation of the term of "essential personnel"**. The term should be interpreted broadly, in line with operational needs, e.g. covering besides pilots also on-board engineers, and in coordination with border and migration authorities and civil aviation organisations. One carriers' representative underlined that such **harmonisation should also cover the neighbouring countries**. Another concern was the **timely information, particularly on upcoming measures** by the MS, also in the view of **liability and passenger rights**.

Various carriers' representatives indicated that it is **difficult to estimate the costs caused by the internal border controls** at this point. The Commission underlined that also data from 2015 onwards, when internal border controls were introduced in response to terror threats and irregular migration would be useful for the Commission's impact assessment.

### **3. PUBLIC CONSULTATION**

In addition, a **public consultation** was carried out. It was launched on 19 January 2021, with the deadline for contributions set at 16 March 2021.



The Commission published the Inception Impact Assessment on its website<sup>128</sup> for four weeks, but only received limited feedback, with four comments only: one from France, one from Croatia, one from Ukraine and one anonymous.

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<sup>128</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12827-Amendment-of-the-Schengen-Borders-Code>.

**Table 1 – Stakeholders’ consultation**

<i>Method of consultation</i>	<i>Stakeholder group</i>	<i>Consultation period</i>	<i>Objective of the consultation</i>
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**Schengen Strategy**

<b><i>1<sup>st</sup> Schengen Forum</i></b>	European Parliament, Member States, European Commission	30 Nov 2020	To obtain support on the strategy main elements
<b><i>Roadmap</i></b>	Public	14 Jan – 5 Feb	
<b><i>Public Consultation</i></b>	Public	19 Jan – 16 Mar	collect feedback from citizens, civil society and other stakeholders

**Revision of the Schengen Borders Code**

<b><i>Inception Impact Assessment</i></b> <sup>129</sup>	Public	8 Jan – 5 Feb 2021	
<b><i>Workshops at technical level</i></b> <i>(measures allowing for a more effective cooperation within the Schengen area)</i>	<ul style="list-style-type: none"> <li>- Member States</li> <li>- European Parliament</li> <li>- Civil Society</li> <li>- Carriers</li> </ul>	<ul style="list-style-type: none"> <li>14 Jan 2021</li> <li>14 Jan 2021</li> <li>14 Jan 2021</li> <li>14 Jan 2021, 22 Jan 2021</li> </ul>	Collect views from different categories of stakeholders
<b><i>Workshop on Integrated Border Management</i></b>	<ul style="list-style-type: none"> <li>- Member States</li> </ul>	25 February 2021	Collect view and exchange best practices
<b><i>Public</i></b>	Wide public	19 January- 16	Collect views

<sup>129</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12827-Temporary-checks-at-internal-borders-amending-the-Schengen-Borders-Code>

<i>Method of consultation</i>	<i>Stakeholder group</i>	<i>Consultation period</i>	<i>Objective of the consultation</i>
<i>consultations</i>		March 2021	

**Analysis of the public consultation “*Communication from the Commission to the European Parliament and to the Council: Towards a stronger and more resilient Schengen Area*”:**

The public consultation “*Communication from the Commission to the European Parliament and to the Council: Towards a stronger and more resilient Schengen Area*” had the objective to collect feedback from citizens, civil society and other stakeholders with view on the adoption of a Strategy on the future of Schengen. During the publication period from 19 January 2021 to 16 March 2021, 157 replies were registered. 99 participants were EU citizens (63.06%), 40 non-EU citizens (25.48%), 6 business associations (3.82%; from Germany, Belgium, Luxembourg and Russia), 4 company/business organisations (2.55%; from Germany, Slovakia, Sweden, Ukraine), 4 public authorities (2.55%; two national authorities/agencies from the Netherlands, two local authorities from Germany and Poland), 2 trade unions (1.27%; from Germany and Spain), 1 academic/research institution (0.64%; from Hungary) and 1 NGO (0.64%; from Belgium).

The public consultation was based on a **questionnaire with 10 multiple choice questions** on the frequency (Q1) of and reasons (Q2) for travel within the Schengen area (before the Covid-19 pandemic), the participants’ view on the Schengen Area being one of the EU’s biggest achievements, being beneficial for social and/or economic reasons and having more advantages than disadvantages (Q3), the need for reinforcement of certain elements of the Schengen framework (Q4), the contribution of these elements to the security of the external Schengen borders (Q5), the EU coordination during the Covid-19 pandemic (Q6), the impact of reintroduced internal border controls on the citizens’ lives (Q7), the substitution of border control through non-systematic alternative measures, such as police checks (Q8), the intensified use of modern technologies with view on their impact on private life (Q9) and the importance of monitoring of the common Schengen rules (Q10). The questionnaire did not include free text fields for additional comments. However, with direct reference to the public consultation, Airport Council International (ACI) Europe and Fragomen Europe Immigration Taskforce send their written considerations by email.

**Results:** With **88.55% (139 replies)**, the large majority of all replies received, was given by participants in their capacity as private persons, of which 71.22% were EU-citizens and 28.78% non-EU citizens. Most answers were received from German (33, 23.74%) and Ukrainian (32, 23.02%) citizens, followed by Slovaks (11, 7.91%) and Italians (10, 6.47%). The reason for the large share of Ukrainian participants is not apparent.

Overall, the most important **reason for travelling** of private persons is tourism (85,61%), followed by family/relationship reasons (43.88%) and business (other than commuting) (35,25%). 14.39% of the responding EU and non-EU citizens are regularly

commuting between Schengen States for study or professional reasons. In general, the reasons for travel in the Schengen Area are comparable for EU-citizens and non-EU citizens with the only exception of commuting between Schengen States for study or professional reasons. The share of commuting non-EU citizens (22.50%) is more than twice as high as the one of commuting EU-citizens (11.11%).

The **great majority of EU and non-EU citizens sees the Schengen Area positive**: 82.01% of the EU and non-EU citizen agree that the Schengen Area is one of the biggest achievements of the EU (12.23% tend to agree), 85.61% consider the Schengen Area as good for economic/social reasons (7.92% tend to agree) and 79.14% consider that the advantages of Schengen outweigh the disadvantages (12.23% tend to agree). All statements were seen slightly more positive by non-EU citizens, who did not at all “disagree” or “tend to disagree” with the proposed positive statements.

With regard to the **development of the Schengen framework**, particularly the elements the participants would like to see reinforced, 82.83% of the EU citizens indicated the coordination in crisis situations, including common threats such as pandemics, 62.63% the removal of obstacles to cross the internal borders, particularly long-lasting reintroductions of internal border controls and 51.52% the control and compliance with the Schengen rules. The replies of the non-EU participants revealed the same pattern, but overall, less non-EU participants attributed importance to the reinforcement of the three proposed elements. 62.59% of the EU and non-EU citizens consider that the implementation of these elements will increase the **security at the external borders**, finally strengthening the Schengen Area (16.55% disagree). Being asked if a **coordination at EU-level of measures applicable at the external borders of the EU in response to common threats** such as a pandemic is beneficial, 90.91% of the EU citizens agreed and only 5.05% disagreed. With 72.50% the share of agreement among non-EU citizens is considerably lower (12.50% disagreement).

41.01% of the participating EU and non-EU citizens affirmed that they have not been affected by **internal border controls**, while 25.18% indicated that they had to wait and their trip was delayed. 38.85% hesitated to travel or decided not to travel due to the internal border controls. The share of Non-EU citizens being unsure about required documents was with 42.50% almost twice as high as the share of EU-citizens (21.21%), which might also have translated into the higher share of Non-EU citizens being hesitant to travel or deciding not to travel (47.50% compared to 35.35%).

72.66% of the EU and non-EU citizens agreed that border controls at internal borders should be substituted, whenever possible, by **non-systematic alternative measures**, such as police checks and modern technologies (14.39% disagree). The share of EU citizens agreeing with the substitution of border controls by alternative measures (74.75%) was slightly higher than the share of non-EU citizens (67.50%). While a clear majority (73.38%) of the private persons did not see problems with automated control measures in the internal border areas, provided that they are reasonably regulated by law and fully respect data protection rules, more than one fourths of EU citizens (25.25%) opposed such measures, considering them as “an unacceptable intrusion” in their private life. Still considerable 12.50% of non-EU citizens shared this view.

Only a slight majority (52.52%) of EU and non-EU citizens fully agreed that a regular and comprehensive **monitoring** of the respect of common rules and standards across the

Schengen area, with the involvement of EU institutions and all countries concerned, is important to ensure and foster trust in the implementation of those rules. Still, 35.97% tend to agree to this statement.

6,37% of the replies (10 replies) were received by **business associations and company/business organisations**. Despite the considerable small number of replies, these reflect a quite uniform point of view. Business associations and company/business organisations **see the Schengen Area very positive**. All participants fully agreed that the Schengen Area is one of the EU's greatest achievements and that the Schengen Area is good for economic/social reasons. Still 90% fully agree that the Schengen Area has more advantages than disadvantages (the remaining 10% tend to agree). While all business associations and company/business organisations travel for professional reasons within the Schengen Area, the share of commuters for business or study reasons is with 40% more than twice as high as for persons responding in private capacity.

All business associations and company/business organisations see a need for **reinforced action in removing difficulties in crossing the internal borders between the Schengen States**, in particular by lifting long lasting reintroductions of border controls at internal borders, 80% for better coordination in crisis situations, including pandemics, and 70% for a reinforced monitoring of the Schengen rules. Overall, the demand for action lies clearly above the one from private persons. Furthermore, contrarily to private persons, the responding businesses attributed greater importance to the removal of long-term difficulties in crossing internal borders as to the crisis coordination at EU level.

The **impact of the reintroduced border controls** hit businesses harder than citizens in their private capacity with **almost all business associations and company/business organisations having suffered either from delays when transporting goods across the borders (60%) or from other reasons (60%)**. 50% of the participants had to wait and were impacted by delayed trips. Moreover, the share of participants being hesitant to travel or deciding not to travel, was with 80% more than twice as high for business associations and company/business organisations as for private persons. Furthermore, 70% of the participating business associations and company/business organisations were unsure regarding the documents needed to cross the border. The huge impact of the border controls on businesses is reflected by the business associations' and company/business organisations' view on **alternative measures**: 80% would favour non-systematic alternatives to border checks and no business association or company/business organisation would oppose automated control measures in the internal border areas, provided they are reasonably regulated by law fully respecting data protection rules..

Furthermore, 90% of the business associations and company/business organisations considered the coordination at EU-level of measures applicable at the **external borders of the EU** in response to common threats such as a pandemic as beneficial.

While only 40% of the business associations and company/business organisations fully agree on the importance of the monitoring of the respect of common rules and standards across the Schengen area for the trust in the implementation of these rules and standards, the remaining majority still tends to agree.

The data received by the public authorities, trade unions, the academic/research institution and the NGO mirrored this positive image of Schengen. Due to the very low

number of participants (1 to 4, which equals between 0.66% and 2.55% of all replies) and the subsequent lack of comparable data, the data received is not analysed in detail.

Overall, the public consultation shows:

- The **Schengen Area is in general perceived very positively**, as well by EU and non-EU citizens as by businesses and other stakeholders. Businesses tend to see the advantages as well as the remaining challenges of Schengen more clearly than private persons.
- **Businesses are more impacted by internal border controls** than private persons with **almost all responding business having suffered from the consequences of internal border controls**. To some extent, this might also be linked to a greater share of businesses relying on cross-border commuting (40%).
- While **business are very open to the use of alternative measures to border control**, such as the use of new technologies, **a considerable share of private persons (21.58% of all participants in private capacity and even 25.25% of EU citizens) is concerned about the impact such measures would have on their privacy**.
- Particularly businesses see a clear need for development of the Schengen framework. **All consulted businesses hold that more action is required regarding the lifting of long-lasting border controls** (vs. 62.63% of private persons). While private persons attributed more importance to the coordination of crisis response, e.g. in pandemics, the majority (62.63%) still considered that there is a need of reinforced action to remove barriers to border crossings at the internal borders.

Outside the direct scope of the public consultation, but in response to it, two contributions were received by email.

**Airport Council International (ACI) Europe** considers that a revision of the Schengen Borders should give the Commission the necessary tools and powers to ensure that restrictions of the free movement of persons are only introduced as last resort measure, are limited in time and proportionate. More specifically, ACI Europe points at the additional costs of conducting separated border controls for passengers on Schengen-internal flights, as it is currently required, highlighting that airports are not designed to accommodate such a second category of border checks on a permanent basis. Therefore, ACI Europe suggests that a legislative amendment of the Schengen Borders Code should, in the case of reintroduced internal border control, allow passengers on Schengen-internal flights to follow a common flow and common border control together with passengers on international flights.

The **Fragomen Europe Immigration Taskforce** points at difficulties, business travellers face when entering the Schengen Area and suggests the introduction of unified visa application procedures, additional guidance by the EU regarding the exemption of business travellers from Covid-19 related travel restrictions, particularly the introduction of a uniform confirmation document for business travel, which should reduce the

discretionary power by the Member States' consulates and border guards to establish if a business trip is considered as essential travel, and the introduction of a simplified short-term visa application process for frequent business travellers into the Schengen Area. These suggestions concern the visa policy as well as the modalities regarding restrictions of the freedom of movement under Union law, which are not subject to the considered options for the development of the Schengen Borders Code.

### ANNEX 3: WHO IS AFFECTED AND HOW?

#### 1. PRACTICAL IMPLICATIONS OF THE INITIATIVE

The initiative concerns managing exceptional and crisis situations. Therefore, the proposal has a capacity to affect the following stakeholders:

- Member States (Public Authorities, Border Guards, Police);
- EU institutions (European Parliament, Council and Commission);
- EU citizens and other persons residing in the Schengen area, in particular in the cross-borders regions;
- Carriers

The immediate effect of the proposal could be visible in the cross-border areas, should the national authorities decide to lift current checks at internal borders.

#### 2. SUMMARY OF COSTS AND BENEFITS

<i>I. Overview of Benefits (total for all provisions) – Preferred Option</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Reducing hurdles to persons and goods moving in the Schengen area	<p>Citizens and other authorised persons can move freely in the Schengen area without unnecessary hurdles without being subject to the long-lasting border checks in response to abstract threat or border checks reintroduced as a first aid measure</p> <p>Exact data not available –benefits largely correspond to savings in terms of time spent when crossing the internal borders</p>	<p>This will allow for truly achieving one of the objectives set out in the Treaty on European Union:</p> <p><i>Article 3(2) The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime</i></p>
<i>Indirect benefits</i>		
Reviving cross-border labour market	Exact data not available	Benefits will result from saving of time for the cross-border workers, reduction of risk of absenteeism and avoiding that workers get reluctant to seek cross-border employment (business perspective)
Reviving Single Market	Exact data not available	Undisturbed supply chains, taking full potential of cross-border



		exchange and consumption
Limiting the costs related to the lack of predictability in the crisis situation	Exact data not available	Business and self-employed may expect minimum standards and common rules to apply also in the crisis situation.  Carriers may expect uniform rules applicable with regard to carriers liability at the external borders in relation to the application of travel restriction for non-essential travel to the EU by the third country nationals

<b>II. Overview of costs – Preferred option</b>							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
<b>Contingency planning for Schengen (including the rules on mitigating measures)</b>	Direct costs	-	-	-	-	-	-
	Indirect costs	-	-	-	-	-	-
<b>Reintroductions of border checks are truly last resort measure; other compensatory measures are privileged</b>	Direct costs	-	-	-	-	-	Costs of preparation of risk assessment and regular reporting
	Indirect costs	-	-	-	-	-	
<b>Uniform application of travel restrictions at the external</b>	Direct costs	-	-	-	-	-	-
	Indirect costs	-	-	-	Limitation of prospects for tourist	-	-

<b>borders</b>					destinations relying on third country nationals		
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## ANNEX 4: RELEVANT INPUTS AND STUDIES

CM2011Meijers Committee Recommendations for a new Strategy on the Future of Schengen November 2020

Ref. Ares(2020)720051 6 - 30/11/2020

The European Commission emphasizes in its new Pact on Migration and Asylum that effective management of EU external borders is a key element of a Schengen area without internal borders. To ensure a 'well-functioning Schengen area', the Commission announces, in section 4.4, the presentation of a new Strategy on the future of Schengen, including 'initiatives for a stronger and more complete Schengen'. In this contribution, the Meijers Committee focuses on four subjects which need further development in this new strategy:

1. The temporary reintroduction of internal border controls.
2. The Schengen evaluation mechanism.
3. Controls in the territory.
4. The enlargement of the Schengen area.

Ref. 1. Temporary reintroduction of internal border controls

In response to refugee and migration flows in 2015 and 2016, but also in reaction to terrorist attacks in several European cities, Member States have repeatedly reintroduced internal border controls, with reference to the provisions of the Schengen Borders Code (SBC). Since 2015, these controls have been extended several times. This has resulted in a quasi-permanent reintroduction of controls at parts of the internal borders. In 2020, the COVID-19 pandemic triggered both the reintroduction of new internal border controls, as well as the prolongation of existing internal border controls.

This practice undermines the essence of the Schengen space as an area without internal border controls, provided for in Article 3(2) TEU, Article 67(2) TFEU and the provisions of Protocol (No 19) on the Schengen acquis. It is also in clear contravention of the provisions of the SBC that regulate in secondary law the exceptions to the absence of border controls. These provisions emphasize that the reintroduction of internal border controls is only allowed as a measure of last resort and of a temporary nature and if necessary to counter threats to public policy or internal security, respecting the principle of proportionality.

This note is part of a series of the Meijers Committee commenting on the Commission's New Pact on Migration and Asylum, COM(2020) 609 final. Please find all our comments on [www.commissie-meijers.nl](http://www.commissie-meijers.nl).

Notwithstanding legitimate concerns of the Member States for public policy or internal security, and more recently public health, the extent and duration of the reintroduction of internal border controls is neither proportionate nor necessary. In addition, the Court of Justice of the European Union (CJEU) has clearly held that a Member State cannot simply invoke Article 72 TFEU, without proving that recourse to that article is necessary for the exercise of its responsibilities for the maintenance of law and order or internal security. With respect to Article 4(2) TEU, the CJEU has held that the reference to national security goes beyond objectives of combating crime in general, even serious

crime, and of safeguarding public security. Threats to national security can be distinguished, by their nature and particular seriousness, from the general risk that tensions or disturbances, even of a serious nature, affecting public security will arise.

The Meijers Committee regrets that there are no (publicly) available reports informing the Council and Parliament, and no Commission opinions on the reinstatement of internal border controls, as required under Article 33 SBC. The Commission should provide the necessary information which allows other Member States, the EU institutions and the general public to monitor compliance of the reinstatement of controls at the internal borders with Union law.

Furthermore, the Meijers Committee regrets the lack of enforcement action by the Commission. This has resulted in legal uncertainty for Union citizens and third-country nationals alike, as well for national administrative and judicial authorities. This is evidenced by the preliminary reference of the Austrian Landesverwaltungsgericht Steiermark on the reintroduction of controls at the Austrian internal borders. The Meijers Committee stresses that the enforcement of EU law in a core area of European integration is too important to be left to private persons in individual cases.

Finally, in relation to the recent reinstatement of border controls by different Member States in response to the COVID-19 pandemic, the Meijers Committee notes that the SBC lacks an explicit legal basis for the reintroduction of border controls on the ground of public health.

In light of the above, the Meijers Committee urges that a new Strategy on the future of Schengen clarifies the rules for the reinstatement of controls at the internal borders and amends the SBC to this effect.

### Recommendations

- Exhaustively regulate the rules and procedures for the temporary reintroduction of internal border controls.
- List and define in more detail the possible grounds for the reintroduction of internal border controls.
- Add 'public health' as a ground for the reintroduction of internal border controls, applying the definition as provided in Article 2(21) SBC and referring to the WHO list of infectious or contagious parasitic diseases.
- Provide for a special procedure in case of prolonged threats to public order, national security or public health, and to include in this procedure:
  - sufficient safeguards to ensure that the reintroduction of internal border controls does not go beyond what is absolutely necessary;
  - the obligation for Member States to submit, after an initial period of reintroduction of border controls, a motivated request to the Commission for further prolongation;

- the obligation for a Member State to, after a fixed number of prolongations of internal border controls, submit a motivated request to the Council for further prolongation, subject to (reverse) qualified majority voting.

- Clearly state whether and if so under what conditions different grounds for the reintroduction of internal border controls may be applied cumulatively and consecutively.
- Clearly define the monitoring and information obligation of the Commission and Member States concerned, including a clear time frame.
- Make clear that controls within the territory of a Member State are to be given priority over the reinstatement of internal border checks.

## Ref.2 Schengen Evaluation Mechanism

The Meijers Committee welcomes the further development of the Schengen Evaluation Mechanism (SEM) to ensure the correct and full implementation of Schengen rules and to strengthen mutual trust between Member States. Effective implementation and enforcement of the Schengen rules is key to the confidence and success of the area without internal border controls.

The Meijers Committee encourages the Commission to make the results of the review of Council Regulation (EU) No 1053/2013 based on Article 22 of that Regulation publicly available. Already at this stage, based on the experience in practice with the current mechanism, it wishes to put forward a number of suggestions for improvement.

### Recommendations

- Include a general evaluation per Member State of compliance with the Schengen acquis rather than on selected topics only.
- Improve the overall transparency of the SEM, with due respect for sensitive information.
- Incorporate fundamental rights compliance and involve the Fundamental Rights Agency.
- Enable the Commission to determine the composition of the evaluation teams.
- Include EU experts from relevant bodies and agencies in evaluation teams, in addition to Commission and Member State experts, such as Frontex, as well as an independent expert appointed by the European Parliament.
- Allow evaluation teams to be allowed to pay unannounced on-site visits to Member States, instead of having to give a 24-hour notice as is currently required.
- Improve the follow-up to the findings of the SEM by providing for shorter and clearer deadlines on the evaluators and the Member States being evaluated.
- Empower the Commission rather than the Council to adopt recommendations on the basis of evaluations.

- Facilitate access of individual Members of the European Parliament to the evaluation reports. Ensure that the Commission informs both the Council and the European Parliament of the findings of the evaluation teams, as well the recommendations based thereon.
- Ensure that the Commission makes the findings of the evaluation teams, as well as the recommendations based thereon, publicly available, with due respect for sensitive information.

### Ref. 3 Checks within the territory

Both in the New Pact on Migration and Asylum and in the Communication on the approach for restoring the freedom of movement and lifting internal border controls in relation to COVID-19, the Commission points at the use of 'controls based on risk assessment or local police measures' as a viable alternative to internal border controls.<sup>130</sup> It also refers to the use of 'new technology and smart use of IT interoperability' to make controls 'less intrusive'.<sup>131</sup> These proposals are in line with earlier recommendations and guidelines.<sup>132</sup>

The Meijers Committee emphasizes that the use of police checks and new technologies should not result in restrictions to travel for EU citizens and third-country nationals within the Schengen territory, since this would undermine the very goal of the Schengen cooperation: seamless travel within an area without internal border controls. Interoperability, or the interlinked usage of EU large-scale databases (SIS, Eurodac, VIS, EES, ETIAS and ECRIS-TCN) and the access to law enforcement authorities to administrative data on third-country nationals, coupled to new technologies of biometrics and surveillance, may result in a 'multiplication of borders', meaning that persons may be controlled at any time at any place: at the external borders, but also within the territory.

Furthermore, the application of police controls within the Schengen area should be in full compliance with national and European data protection standards and non-discrimination legislation. The discretionary powers of police and immigration authorities inside the territory and within internal border areas, combined with the possibility to check aforementioned data systems, creates a risk that third-country nationals or those considered to be, putatively or by Union law,<sup>133</sup> will be more often stopped for identification and comparison of their (biometric) data. Consequently, they may be confronted with disproportionate or arbitrary barriers of entry, expulsion, or law enforcement measures. Research carried out in the Dutch border area identified a clear

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<sup>130</sup> COM(2020) 609 final, p. 15 and C(2020) 3250 final, p. 10.

<sup>131</sup> COM(2020) 609 final, *ibid*

<sup>132</sup> Recommendation (EU) 2017/820 of 12 May 2017 and Annex to COM(2012) 230 final.

<sup>133</sup> This risk will increase if the EU maintains or introduces rules similar to Article 2 of Regulation 2019/816, stating that certain Union citizens should be treated as third-country nationals, see our earlier comments CM1710, CM1711 and CM1812, available at [www.commissie-meijers.nl](http://www.commissie-meijers.nl). See also Bast, J. et al, Human Rights Challenges to European Migration Policy (REMAP study), October 2020, p. 108, <http://www.migrationundmenschrechte.de/kontext/controllers/document.php/19.c/9/52276f.pdf>.

risk of discrimination and racial profiling by police and border guards when controlling individuals during mobile spot checks.<sup>134</sup>

In earlier comments, the Meijers Committee has expressed its concerns with regard to the use and possible discriminatory effects of large-scale databases such as SIS, VIS, ETIAS and ECRIS-TCN, and the framework of interoperability, not only at the external borders but also within the Schengen territory.<sup>135</sup> In this regard, the Meijers Committee refers to the report on the use of digital border technologies by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance published in November 2020. In this report, the Rapporteur expresses her concerns about the discriminatory and exclusionary effects of these digital technologies without necessary human rights safeguards. The report also describes how these measures are deployed to advance existing racially discriminatory and xenophobic ideologies, in part due to wide-spread perception that migrants and refugees are to be considered as per se threats to security.<sup>136</sup>

The CJEU has in a series of cases circumscribed the discretionary power of the Member States to exercise border controls in its territory.<sup>137</sup> Nevertheless, questions remain as regards the role of private companies in carrying out checks on behalf of the Member States. In the *Touring Tours* case these checks were equated with controls within the Member States. However, this does not do justice to the specificity of these controls, being carried out by private operators in another Member State than the one that prescribes these controls.

The Meijers Committee recommends a better regulation and delimitation of police powers of the Member States in border areas. Importantly, these controls should be carried out in full compliance with EU law, including respect for fundamental rights and freedoms. To this effect the Commission should submit proposals, either of a legislative nature or in the form of guidelines.

### Recommendations

- Further define the notion of 'checks within the territory', to delineate them from border controls.
- Further regulate the conditions under which 'checks within the territory' can take place in border areas.

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<sup>134</sup> Van der Woude, M. and Van der Leun, J., 'Crimmigration checks in the internal border areas of the EU: finding the discretion that matters', *European Journal of Criminology* 2017 14 (1), p. 27-45.

<sup>135</sup> See our earlier comments CM1802 (interoperability) and CM1902 (ECRIS-TCN), available at [www.commissie-meijers.nl](http://www.commissie-meijers.nl).

<sup>136</sup> UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report A/75/590, November 2020, <https://www.ohchr.org/EN/newyork/Documents/A-75-590-AUV.docx>

<sup>137</sup> *Melki & Abeli*, joined cases C-188/10 and C-189/10; *Adil*, case C-278/12 PPU and A. (*Europabrücke*), case C- 9/16.

- Specify that, to the extent to which police controls take place in border areas and are aimed at the prevention of irregular migration or illegal border crossing, the Charter of Fundamental Rights applies.
- Codify the guidance provided by the case law of the CJEU and specify more clearly what is required in terms of intensity, frequency and selectivity to distinguish police controls from border controls.
- Regulate the position of private companies when obliged to carry out controls within the territory on behalf of the Member States.
- Prevent racial profiling, invasive checks, and the abuse of discretion by requiring national authorities to develop guidelines, training programs, accessible complaint mechanisms and a system of consistent monitoring and evaluation of controls taking place within border areas.
- Ensure access to effective judicial protection for individuals with regard to actions and decision-making based on foreign SIS alerts or risk assessment, but also information as stored in other EU databases, as Eurodac, VIS, ETIAS, and ECRIS-TCN, not only at the external borders but also within the territory, including internal border areas.
- Ensure that any use of technological means complies fully with applicable national and EU data protection and non-discrimination legislation.

#### 4. Enlargement of the Schengen Area

A new Strategy on the future of Schengen will need to address the position of Schengen candidate countries, i.e. those Member States that have acceded to the European Union, but in relation to whom there has not yet been a Council Decision taken to lift internal border checks.

Already, the Schengen evaluation mechanism plays an important role in the assessment of the readiness of the Schengen candidate countries. This role could be reinforced. Currently there are four Member States that have been declared technically ready by the Commission to join the Schengen area. A number of Member States has however blocked the adoption of a unanimous Council Decision that would allow for full accession to the Schengen area, based on political concerns in relation to the respect for the rule of law and corruption in the Member States concerned.

The Meijers Committee would like to point out that despite resolutions from the European Parliament calling for an end to this situation, the exclusion of these countries from the Schengen area continues to this very day.<sup>138</sup> The extended stay of these countries in the 'Schengen waiting room' has a number of undesirable consequences.

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<sup>138</sup> European Parliament Resolution of 11 December 2018 (P8\_TA(2018)0497) and of 13 October 2011 (P7\_TA(2011)0443).



The current situation leads to a de facto dual external border, a duplication of border controls, and the primacy of security measures over facilitating borderless travel in Europe. Schengen candidate countries have increasingly been allowed to participate in Schengen developing measures, notably the interoperability initiative, without benefitting from the lifting of internal border checks. This means that a number of Member States, their citizens and the third-country national legally present in their territory, are denied the benefits of the objective laid down in primary law, namely the establishment of an area without internal borders.

Schengen candidate countries guard their external borders in line with EU standards, including the relevant parts of the SBC, and are assisted in doing so by the European Border and Coast Guard Agency (Frontex). The CJEU has made it clear that participation in measures related to the external borders presupposes participation in the underlying Schengen rules, more specifically the lifting of checks at the internal borders.

Finally, this situation creates considerable uncertainty as to the legal regime that is applicable at the external borders of the Member States that fully participate in Schengen and border a Schengen candidate country, given that internal and external borders have been defined as mutually exclusive.

### Recommendations

For this reason, the Meijers Committee recommends that a new Strategy on the future of Schengen includes:

- Clear rules governing the accession to the Schengen area once a candidate Member State has acceded, comparable to the Copenhagen criteria for accession to the European Union itself.
- A path towards accession for the current Schengen candidate countries, based upon binding rules and strict conditionality.
- A clearly defined role for a revised Schengen evaluation mechanism and the vulnerability mechanism under the European Border and Coast Guard Regulation (Article 13) in order to access independently and objectively fulfillment of the criteria for accession to Schengen.
- Clarification in the SBC as to the applicable legal regime at the at the external borders of a Member State fully participating in Schengen and the external borders of a Schengen candidate country.

### 5. Concluding remarks on recent developments

Finally, the Meijers Committee would like to briefly comment on the call put forward in November 2020 by the French President Macron for a reform of the Schengen area and closer cooperation in the area of internal security.

The Schengen flanking measures have always had a dual nature. On the one hand they comprise measures regulating visa, borders, migration and asylum, on the other they concern police cooperation and judicial cooperation in criminal matters. Although both deserve to be included in a new Strategy for the future of Schengen, it should be

emphasized that the primary objective of both types of flanking measures has always been to facilitate free travel and lift internal border controls.

Although Member States may have legitimate concerns of public order and national security, it is highly doubtful that these can be addressed through the return of internal border controls. Border controls have a highly symbolic value, but are seldomly the most effective means in the fight against terrorism and organised crime, as the recent terror attacks taking place in Vienna and Paris have sadly shown. These attacks took place despite the existence of controls at the internal borders. In this regard much more emphasis should be placed on effective cooperation between law enforcement staff and the accurate and timely exchange of information, which, however should at all times respect the basic principles of criminal justice and fundamental rights.

As regards the call for a reinforcement of the external borders, the Meijers Committee recalls that a recent amendment to the founding Regulation of Frontex has already significantly reinforced the powers of this agency in the field of border management and return. It is submitted that all efforts should be on the implementation of this new mandate, and that no further legislative changes should be proposed before a thorough evaluation of the new legal framework has been carried out.

Costs of non-Schengen: Directorate-General for Internal Policies Policy Department A: Economic and Scientific Policy, European Parliamentary Research Service European Added Value Unit, PE 578.974-May 2016: “Cost of non-Schengen: the impact of border controls within Schengen on the Single Market”, requested by the European Parliament's Committee on Internal Market and Consumer Protection.



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## ANNEX 5: CONCLUSIONS OF THE CHAIR – SCHENGEN FORUM 30 NOVEMBER 2020

Schengen is one of the biggest achievements of European integration and is cherished by European citizens. Schengen has been seriously put to the test this year in particular and Member States have the responsibility to rebuild trust in the area of freedom, security and justice and ensure that citizens can fully reap the benefits. A strong Schengen area is essential for the well functioning of the internal market and for the post-Covid economic recovery. The following six conclusions can be drawn from the 1<sup>st</sup> Schengen Forum:

1. The Schengen Forum highlighted the need for **joint action** in a number of areas to strengthen the political and operational governance of the Schengen area so as to make it more efficient, more resilient and reinforce mutual trust. Targeted technical consultations will take place over the coming months in order to further deepen the issues raised during the Forum and a 2<sup>nd</sup> Schengen Forum will be organised in Spring 2021, ahead of the adoption by the Commission of a new Schengen Strategy.
2. On the specific issue of **external borders**, the Forum discussions highlighted the need to focus on the implementation of 1/ the new IT-architecture and interoperability of the external border management systems; and 2/ the standing corps of the European Border and Coast Guard. The implementation of both these elements requires strong political support as well as adequate human and financial resources. There is also a need to reinforce procedures to ensure that nobody enters the EU territory without being checked.
3. Concerning the **Schengen evaluation mechanism**, the importance of increasing its effectiveness and efficiency was noted so as to bring concrete improvements on the ground and increase trust. The Commission's five year report, the study recently published by the European Parliament and the outcomes of the Forum will all feed into the forthcoming legislative initiative to revise the legal framework.
4. As regards **crisis management**, we need a contingency plan to neutralise or at least limit the risk that possible future crises may again disrupt the area of free movement. It is important to react in a quick and coordinated manner whenever a serious crisis calls for it. The EU needs to have strong rules and procedures in place to handle such situations.
5. As regards **controls at internal borders**, the Forum underlined that these must be truly measures of last resort. Existing controls need to be lifted as soon as possible. In order to do so successfully, current **alternative measures** should be reinforced and additional ones should be considered: reinforcing police cooperation in the Union and exchanging relevant data between law enforcement authorities were some of the key measures mentioned. The best use of new technologies must be ensured for the protection of our citizens and for the facilitation of travel. Existing technologies should be applied to their full and additional joint work in the area of

security research is desirable. Technologies must of course be managed in a transparent manner and in a manner compatible with data protection rules.

6. The EU should **update its legal framework** which is today no longer fully fit for purpose. The current legal rules applicable to the management of the external borders and to the temporary reintroduction of controls at the internal borders should be reviewed taking into account the lessons learnt. A legislative initiative revising the Schengen Borders Code will be presented in this respect.

**ANNEX 6: LIST OF REINTRODUCED BORDER CHECKS AT INTERNAL BORDERS**

**Member States' notifications of the temporary reintroduction  
of border control at internal borders  
pursuant to Article 25 and 28 *et seq.* of the Schengen Borders Code**

NB	Member State	Duration	Reasons/Scope
293	Denmark	12/05/2021-11/11/2021	Terrorist threats, organized criminality threats, Coronavirus COVID-19; to be determined but may concern all internal borders
292	Germany	12/05/2021-11/11/2021	Secondary movements, situation at the external borders; land border with Austria
291	Austria	12/05/2021-11/11/2021	Secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia
290	Norway	11/04/2021-10/05/2021	Coronavirus COVID-19; all internal borders
289	Hungary	08/04/2021-18/04/2021	Coronavirus COVID-19; all internal borders
288	Portugal	01/04/2021-15/04/2021	Coronavirus COVID-19; internal border with Spain
287	France	01/05/2021-31/10/2021	Continuous terrorist threat, secondary movements, Coronavirus COVID-19; all internal borders
286	Spain	06/04/2021-16/04/2021	Coronavirus COVID-19; land border with Portugal
285	Germany	01/04/2021-14/04/2021	Coronavirus COVID-19; internal borders with the Czech Republic
284	Belgium	02/04/2021-18/04/2021	Coronavirus COVID-19; all internal borders
283	Finland	01/04/2021-30/04/2021	Coronavirus COVID-19; all internal borders except the border with Iceland
282	Iceland	28/03/2021-16/04/2021	Coronavirus COVID-19; all internal borders

281	Hungary	29/03/2021-07/04/2021	Coronavirus COVID-19; all internal borders
280	Austria	30/03/2021-28/04/2021	Coronavirus COVID-19; borders with the Slovak Republic and the Czech Republic
279	Hungary	22/03/2021-28/03/2021	Coronavirus COVID-19; all internal borders
278	Iceland	18/03/2021-27/03/2021	Coronavirus COVID-19; all internal borders
277	Belgium	27/03/2021-01/04/2021	Coronavirus COVID-19; all internal borders
276	Belgium	18/03/2021-26/03/2021	Coronavirus COVID-19; all internal borders
275	Germany	18/03/2021-31/03/2021	Coronavirus COVID-19; land and air border with the Czech Republic, air border with Austria
274	Portugal	17/03/2021-31/03/2021	Coronavirus COVID-19; internal border with Spain
273	Norway	12/03/2021-10/04/2021	Coronavirus COVID-19; all internal borders
272	Spain	16/03/2021-06/04/2021	Coronavirus COVID-19; land border with Portugal
271	Hungary	16/03/2021-21/03/2021	Coronavirus COVID-19; all internal borders
270	Finland	19/03/2021-17/04/2021	Coronavirus COVID-19; all internal borders except the border with Iceland
267	Germany	04/03/2021-17/03/2021	Coronavirus COVID-19; land and air border with the Czech Republic, air border with Austria
266	Portugal	02/03/2021-16/03/2021	Coronavirus COVID-19; internal border with Spain
265	Belgium	26/02/2021-17/03/2021	Coronavirus COVID-19; all internal borders
264	Hungary	28/02/2021-15/03/2021	Coronavirus COVID-19; all internal borders
263	Spain	01/03/2021-16/03/2021	Coronavirus COVID-19; land border with Portugal

262	Austria	28/02/2021- 29/03/2021	Coronavirus COVID-19; borders with the Slovak Republic and the Czech Republic
261	Germany	24/02/2021- 03/03/2021	Coronavirus COVID-19; land and air border with the Czech Republic, air border with Austria
260	Finland	22/02/2021- 18/03/2021	Coronavirus COVID-19; all internal borders except the border with Iceland
259	Portugal	10/02/2021- 01/03/2021	Coronavirus COVID-19; internal border with Spain
258	Germany	14/02/2021- 23/02/2021	Coronavirus COVID-19; land and air border with the Czech Republic, air border with Austria
257	Spain	10/02/2021- 01/03/2021	Coronavirus COVID-19; land border with Portugal
256	Norway	10/02/2021- 12/03/2021	Coronavirus COVID-19; all internal borders
255	Belgium	06/02/2021- 25/02/2021	Coronavirus COVID-19; all internal borders
254	Austria	08/02/2021- 27/02/2021	Coronavirus COVID-19; borders with the Slovak Republic and the Czech Republic
253	Portugal	31/01/2021- 09/02/2021	Coronavirus COVID-19; internal border with Spain
252	Spain	31/01/2021- 10/02/2021	Coronavirus COVID-19; land border with Portugal
251	Hungary	29/01/2021- 27/02/2021	Coronavirus COVID-19; all internal borders
250	Belgium	27/01/2021- 05/02/2021	Coronavirus COVID-19; all internal borders
249	Finland	27/01/2021- 25/02/2021	Coronavirus COVID-19; all internal borders, since 15/02/2021 all internal borders except the border with Iceland
248	Austria	19/01/2021- 07/02/2021	Coronavirus COVID-19; borders with the Slovak Republic and the Czech Republic
247	Austria	09/01/2021- 18/01/2021	Coronavirus COVID-19; borders with the Slovak Republic and the Czech Republic
246	Finland	11/01/2021- 09/02/2021	Coronavirus COVID-19; all internal borders

245	Hungary	30/12/2020-28/01/2021	Coronavirus COVID-19; all internal borders
244	Finland	14/12/2020-12/01/2021	Coronavirus COVID-19; all internal borders
243	Hungary	30/11/2020-29/12/2020	Coronavirus COVID-19; all internal borders
242	Finland	23/11/2020-13/12/2020	Coronavirus COVID-19; all internal borders
241	Austria	12/11/2020-11/05/2021	Secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia
240	Norway	12/11/2020-09/02/2021	Coronavirus COVID-19; all internal borders
239	Finland	11/11/2020-22/11/2020	Coronavirus COVID-19; all internal borders
238	Hungary	31/10/2020-29/11/2020	Coronavirus COVID-19; all internal borders
237	Germany	12/11/2020-11/05/2021	Secondary movements, situation at the external borders; land border with Austria
236	Norway	12/11/2020-11/05/2021	Terrorist threats, secondary movements; ports with ferry connections to Denmark, Germany and Sweden
235	Norway	13/10/2020-11/11/2020	Coronavirus COVID-19; all internal borders
234	Denmark	12/11/2020-11/05/2021	Terrorist threats, organized criminality threats, Coronavirus COVID-19; to be determined but may concern all internal borders
233	Sweden	12/11/2020-11/05/2021	Terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders
232	France	01/11/2020-30/04/2020	Terrorist threats, situation at the external borders: all internal borders
231	Finland	12/10/2020-10/11/2020	Coronavirus COVID-19; all internal borders
230	Finland	18/09/2020 – 18/10/2020	Coronavirus COVID-19; borders with Lithuania and Poland



229	Finland	18/09/2020 18/10/2020	–	Coronavirus COVID-19; borders with Iceland, Norway, Sweden, Germany, Slovakia, Estonia
228	Norway	14/9/2020 13/10/2020	–	Coronavirus COVID-19: all internal borders
227	Hungary	30/9/2020 30/10/2020	–	Coronavirus COVID-19: all internal borders
226	Finland	18/09/2020 18/10/2020	–	Coronavirus COVID-19; borders with Austria, Belgium, Switzerland, Czech Republic, Denmark, Greece, Italy, Hungary, Spain, France, Luxembourg, The Netherlands, Malta, Portugal, Sweden, Slovenia
225	Hungary	01/09/2020- 30/9/2020		Coronavirus COVID-19: to protect public health, all internal borders
224	Finland	24/08/2020- 18/09/2020		Coronavirus COVID-19; borders with Austria, Belgium; Switzerland, Czech Republic, Germany, Denmark, Spain, France, Iceland, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Sweden, Slovenia
223	Norway	14/08/2020- 13/09/2020		coronavirus COVID-19; internal air, land and sea borders
222	Lithuania	16/08/2020- 14/09/2020		coronavirus COVID-19; internal air and sea borders
221	Finland	10/08/2020- 08/09/2020		coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden, Czechia, Austria, Slovenia and Switzerland
220	Finland	27/07/2020- 25/08/2020		coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden, Czechia, Austria, Slovenia and Switzerland
219	Lithuania	17/07/2020- 15/08/2020		coronavirus COVID-19; internal air and sea borders
218	Finland	15/07/2020- 11/08/2020		coronavirus COVID-19; borders with Spain, Luxembourg, Portugal, Poland, France, Sweden and Czechia
217	Spain	21/06/2020- 30/06/2020		coronavirus COVID-19; borders with Portugal
216	Portugal	16/06/2020- 30/06/2020		coronavirus COVID-19; land border with Spain

215	Germany	16/06/2020-21/06/2020	coronavirus COVID-19; air borders with Spain (lifting the controls reintroduced on the basis of coronavirus at the borders with Austria, Switzerland, France, Denmark and Italy as of 15 June 2020)
214	Iceland	16/06/2020-22/06/2020	coronavirus COVID-19; all internal borders
213	Finland	15/06/2020-14/07/2020	coronavirus COVID-19; all internal borders, except borders with Norway, Denmark, Iceland, Estonia, Latvia and Lithuania
212	Lithuania	17/06/2020-16/07/2020	coronavirus COVID-19; internal air and sea borders (lifting the border controls at the land border with Poland as of 12 June 2020)
211	Switzerland	09/06/2020-15/06/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
210	Czechia	14/06/2020-30/06/2020	coronavirus COVID-19; all internal air borders (lifting the border controls at the internal land borders as of 5 June 2020)
209	Spain	08/06/2020-21/06/2020	coronavirus COVID-19; all internal borders
208	Iceland	04/06/2020-15/06/2020	coronavirus COVID-19; all internal borders
207	Belgium	09/06/2020-14/06/2020	coronavirus COVID-19; all internal borders
206	Austria	01/06/2020-15/06/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
205	Lithuania	01/06/2020-16/06/2020	coronavirus COVID-19; land border with Poland, sea borders, air borders
204	Slovakia	28/05/2020-26/06/2020	coronavirus COVID-19, all internal borders
203	Spain	24/05/2020-07/06/2020	coronavirus COVID-19; all internal borders
202	Estonia	18/05/2020-16/06/2020	coronavirus COVID-19; internal air and sea borders (lifting the border controls at the internal land borders as of 15 May 2020)
201	Iceland	14/05/2020-03/06/2020	coronavirus COVID-19; all internal borders

200	Germany	16/05/2020-15/06/2020	coronavirus COVID-19; land and air borders with Austria, Switzerland, France, Denmark, Italy and Spain, sea border with Denmark;
199	Portugal	15/05/2020-15/06/2020	coronavirus COVID-19; land border with Spain
198	Spain	15/05/2020-24/05/2020	coronavirus COVID-19; all internal sea and air borders
197	Poland	14/05/2020-12/06/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
196	Slovakia	08/05/2020-27/05/2020	coronavirus COVID-19, all internal borders
195	Hungary	12/05/2020-11/11/2020	coronavirus COVID-19; all land and air borders
194	Spain	10/05/2020-24/05/2020	coronavirus COVID-19; all land borders
193	Finland	14/05/2020-14/06/2020	coronavirus COVID-19; all internal borders
192	Lithuania	14/05/2020-31/05/2020	coronavirus COVID-19; all internal borders
191	Czechia	14/05/2020-13/06/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
190	Austria	08/05/2020-31/05/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
189	Iceland	04/05/2020-15/05/2020	coronavirus COVID-19; all internal borders
188	Poland	04/05/2020-13/05/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
187	Portugal	05/05/2020-15/05/2020	coronavirus COVID-19; land border with Spain
186	Germany	05/05/2020-15/05/2020	coronavirus COVID-19; land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
185	Czechia	24/04/2020-14/05/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders

184	Switzerland	02/05/2020-08/06/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
183	Norway	05/05/2020-16/05/2020	coronavirus COVID-19; all internal borders
182	Belgium	08/05/2020-08/06/2020	coronavirus COVID-19; all internal borders
181	Spain	26/04/2020-10/05/2020	coronavirus COVID-19; all land borders
180	Hungary	01/05/2020-11/05/2020	coronavirus COVID-19; all land and air borders
179	Estonia	01/05/2020-17/05/2020	coronavirus COVID-19; all internal borders
178	Austria	28/04/2020-07/05/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland, Liechtenstein, Slovakia and Czechia
176	Lithuania	28/04/2020-14/05-2020	coronavirus COVID-19; all internal borders
175	Iceland	24/04/2020-04/05/2020	coronavirus COVID-19; all internal borders
174	Austria	12/05/2020-11/11/2020	secondary movements, risk related to terrorists and organized crime, situation at the external borders, risk of Coronavirus causing additional migrant movements; land borders with Hungary and with Slovenia.
173	Belgium	19/04/2020-08/05/2020	coronavirus COVID-19; all internal borders
172	Slovakia	17/04/2020-07/05/2020	coronavirus COVID-19, all internal borders
171	Germany	15/04/2020-05/05/2020  12/05/2020-11/11/2020	coronavirus COVID-19; internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark  secondary movements, situation at the external borders; land border with Austria
171	Estonia	15/04/2020-01/05/2020	coronavirus COVID-19; all internal borders

170	Portugal	15/04/2020-05/05-2020	coronavirus COVID-19; land border with Spain
169	Norway	15/04/2020-05/05/2020  15/05/2020-13/08/2020  12/05/2020-12/11/2020	coronavirus COVID-19; all internal borders  coronavirus COVID-19; all internal borders  terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden;
168	Poland	14/04/2020-03/05/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
167	Hungary	11/04/2020-01/05/2020	coronavirus COVID-19; all land and air borders
166	Slovakia	08/04/2020-17/04-2020	coronavirus COVID-19, all internal borders
165	Spain	11/04/2020-26/04/2020	coronavirus COVID-19; all land borders
164	Austria	10/04/2020-27/04/2020	coronavirus COVID-19; land borders with Czechia and Slovakia
163	Lithuania	13/04/2020-27/04/2020	coronavirus COVID-19; all internal borders
162	Switzerland	12/04/2020-02/05/2020	coronavirus COVID-19; all internal air and land borders except from borders with Liechtenstein
161	Sweden	12/05/2020-12/11/2020	terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders
160	Denmark	12/05/2020-12/11/2020	coronavirus COVID-19 (to the extend necessary), terrorist threats, organized criminality; all land, air and sea borders.  After lifting the COVID-19 travel restrictions, the border controls will be limited to the Danish land and sea borders with Germany and Sweden (Øresundsforbindelsen).
159	Austria	08/04/2020-27/04/2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland and Liechtenstein
158	Finland	14/04/2020-13/05/2020	coronavirus COVID-19; all internal borders

157	Switzerland	04/04/2020-24/04/2020	coronavirus COVID-19; all air borders except air borders with Liechtenstein
156	Czechia	04/04/2020-24/04/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
155	France	01/05/2020-31/10/2020	continuous terrorist threat and the risk of terrorists using the vulnerability of States due to COVID-19 pandemics, support to measures aiming at containing the spread of virus; all internal borders
154	Belgium	30/03/2020-19/04/2020	coronavirus COVID-19; all internal borders
153	Portugal	26/03/2020-15/04/2020	coronavirus COVID-19; land border with Spain
152	Norway	26/03/2020-15/04/2020	coronavirus COVID-19; all internal borders
151	Spain	27/03/2020-11/04/2020	coronavirus COVID-19; all land borders
150	Germany	26/03/2020-15/04/2020	coronavirus COVID-19; internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea border with Denmark
149	Poland	25/03/2020-13/04/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
148	Lithuania	24/03/2020-13/04/2020	coronavirus COVID-19; all internal borders
147	Switzerland	25/03/2020-04/04/2020	coronavirus COVID-19; all air borders except air borders with Liechtenstein
146	Estonia	27/03/2020-15/04/2020	coronavirus COVID-19; all internal borders
145	Switzerland	28/03/2020-17/04/2020	coronavirus COVID-19; air borders with Italy, France, Germany, Austria and Spain
		26/03/2020-15/04/2020	coronavirus COVID-19; land borders with France, Germany and Austria
		23/03/2020-12/04/2020	coronavirus COVID-19; land border with Italy
142	Belgium	20/03/2020-30/03/2020	coronavirus COVID-19; all internal borders

141	Germany	19/03/2020-29/03/2020	coronavirus COVID-19; air borders with Austria, Switzerland, France, Luxembourg, Denmark, Italy and Spain, sea borders with Denmark
140	Austria	18/03/2020-07/04-2020	coronavirus COVID-19; land borders with Germany, Italy, Switzerland and Liechtenstein
139	Hungary	22/03/2020-11/04/2020	coronavirus COVID-19; land borders with Slovenia, Austria and Slovakia, all air borders
138	Switzerland	18/03/2020-28/03/2020	coronavirus COVID-19; air borders with Spain, Italy, France, Germany and Austria
137	Finland	19/03/2020-13/04/2020	coronavirus COVID-19; all internal borders
136	Spain	17/03/2020-26/03/2020	coronavirus COVID-19; all land borders
135	Portugal	16/03/2020-26/03/2020	coronavirus COVID-19; land border with Spain
134	Switzerland	16/03/2020-26/03/2020	coronavirus COVID-19; land borders with France, Germany and Austria
133	Norway	16/03/2020-26/03/2020	coronavirus COVID-19; all internal borders
132	Estonia	17/03/2020-27/03/2020	coronavirus COVID-19; land borders with Latvia, air borders, sea borders
131	Czechia	18/03/2020-04/04/2020	coronavirus COVID-19; land borders with Germany and Austria, air borders
130	Germany	16/03/2020-26/03/2020	coronavirus COVID-19; land borders with Denmark, Luxembourg, France, Switzerland and Austria.
129	Lithuania	14/03/2020-24/03/2020	coronavirus COVID-19; all internal borders
128	Poland	15/03/2020-24/03/2020	coronavirus COVID-19; land borders with Czechia, Slovakia, Germany, Lithuania, sea borders, air borders
127	Denmark	12/11/2019 – 12/05/2020	coronavirus COVID-19, terrorist threats, organized criminality from Sweden; all land, air and sea borders
127	Austria	14/03/2020-24/04-2020	coronavirus COVID-19; land borders with Switzerland and Liechtenstein

126	Switzerland	13/03/2020-23/03/2020		coronavirus COVID-19; land border with Italy
125	Czechia	14/03/2020-18/03/2020		coronavirus COVID-19; land borders with Austria and Germany, air borders
124	Hungary	12/03/2020-22/03/2020		coronavirus COVID-19; land borders with Austria and Slovenia
123	Austria	11/03/2020-21/03/2020		coronavirus COVID-19; land border with Italy
122	Spain	28/11/2019-13/12/2019		XXV United Nations Conference on Climate Change (COP25) in Madrid; Air borders (mainly Madrid and Barcelona airports), sea borders, mainly ports in northern Spain, land border with France, keeping the usual authorized crossing points.
121	Norway	12/11/2019-12/05/2020	–	terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden;
121	Sweden	12/11/2019-12/05/2020	–	terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders;
120	Denmark	12/11/2019-12/05/2020	–	terrorist threats, organized criminality from Sweden; land border with Germany and with Sweden, ferry connections to Germany and to Sweden, until 12 May 2020;
119	Austria	12/11/2019-12/05/2020	–	coronavirus COVID-19 (as of mid-March), secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia;
118	Germany	12/11/2019-12/05/2020	–	secondary movements, situation at the external borders; land border with Austria;
117	France	31/10/2019-30/04/2020		coronavirus COVID-19 (as of beginning of March), persistent terrorist threat, upcoming high profile political event in Paris, secondary movements; all internal borders;
116	Norway	12/05/2019-12/11/2019		security situation in Europe; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden;



115	Sweden	12/05/2019-12/11/2019		serious threat to public policy and internal security; to be determined but may concern all internal borders;
114	Denmark	12/05/2019-12/11/2019		severe threat to public order and internal security; internal border with Germany (land and ports with ferry connections)
113	Austria	12/05/2019-12/11/2019		security situation in Europe and continuous significant secondary movements; land borders with Hungary and with Slovenia;
112	Germany	12/05/2019-12/11/2019		migration and security policy; land border with Austria
111	France	01/05/2019-31/10/2019		Terrorist threats, situation at the external borders
110	Poland	10-16/02/2019		Ministerial to Promote a Future of Peace and Security in the Middle East; all internal borders
109	Sweden	12/02/2019 11/05/2019	-	serious threat to public policy and internal security; all internal borders
108	Poland	22/11/2018 16/12/2018	-	climate conference COPT 24, all internal borders
107	Austria	12/11/2018 11/05/2019	-	security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
106	Norway	12/11/2018 11/05/2019	-	security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden
105	Sweden	12/11/2018 11/02/2019	-	serious threat to public policy and internal security; all internal borders
104	Denmark	12/11/2018 11/05/2019	-	persistent and severe threat to public order and internal security; all internal borders with an initial focus on the land border with Germany and ports with connection to Germany
103	Germany	12/11/2018 11/05/2019	-	threats resulting from the continuous significant secondary movements; land border with Austria
102	France	01/11/2018 30/04/2019	-	Terrorist threats, situation at the external borders, upcoming high level political meetings
101	Austria	17/09/2018-21/09/2018		informal meeting of the European Council in Salzburg; border Salzburg and Upper Austria to Germany, border East Tyrol and Carinthia to Italy, Salzburg Airport (all arriving flights)

100	Austria	09/07/2018 13/07/2018	-	informal meeting of Justice and Home Affairs Ministers in Innsbruck; border Tyrol to Germany, border North Tyrol to Italy, Innsbruck Airport (all arriving flights).
99	Norway	12/05/2018– 11/11/2018		security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden
98	Sweden	12/05/2018– 11/11/2018		continuous serious threat to public policy and internal security; all internal borders
97	Denmark	12/05/2018– 11/11/2018		security situation in Europe and threats resulting from the continuous significant secondary movements; all internal borders with an initial focus on the land border with Germany and ports with connection to Germany
96	Germany	12/05/2018– 11/11/2018		security situation in Europe and threats resulting from the continuous significant secondary movements; land border with Austria
95	Austria	12/05/2018– 11/11/2018		security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
94	France	30/04/2018- 30/10/2018		persistent terrorist threat; all internal borders
93	Sweden	12-19/11/2017		Social Summit for Fair Jobs and Growth; Gothenburg Landvetter Airport and Svinesund (Sweden/Norway border)
92	Norway	12/11/2017 12/05/2018	-	security situation in Europe and threats resulting from the continuous significant secondary movements; ferry connections with Denmark, Germany and Sweden
91	Sweden	12/11/2017 12/05/2018	-	security situation in Europe and threats resulting from the continuous significant secondary movements; selected harbours in Police Regions South and West and at the Öresund Bridge;
90	Denmark	12/11/2017 12/05/2018	-	security situation in Europe and threats resulting from the continuous significant secondary movements; internal border with Germany;
89	Germany	12/11/2017 12/05/2018	-	security situation in Europe and threats resulting from the continuous significant secondary movements; land border with Austria and flight connections from Greece;

88	Austria	12/11/2017 - 12/05/2018	- Security situation in Europe and threats resulting from the continuous significant secondary movements; land borders with Hungary and with Slovenia
87	France	01/11/2017 - 30/04/2018	- Persistent terrorist threat All internal borders
86	Norway	26/08/2017-25/09/2017	UCI Road World Championship in Bergen Bergen air border
85	Italy	10-30/05/2017	G7 Summit Taormina
84	Norway	11/05/2017-11/11/2017	In line with Recommendation of the Council of 11 May 2017, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
83	Sweden	11/05/2017-11/11/2017	In line with Recommendation of the Council of 11 May 2017, Swedish harbors in the Police Region South and West and at the Öresund bridge
82	Denmark	11/05/2017-11/11/2017	In line with Recommendation of the Council of 11 May 2017, Danish ports with ferry connections to Germany and at the Danish-German land border
81	Germany	11/05/2017-11/11/2017	In line with Recommendation of the Council of 11 May 2017, land border with Austria
80	Austria	11/05/2017-11/11/2017	In line with Recommendation of the Council of 11 May 2017, land border with Slovenia and with Hungary
79	Norway	11/02/2017-11/05/2017	In line with Recommendation of the Council of 7 February 2017, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
78	Sweden	11/02/2017-10/05/2017	In line with Recommendation of the Council of 7 February 2017, Swedish harbors in the Police Region South and West and at the Öresund bridge
77	Denmark	11/02/2017-11/05/2017	In line with Recommendation of the Council of 7 February 2017, Danish ports with ferry connections to Germany and at the Danish-German land border
76	Germany	11/02/2017-11/05/2017	In line with Recommendation of the Council of 7 February 2017, land border with Austria
75	Austria	11/02/2017-11/05/2017	In line with Recommendation of the Council of 7 February 2017, land border with Slovenia and with Hungary

74	France	27/01/2017- 15/07/2017	Persistent terrorist threat - all internal borders
73	Malta	21/01/2017- 09/02/2017	Malta Informal Summit and Joint Valetta Action Plan Meeting - air and sea borders
72	Norway	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, in the Norwegian ports with ferry connections to Denmark, Germany and Sweden
71	Sweden	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, Swedish harbors in the Police Region South and West and at the Öresund bridge
70	Denmark	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, Danish ports with ferry connections to Germany and at the Danish-German land border
69	Germany	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, land border with Austria
68	Austria	12/11/2016 12/02/2017	In line with Recommendation of the Council of 11 November 2016, land border with Slovenia and with Hungary
67	France	26/07/2016- 26/01/2017	In relation to the emergency state as introduced further to the Nice attack  All internal borders
66	Poland	04/07/2016 02/08/ 2016	- NATO Summit, World Youth Days and visit of Pope  All internal borders
65	Norway	10/06/2016 12/11/ 2016	- In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Norwegian ports with ferry connections to Denmark, Germany and Sweden.
64	Sweden	08/06/2016 12/11/2016	- In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Swedish harbours in the Police Region South and West and at the Öresund bridge
63	Denmark	01/06/16 12/11/2016	- In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC Danish ports with ferry connections to Germany and at the Danish-German land border
62	Austria	16/05/2016 12/11/2016	- In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC, land border with Slovenia and with Hungary
61	Germany	12/05/2016 12/11/2016	- In line with Recommendation of the Council of 12 May 2016 under Art.29 of the SBC, land border with Austria

60	France	27/05/2016 - 26/07/2016	EURO 2016, Tour de France All internal borders
59	Belgium	23/02/2016- 22/04/2016	Irregular migrants attempting to travel to UK - Border between the Province of West-Vlaanderen and France
58	Denmark	04/03/2016 - 02/06/2016	Big influx of persons seeking international protection All internal borders, with focus on ferries from Germany and land border with Germany.
57	Norway	15/01/2016 - 11/06/2016	Continues threat of big influx of persons seeking international protection All borders with focus on ports with ferry connections to Norway via internal borders
56	Sweden	10/01/2016- 07/06/2016	Continuous big influx of persons seeking international protection All borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden.
55	Denmark	04/01/2016 - 03/03/2016	Unexpected migratory flow All internal borders, with focus on ferries from Germany and land border with Germany.
54	France	14/12/2015- 26/05/2016	In relation to the emergency state as introduced further to Paris attacks All internal borders
53	Norway	26/11/2015- 15/01/2016	Unexpected migratory flow All borders with focus on ports with ferry connections to Norway via internal borders
52	Austria	16/11/2015 - 16/05/2016	Continuous big influx of persons seeking international protection All borders, with special focus on the land border with Slovenia, Hungary and Italy, subject to possible changes The border can be crossed only at authorised border crossing points (the list attached)
51	Germany	14/11/2015 - 13/05/2016	Continuous big influx of persons seeking international protection All borders, with focus on the German-Austrian land border

50	France	13/11-13/12/2015	21st UN Conference on Climate Change from 30 November to 11 December 2015, internal land borders and air borders
49	Sweden	12/11 - 09/01/2016	Unprecedented influx of persons All borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden.
48	Malta	9/11 - 31/12/2015	- Valetta Conference on Migration and Commonwealth Heads of Government Meeting Terrorist threat and smuggling of illegal migrants Air and sea passenger terminal
47	Hungary	17-26/10/2015	Big influx of persons seeking international protection, land borders with Slovenia
45-46	Slovenia	17-26/9; 27/9-16/10/2015	Big influx of persons seeking international protection, land borders with Hungary
41-44	Austria	16-25/9; 26/9-15/10; 16/10-4/11/2015; 5/11/2015-15/11/2015	Big influx of persons seeking international protection, all borders, focus on land borders with Italy, Hungary, Slovenia and Slovakia
37-40	Germany	13-22/09; 23/09-12/10; 13/10-1/11/2015; 2/11-13/11/2015	Big influx of persons seeking international protection, all borders with focus on Austrian land borders
36	Germany	16/5-15/6/2015	G7 Summit
35	Estonia	31/8-3/9/2014	Visit of the US President
34	Norway	24-31/7/2014	terrorist threat
33	Belgium	1-6/2014	G7 Summit
32	Netherlands	14-28/3/2014	Netherlands on 14-28 March 2014 Nuclear Security Summit in the Hague

31	Poland	8-23/11/2013	19th session of the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC), the 9th session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and the 39th Session of the Subsidiary Bodies in Warsaw (11-22/11/2013) All internal borders
30	Norway	3-12/12/2012	Nobel Peace Prize ceremony in Oslo (10/12/2012)
29	Poland	4/6/2012-1/7/2012	Euro 2012 Football Championships (8/6-1/7/2012) All internal borders
28	Spain	2-4/5/2012	Meeting of the Governing Council of the European Central Bank in Barcelona
27	France	24/10/2011-05/11/2011	G-20 meeting in Cannes (03-04/11/2011)
26	Sweden	22/07/2011, 23h00-23/07/2011, 09h00	Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011
25	Norway	22/07/2011, 17h23--25/07/2011, 17h00	Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011
24	Austria	04/06/-09/06/2011	World Economic Forum (07/06/-09/06/2011)
23	Portugal	16/11-20/11/2010	NATO Summit in Lisbon (19/11/-20/11)
22	Latvia	24/05-01/06/2010	NATO Parliamentary Assembly in Riga (28/05-01/06/2010).
21	France	28/05-02/06/2010	Franco-African Summit in Nice (31/05-01/06/2010).
20	Estonia	17-23/04/2010	Informal meeting of NATO Foreign Ministers in Tallinn (22-23/04/2010).
19	Malta	5-18/04/2010	Visit of Pope Benedict XVI (17-18/04/2010)
18	Denmark	1-18/12/2009	UN Climate Change Conference in Copenhagen (7-18/12/2009). DK-DE and DK-SE borders

17	Norway	27/11/2009– 12/12/2009	Nobel Peace Prize Ceremony in Oslo (10/12/2009).
16	France	27/09/2009	50 <sup>th</sup> Anniversary of ETA. FR-ES land borders, BCP border complex from Hendaye to Arneguy (14 border crossing points).
15	Spain	26-27/09/2009	Celebration of ‘Basque Warrior day’ in the Basque Country and Navarra (ES) and in Pyrénées-Orientales (FR) ES-FR land borders in the provinces of Guipuzcoa and Navarra
14	France	19/09/2009, 13h — 19:40	Demonstration by Batasuna in Bayonne. Five FR-ES border crossing points (highway A63, St Jacques international bridge , Béhobie international bridge, Hendaye station, port of Hendaye)
13	Italy	28/06/2009– 15/07/2009	G8 Summit in L’Aquila (10-12/7/2009) Land, air and sea borders
12	France	30/03/2009– 5/04/2009	NATO Summit in Strasbourg (3-4/4/2009) Land and air borders with BE, LU, DE, CH, IT and ES
11	Germany	20/03/2009– 5/04/2009	NATO Summit in Strasbourg, Baden-Baden and Kehl (3-4/4/2009). Land, air and sea borders
10	Iceland	05-07/03/2009	Visit of <i>MC Hells Angels</i> to the Icelandic Motorcycle club in Reykjavik. Air borders (16 flights checked from SE, DK, NL, FR, DE, and NO)
9	Finland	24/11/2008– 5/12/2008	Meeting of Council of Ministers of OSCE in Helsinki (4-5/12/2008). Controls mainly at Helsinki-Vantaa airport and at ports of Helsinki and Turku
8	France	27/09/2008, 08h — 18:45	Demonstration on 27 September at 16:00 in Bayonne, supervised by Batasuna. Five FR-ES border crossing points (Hendaye: highway A63, St Jacques international bridge, Béhobie international bridge, Hendaye station, port of Hendaye)



7	Austria	02/06/2008– 01/07/2008	European Football Championship EURO 2008, AT — CH (7/6-29/6/2008). Land and air borders
6	Iceland	2–3/11/2007	Participation of <i>MC Hells Angels</i> at the inauguration of the Icelandic Motorcycle club in Reykjavik (1-4/11/2007). Air borders (14 flights checked from SE, DK, FI, DE and NO)
5	Germany	25/5–9/06/2007	G8 Summit in Heiligendamm/Mecklenburg-Western Pomerania (6-8/6/2007) Land, air and sea borders
4	France	12–16/02/2007	Conference of Heads of States of Africa and France in Cannes (13-16/2/2007). FR-IT border (detailed information provided in the notification)
3	Finland	13–29/11/ 2006	EUROMED meeting in Tampere. Controls mainly at Helsinki-Vantaa, Turku and Tampere-Pirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders
2	Finland	9–21/10/2006	Informal meeting of Heads of States and Government in Lahti. Controls mainly at Helsinki-Vantaa, Turku and Tampere-Pirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders
1	France	21/10/2006, 08h — 20:00	Youth Days of radical young Basques in Saint-Pée-sur-Nivelle and demonstration organised in Bayonne by the support committee of Philippe Bidart. FR-ES land border (border crossing point on the highway A63 in Biriadou, St Jacques bridge, Béhobie bridge, Hendaye station)

\* In line with the Schengen Borders Code in case of foreseeable events constituting a serious threat to the internal security and public policy the Member States may reintroduce border control at internal borders for a period of up to 30 days or, if from the outset it is known that the serious threat will persist for a period exceeding 30 days, for the foreseeable duration of the threat.

## ANNEX 7: FACTS ON THE EVOLUTION OF THREATS

Since 2015 (and until the outbreak of COVID-19), the six Schengen States which have reintroduced border controls (Austria, Germany, France, Sweden, Denmark and Norway), have been referring to migration, terrorism and the situation at the external borders have been the most frequently raised to in order to justify the continuous prolongations of border checks at their internal borders by the six Schengen States mentioned in Table 1. In view of the geopolitical situation as well as thanks to the measures adopted by the European Union, the level of these threats has decreased since then. Unfortunately, this decrease has not led to lifting border checks. Moreover, some Member States put the bar very low when it comes to the definition of what can constitute a threat justifying the reintroduction of border checks. For instance, Austria is of the opinion that since the 2015/2016 crisis, the Schengen area does not allow for attaining the objectives set out in Article 3 TEU anymore.

- *Migration*

To recall, the migratory crisis of 2015 brought hundreds of thousands of persons to Europe mostly fleeing from the war zones in Syria. In 2015 alone, more than 868 000 persons entered into the Schengen area irregularly through the Aegean sea<sup>139</sup>. For this reason, the Commission accepted the notifications of temporary reintroduction of border checks at internal borders submitted at that time by Austria, Germany, Slovenia, Hungary, Sweden, Norway and Denmark. Recital 26 of the Schengen Borders Code states 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*”, but the level of the migratory pressure was considered exceptional. In its Opinion of 23 October 2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria<sup>140</sup>, the Commission explicitly approved the use of border checks at internal borders as a tool to address the extraordinary migratory pressure.

The available data on migration trends demonstrate that, as of 2018, migratory flows have returned to the levels before 2015. According to the data collected for the purpose of the Pact on Migration and Asylum, there were 141,700 illegal border crossings in 2019, which means a decrease by 5% compared to 2018, the lowest level in six years. Moreover, in the period January-November 2020 there have been ‘only’ 114,300 illegal border crossings, i.e. 10% less than in the same period of 2019. Thus, the claims of some Member States that the data shows that migratory flows are currently getting back to the levels before the pandemic, cannot be accepted.

These trends put in question the necessity of border checks and suggest that the Member States do not sufficiently adapt to the changing trends in their response.

- *Terrorism*

Also the trends regarding terrorism have evolved. While the Paris attack was committed by an organised group operating from another Member State, the vast majority of subsequent attacks have been committed by radicalised individuals who were residing in

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<sup>139</sup> See Back to Schengen – a Roadmap’ COM(2016)120, p. 4.

<sup>140</sup> C(2015)7100 For full reference see Annex 11.

the territory of the Member State concerned. It is also striking that in two cases where the culprit crossed the border directly before or after the attack, the borders crossed were at that moment subject to reintroduced border checks<sup>141</sup> that, however, did not lead to any arrest.

- *Management of the External Borders*

While in 2015/2016 the frontline Member States were exposed to extreme pressure, the situation has changed since then. In 2016, serious deficiencies identified at the Greek external border<sup>142</sup> led to the adoption of four Council Recommendations<sup>143</sup> that, based on Article 29, called on five Member States to temporarily reintroduce border checks at their internal borders between May 2016 and November 2017. The creation and then further reinforcement of the European Border and Coast Guard in 2016 and 2019<sup>144</sup>, the ongoing implementation of interoperability and the setting up and upgrading of the large-scale IT-systems such as Entry /Exit System (EES), European Travel Information and Authorisation System (ETIAS), Schengen Information System (SIS) and Visa Information System (VIS), have already significantly reinforced the management of the external borders and will further contribute to making the European border management the most modern border management system in the world, by the end of 2023.

Furthermore, according to the Report of the Commission on the Functioning of the Schengen Evaluation and Monitoring Mechanism<sup>145</sup>, *‘Based on the 42 evaluations carried out in relation to external border management, it can be concluded that Member States are to a large extent adequately implementing the Schengen Borders Code and managing external borders in line with the acquis. Decisive progress has also been made to harmonise Member States’ strategic approaches towards external border management by the gradual implementation of an integrated border management system. While serious deficiencies were identified in four Member States<sup>146</sup>, those countries swiftly took the necessary measures to address the most important deficiencies. Today, no Member State has serious deficiencies in this area, but specific challenges remain in a few countries that still need to be promptly addressed’.*

Therefore, also the situation at the external borders cannot be considered to justify Member States’ decisions on the prolongation of border checks at internal borders.

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<sup>141</sup> The perpetrator of the Berlin attack in 2016 managed to cross the DE/FR border despite reintroduced border checks, before being shot in Italy. Similarly, the perpetrator of Nice attack in 2020 managed to cross the IT/FR border, without being detected.

<sup>142</sup> C(2016)1219 Commission Implementing Decision setting out a recommendation on specific measures to be taken by the Hellenic Republic following the evaluation report of 2 February 2016.

<sup>143</sup> Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk; Council Implementing Decision (EU) 2016/1989 of 11 November 2016, Council Implementing Decision (EU)2017/246 of 7 February and Council Implementing Decision (EU) 2017/818 of 11 May 2017.

<sup>144</sup> Regulation (EU) 2019/1896 (OJ L 295, 14.11.2019, p. 1–131). For full reference see Annex 11.

<sup>145</sup> COM(2020) 779 final, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/pdf/report\\_schengen\\_evaluation\\_and\\_monitoring\\_mechanism\\_com-2020-779\\_0.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/pdf/report_schengen_evaluation_and_monitoring_mechanism_com-2020-779_0.pdf).

<sup>146</sup> In addition to Greece, serious deficiencies in external border management were identified also by the evaluations of Spain, Sweden and Iceland in 2017. Re-visits were carried out in Sweden and in Iceland in 2019.

The mass influx of third country nationals in 2015/2016 and the series of terrorist attacks in 2015 and 2016 put a lot of pressure on the Member States and EU institutions. For the Commission, addressing these challenges and, in particular, assessing the seriousness of a threat to internal security was rendered even more difficult by the fact that it does not dispose of any information concerning the primary and secondary effects of the border checks at the internal border. Also for that reason, the Commission opted for a dialogue with the Member States concerned, instead of taking formal steps (such as issuing an opinion on the necessity/proportionality of such checks, or launching an infringement procedure).

In order to adapt the Schengen Borders Code to the persistence of certain threats, the Commission tabled in 2017 a legislative proposal extending the applicable time-limits for border checks at internal borders in exchange for stronger procedural safeguards (see Annex 17). However, the compromise discussed in the trilogues between the co-legislators in February 2019 did not find sufficient support among Member States.

In parallel, the Commission continued the dialogue with the Member States. The discussion was taken up again at the highest political level at the Schengen Forum on 30 November 2020. The participants in the Forum agreed that Schengen needs to be preserved and that this requires legislative action to make Schengen fit for today's challenges (see Conclusions of the Chair – Annex 9).

Nevertheless, some Schengen States report that their citizens expect a certain degree of control over who is crossing the internal borders. Border controls are a very visible measure and therefore well suited to demonstrate that the national authorities are taking decisive action. For example, according to the research carried out in 2016 by the European Council on Foreign Relations (ECFR), an international think-tank, 59 % of the population in Estonia was ready to give up the Schengen agreement to reduce perceived threats related to uncontrolled refugee flows. This high percentage might also have to do with the fact that, at least where internal border controls are limited to certain areas of the borders and are not continuous, a significant part of the population does not experience any direct negative effects from these controls. According to the special EUROBAROMETER in 2018, nearly 40% of respondents never travel to other countries within the EU, thus making them less concerned by the border checks at internal borders. However, it should be underlined, as demonstrated in the costs of non-Schengen, the permanent reintroduction of border checks at the internal borders would affect all citizens indirectly, irrespectively of their travelling habits, as this would generate a significant costs for the economy overall, without citizens necessarily being aware of this link.

**ANNEX 8: MEASURES BY THE SCHENGEN MEMBER STATES AT THEIR INTERNAL AND EXTERNAL BORDERS IN RESPONSE TO THE FIRST WAVE OF COVID-19 (UNTIL 19 MARCH 2020)**

<b>Member State</b>	<b>Measures at the internal and external borders</b>
Austria	<i>Internal borders:</i> Introduction of internal border control with IT (11 March 2020) CH and LI (14 March 2020) for 10 days. Entry into AT from there is only possible with a health certificate (not older than 4 days) or when admitting into 2 week home quarantine; transit without further stops in Austria is allowed. Exceptions are foreseen for cross-border workers.
	<i>External borders:-</i>
Belgium	<i>Internal borders:</i> No special, restrictive measures at the border for the time being.
	<i>External borders:</i> The Foreign Affairs Ministry advises against any travel abroad (14 March 2020).  BE closed the visa sections and visa applications centers. Certain categories of persons will be able to still apply for a visa, but only through appointment. In line with the COM communication on temporary restrictions for travelling to the EU and the agreement reached between EU heads of state and government yesterday, these categories mainly concern persons who are family members of Belgian or European citizens and other third country nationals who have justified reasons or needs for traveling. Our consulates already advised applicants against travelling to the EU or to postpone travel under the current circumstances, and will continue to do so (17 March 2020).
Bulgaria	<i>Internal borders:-</i>
	<i>External borders:</i> At entry points: contact tracing (forms to be filled-in by all arriving passengers); brochures with information on COVID-19 and the necessary prevention measures translated in 10 languages. Ban on entry on the territory of the country from high-risk countries (a list updated on daily basis); Limitation of free movement in most affected districts.
Croatia	<i>Internal borders: -</i>
	<i>External borders: -</i>
Cyprus	<i>Internal borders:-</i>
	<i>External borders:</i> Entry into CY will only be granted to individuals who fall under the categories listed below, provided that, upon arrival, they submit a medical certificate, issued no more than 4 days before, showing that they have been tested negative for coronavirus, by certified medical centres in their country of origin:  - Cypriot citizens/nationals

	<ul style="list-style-type: none"> <li>- Legal residents of the Republic of Cyprus</li> <li>- EU or TCNs who work in the Republic of Cyprus</li> <li>- Nationals of countries that are in a designated diplomatic service or mission under bilateral or international conventions.</li> <li>- EU or third country nationals attending educational institutions in the Republic of Cyprus.</li> </ul> <p>Those who fulfil all the aforementioned conditions will be placed under a 14-day compulsory quarantine at accommodation facilities designated by the Republic of Cyprus (16 March – 30 April 2020).</p>
Czech Republic	<p><i>Internal borders:</i> Introduction of internal border controls (12 March 2020).</p> <p>The measure concerns the land borders with DE and AT and the air borders (14 March 2020 – 18 March 2020): The internal borders with AT and DE can only be crossed at designated crossing points without any time limit. Persons, who demonstrably cross internal borders on a regular basis, in particular cross-border / commune workers, may also cross at other crossing points.</p> <p>The above-mentioned obligation does not apply to selected categories of persons for whom the restriction on the crossing of internal borders would be disproportionate and in some cases would be contrary to the public interest. These include, for example, an integrated rescue system, people in the event of an unforeseen emergency, freight transport, etc.</p> <p><u>Prolongation of internal border controls</u></p> <p>The measure concerns the land borders with DE and AT and the air borders, and is in force until 4th April 2020 23:59 with the possibility of extension.</p> <p>The internal borders with DE and AT can only be crossed at designated crossing points without any time limit.</p> <hr/> <p><i>External borders:</i> Suspending short term/long term/temporary/permanent visa and residence permits applications at the CZ embassies.</p> <p><u>Additional measures on cross border mobility:</u> Entry ban for all foreigners (incl. EU nationals) with the exception of those foreigners with temporary and residence permit in CZ (16 March 2020). Various exceptions have been already approved (for international transport drivers and crews, cross-border workers/commuters, rescue services, diplomatic personnel, etc.).</p>

	<p>All foreigners who are at the time of the declaration of the state of emergency in the territory legally, temporarily or permanently, under the rules for the stay of foreigners, are entitled to remain in the territory for the duration of the state of emergency (14 March 2020).</p> <p>Travel ban for CZ citizens, as well as for foreigners with temporary and residence permit in CZ (14 March 2020). The entry and travel bans will be applied earlier for the high epidemic risk areas defined by the Health Ministry, namely AT, BE, CH, DE, DK, ES, FR, IT, NL, NO, SE, UK, China, Iran, South Korea.</p>
Denmark	<p><i>Internal borders:</i> Introduction of internal border controls at all internal borders.</p> <p>Additional measures also involve travel restrictions and control of persons at Danish borders: Persons who do not live or work in DK or are not crossing the borders to deliver goods or services – or for other equally relevant purposes, will not be allowed entry (14 March 2020- 13 April 2020).</p> <p><i>External borders:</i> Recommendation that Danes refrain from all non-essential travels out-side Denmark and advise Danes travelling abroad to return to Denmark in the coming days.</p>
Estonia	<p><i>Internal borders:</i> The border guard units (especially at air borders) continue to perform ordinary border checks activities.</p> <p>In the frame of mutual assistance, the Police and Border Guard Board is supporting the activities of the Health Board. The activities are aimed at supporting preventive actions for reducing the risk of COVID-19 spreading (10 March 2020).</p> <p>Assistance includes:</p> <ul style="list-style-type: none"> <li>- Distribution of information in car terminals of Tallinn Harbour, external land border crossing points (Narva-1, Koidula, Luhamaa), at the border between Estonia and Latvia (Valga, Ikla to passengers traveling by public/mass transport (coaches and buses)).</li> <li>- At the passenger`s request the body temperature measurement by handheld digital body temperature devices might be performed by the Police Officers in all locations at the border.</li> </ul> <p>Introduction of internal border controls at land, sea and air borders (17 March 2020).</p> <p><i>External borders:</i> Estonia is temporarily suspending the admission of applications for Schengen visas and long-stay visas to Estonia at Estonia`s representations and visa centres due to the spread of the coronavirus. This</p>

	<p>also applies to Schengen visa applications processed by Estonia on behalf of another member state.</p> <p>By exception, visa applications can be submitted on humanitarian grounds (illness or funeral of a close relative), for transporting goods or raw materials, for providing medical or other services essential for the resolution of the emergency, as well as by individuals whose parent, child or spouse is an Estonian citizen or holds an Estonian residence permit or right of residence.</p> <p>During the emergency situation, previously issued and valid visas cannot be used to enter Estonia.</p>
Finland	<p><i>Internal borders:</i> Introduction of internal border controls (18 March 2020 – 13 April 2020).</p> <p>AT INTERNAL BORDERS, MEANING TRAFFIC BETWEEN FINLAND AND ANOTHER SCHENGEN STATE, IS ALLOWED:</p> <ol style="list-style-type: none"> <li>1. Return to Finland: <ol style="list-style-type: none"> <li>a. Finnish nationals and their family members</li> <li>b. Nationals of other EU and Schengen countries, who are residing in Finland and their family members</li> <li>c. Third country nationals residing in Finland with residence permit</li> </ol> </li> <li>2. Returning transit traffic to other EU or Schengen country or via them: <ol style="list-style-type: none"> <li>a. Nationals of EU and Schengen countries and their family members</li> <li>b. Third country nationals residing in another EU or Schengen country with residence permit</li> </ol> </li> <li>3. Necessary cross-border work traffic and other necessary traffic, which is: <ol style="list-style-type: none"> <li>a. Healthcare and rescue service professionals/personnel, health researchers, and elderly care professionals</li> <li>b. Transport personnel and other transport staff to the extent necessary</li> <li>c. Workers, who based on permanent employee relationship work daily in another country and returns back to the country of residence at least once a week, taking into consideration local circumstances and natural travel-to-work area</li> <li>d. Diplomats, staff of international organisations, military personnel and humanitarian aid workers in the exercise of their functions</li> <li>e. Necessary (return) transit and returns</li> <li>f. Passengers travelling for imperative family reasons</li> <li>g. Persons in need of international protection or for other humanitarian reasons</li> <li>h. Other necessary and justified traffic. For example, other necessary traffic would be maintenance work, that requires maintenance team</li> </ol> </li> </ol>



	<p>or a person arriving from another country and this work cannot be postponed.</p> <p><i>External borders:</i> AT EXTERNAL BORDERS, MEANING TRAFFIC BETWEEN FINLAND AND NON-SCHENGEN COUNTRY, FOR EXAMPLE RUSSIA, IS ALLOWED:</p> <ol style="list-style-type: none"> <li>1. Return to Finland: <ol style="list-style-type: none"> <li>a. Finnish nationals and their family members</li> <li>b. Nationals of other EU and Schengen countries, who are residing in Finland and their family members</li> <li>c. Third country nationals residing in Finland with residence permit</li> </ol> </li> <li>2. Returning transit traffic to other EU or Schengen country or via them: <ol style="list-style-type: none"> <li>a. Nationals of EU and Schengen countries and their family members</li> <li>b. Third country nationals residing in another EU or Schengen country with residence permit</li> </ol> </li> <li>3. Exit of third country national</li> <li>4. Necessary traffic, which is: <ol style="list-style-type: none"> <li>a. Healthcare and rescue service professionals/personnel, health researchers, and elderly care professionals</li> <li>b. Transport personnel and other transport staff to the extent necessary</li> <li>c. Diplomats, staff of international organisations, military personnel and humanitarian aid workers in the exercise of their functions</li> <li>d. Necessary (return) transit and returns</li> <li>e. Passengers travelling for imperative family reasons</li> <li>f. Persons in need of international protection or for other humanitarian reasons</li> <li>g. Other necessary and justified traffic. For example, other necessary traffic would be maintenance work, that requires maintenance team or a person arriving from another country and this work cannot be postponed.</li> </ol> </li> </ol>
France	<p><i>Internal borders:-</i></p> <p><i>External borders:</i> Travel restrictions except air travel. Air passengers are treated in an individual manner (17 March 2020).</p> <p>France provide information to the public through their network of embassies and liaison officers. Third country nationals are prevented from boarding. (They see a drop in extra-Schengen travel of 75%; 25% are remaining EU nationals, only 5% have no right to enter FR)</p>
Germany	<p><i>Internal borders:</i> Introduction of internal border control at the land borders with Denmark, Luxembourg, France, Switzerland and Austria for an initial period of ten days. The Federal Republic of Germany reserves the right to determine border-crossing points for border checks (16 March 2020).</p>

	<p>Cross-border commuters remain largely unimpeded until 17 March 2020 without proof that they have a job in another country. Thereafter, they should provide proof of such a job in order to be able to cross the border. Other unnecessary trips into and out of high-risk areas will no longer be permitted.</p>
	<p><i>External borders:</i> If a foreigner who is legally resident in the federal territory and does not possess a residence title applies for a residence title, his residence shall be deemed to be permitted up to the time of the decision by the foreigners authority.</p>
Greece	<p><i>Internal borders:-</i></p>
	<p><i>External borders:</i> Temporary closure of land borders.</p>
	<p><i>Internal borders:</i> Introduction of internal border controls at the HU/ AT border and HU/SI border (12 March 2020).</p> <p>Introduction of internal border control at the HU/SK border and at all of the Schengen internal air borders as well (17 March 2020).</p> <p>Hungary shall permit entry the following border crossing points:</p> <ul style="list-style-type: none"> <li>- with regard to Slovenia: Rédics, Tornyiszentmiklós; Tornyiszentmiklós- Pince; and</li> <li>- with regard to Austria: Hegyeshalom, Sopron, Rábafüzes; also Fertőd, Kópháza, Kőszeg, Búcsú és Szentpéterfa.</li> <li>- with regard to Slovakia: Rajka, Tornyosnémeti; also Parassapuszta, Vámosszabadi, Esztergom, Sátoraljaújhely</li> <li>- Other roads crossing the border along the indicated border areas will be closed.</li> </ul> <p>HU will extend the reintroduced border control measures at the land and air borders by 20 days (22 March 2020).</p>
	<p><i>External borders:</i> No more visa issuing to Iranian citizens (16 March 2020).</p> <p>Non-Hungarian citizens arriving from abroad are denied access to Hungary. EEA citizens with permanent Hungarian residence card receive the same treatment as Hungarian citizens. In cases deserving special consideration, the Hungarian National Police Headquarter may grant exemption from the travel and traffic restrictions, with appropriate precautionary health measures (17 March 2020):</p> <ul style="list-style-type: none"> <li>- the person concerned has undergone a health screening,</li> <li>- no suspicion of COVID-19 infection has been established in the course of the health screening, and</li> <li>- the person concerned has been registered by the epidemiological authority</li> </ul>

	As a general rule, employees of public sectors which are most affected by the epidemic situation are prohibited from leaving Hungary.
Iceland	<i>Internal borders:</i> -
	<i>External borders:</i> -
Ireland	<i>Internal borders:</i> -
	<i>External borders:</i> -
Italy	<i>Internal borders:</i> -
	<i>External borders:</i> All flights from China, Hong Kong, Macau and Taiwan suspended. Before this date, all passengers arriving from those destinations were subject to medical screening (31 January 2020).
Latvia	<i>Internal borders:</i> Restriction will not apply to cargo, as well as for LV citizens and TCN with permanent residence rights in LV, who are returning to LV, and to TCN who wish to leave LV. The foreign diplomats working in LV, as well as persons arriving in LV for humanitarian reasons or according to LV national interests are excluded as well.
	Controls will not be introduced on the EU's internal borders (17 March 2020).
	<i>External borders:</i> All of the EU's external border crossing points will be closed for people and transport (Restrictions will not apply to cargo).
	Short-term and long-term visas for entry to LV will not be issued by LV diplomatic and consular missions abroad, as long as the emergency situation exists.
Liechtenstein	<i>Internal borders:</i> -
	<i>External borders:</i> The entry for people from high-risk countries are restricted. High risk countries are countries or areas that must have imposed extraordinary measures to prevent and combat the new Virus. At present Italy, Germany, Austria and France are designated high-risk countries. People from high-risk countries will be refused entry into the Customs Union with Switzerland. Exceptions are possible. This counts for example for people who live or work in Liechtenstein. The person that intends to enter the Customs Union has to prove that one the exceptional conditions (Art. 3 of the Ordinance on measures to prevent coronavirus, LR 818.101.24).
Lithuania	<i>Internal borders:</i> Introduction of border control at all internal land-, sea-, and air borders (14 March – 24 March 2020).

	<i>External borders:</i> Lithuanian consulates worldwide suspended acceptance and processing of visa applications, including visa applications in representation of another Schengen states.
Luxembourg	<i>Internal borders:</i> Increased border controls between DE and LU are expected to take place in the coming days.
	<i>External borders:-</i>
Malta	<i>Internal borders:-</i>
	<i>External borders:-</i>
The Netherlands	<i>Internal borders: -</i>
	<i>External borders:</i> Regular border regime in place.
Norway	<i>Internal borders:</i> Introduction of internal border controls at all NO borders (16 March 2020).
	<i>External borders:</i> Norway will temporary refuse applications for Schengen visa (considered to be a threat to public health).
	<p>An administrative decision may be taken under the Immigration Act to reject a foreign national without a residence permit. Decisions are taken by the Directorate of Immigration or the police. The Ministry of Justice and Public Security may assign decision-making competence to another authority. Foreign nationals who are rejected shall leave the realm without undue delay. The first paragraph does not apply to EEA nationals, and their family members as defined under section 110 the Immigration Act, who reside or work in Norway.</p> <p>Suspension of all representation agreements until further notice.</p>
Poland	<i>Internal borders:</i> Introduction of internal border controls at border with CZ, SK, DE, LT as well as at sea and air border crossing points (15 March – 24 March 2020).
	<i>External borders:</i> Entry ban for foreigners (15 March 2020).
Portugal	<i>Internal borders:</i> Introduction of internal border controls at border with Spain (16 March – 15 April 2020). Activation of 9 authorized internal land border crossing points with Spain.
	<p><i>External borders:</i> All measures should be applied without prejudice of:</p> <ol style="list-style-type: none"> <li>a. The right of entry for national citizens and holders of residence permits in both countries;</li> <li>b. Circulation of diplomatic personnel, Armed Forces and law enforcement;</li> </ol>

	<ul style="list-style-type: none"> <li>c. Circulation for the purpose of family reunion of spouses or similar and family members up to 1st degree;</li> <li>d. Access to health facilities, under the terms of bilateral agreements related to the provision of health care;</li> <li>e. The right to exit of citizens living in another country</li> </ul> <p>Ban on disembarkation of passengers and crew of cruise ships with the exception of national citizens and legal residents in Portugal.</p> <p>Suspension of granting of licenses to come ashore for crew members in national ports.</p>
Romania	<i>Internal borders:</i> -
	<i>External borders:-</i>
Slovakia	<i>Internal borders:</i> Slovakia has taken police and medical measures at internal borders of the Slovak Republic with Hungary, Czechia and Austria (13 March 2020). The objective of such measures is to limit the spread of the new Coronavirus through querying the travel history and assessment of the health condition of travellers.
	<p><i>External borders:</i> Slovakia does not allow to enter the territory by all foreigners except those, who:</p> <ul style="list-style-type: none"> <li>- have residence at the territory of Slovakia</li> <li>- are diplomats accredited in EU member states</li> <li>- are cross-border workers</li> <li>- are foreign health professionals for the purpose of combating COVID-19</li> <li>- are drivers of vehicles transporting the goods</li> </ul>
Slovenia	<i>Internal borders:</i> -
	<i>External borders:</i> Due to limitations on travel being instituted in Europe and elsewhere, the Ministry of foreign affairs has issued an appeal to citizens to delay any travel abroad and for those who are abroad to return to Slovenia immediately 9 March 2020)
Spain	<p><i>Internal borders:</i> Introduction of border controls at the land borders (17 March – 26 March 2020).</p> <p>The entry into national territory through the land borders will only be allowed to the following individuals:</p> <ul style="list-style-type: none"> <li>a) Spanish nationals;</li> <li>b) Residents in Spain;</li> <li>c) Cross-border workers;</li> <li>d) In case of force majeure, duly accredited with documentary evidence.</li> </ul>

	<p>Foreign personal accredited as a member of diplomatic missions, consular offices and international organizations located in Spain, are exempted from these measures in their displacements, provided these are displacements linked to the performance of official duties.</p>
	<p><i>External borders:-</i></p>
Sweden	<p><i>Internal borders: -</i></p>
	<p><i>External borders: -</i></p>
Switzerland	<p><i>Internal borders:</i> Introduction of internal border controls at border with IT (13 March – 22 March 2020). In order to make controls at the internal border to IT effective and at the same time as efficient as possible, a certain channelling to larger border crossing points is inevitable. For this reason, smaller border crossing points will stay closed.</p> <p>Border controls now also apply to the air traffic from Italy, France, Germany and Austria (18 March 2020). Swiss border control authorities will set up the corresponding arrangements at the airports. Furthermore, people from high-risk countries, who comply with one of the four cases above, may only enter at the airports of Zurich, Geneva or Basel.</p>
	<p><i>External borders:</i> Travel restrictions for passengers from Italy, France, Germany, Austria, Spain and from all non-Schengen states (18 March 2020):</p> <p>People travelling from IT, FR, DE, AT and ES may only enter Switzerland in one of the following four cases:</p> <ul style="list-style-type: none"> <li>- they are a Swiss citizen;</li> <li>- they have a residence permit in Switzerland;</li> <li>- for professional reasons;</li> <li>- if they are in a situation "of absolute necessity".</li> </ul> <p>Suspension of issuing Schengen Visas for three months.</p>

## ANNEX 9: EXAMPLES OF GOOD PRACTICES DURING THE COVID-19 PANDEMIC

At the Hungarian/Slovenian land border, a few days after borders shutdowns related to COVID-19, both countries gave clear feedback to each other of the negative impact of this measure. As a result, borders were reopened for cross-border commuters, farmers and owners of property in the neighbouring country. The authorities agreed to leave the most important border crossing points open to passengers and to freight transport. Governments acted rapidly and in an organised manner: the restrictions for passenger traffic in Órség and freight transport in Lendava were quickly lifted.

As regards **twin cities**, at the EE-LV land border an exemption was made allowing residents of the twin towns of Valka and Valga to move across the Estonia-Latvia border for ‘valid reasons’. A valid reason was considered to be a job, family or residence in Estonia, but residents had to be included in the list prepared by the Valka Municipality and had to present a passport or ID card when crossing the border. These rules were taken in an effort to cause as little disruption as possible to daily life and the provision of services.

Euregio Meuse-Rhin underlines the well-functioning **multi-governance cooperation of the local task-forces** (Euregio’s Meuse-Rhin’s crisis management task force and citizen information points) with the regional governments and the national governments of Belgium, Germany and the Netherlands. In this regard, the **trust building during non-crisis times is essential** in order to have **structures already in place for crisis times** and ensure a smooth cooperation and the possibility to bring the specific problems of border regions on the political agenda at regional and national level.

In order to enable cross-border commuters to comply with test requirements on entry, **COVID-19-test facilities directly at the border** were built, for example at the German-French border crossing point “Goldene Bremm”<sup>147</sup>.

General **exemptions from quarantine requirement for short-term stays within the context of cross-border traffic** were introduced by some Member States or regions, e.g. by the German Bundesland Nordrhein-Westfalen for stays of under 24h for cross-border traffic from BE, LU and NL<sup>148</sup>.

The German Bundesland Nordrhein-Westfalen issued a general ruling (Allgemeinverfügung) on 4 April 2021 on test requirements for persons entering from high incidence areas, which **extends the period of validity of negative test results for cross-border commuters** and for regular visits of close relatives, partners and dependent children in the Bundesland to 72h compared to 48h for entries for other reasons. This way, commuting workers can cover one working week of up to six days with two negative COVID-19 tests instead of three. In its explanatory memorandum, the general ruling refers to the “close economic and personal ties” in border areas, and comes to the conclusion that the strict test requirements in case of the classification of a neighbouring country as “area of high incidence” would lead to a “considerable burden” on the border

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<sup>147</sup> [https://www.saarland.de/DE/portale/corona/impfungstest/testzentrum/testzentrum-dt-fr/deutsch-franzoesisches-testzentrum/deutsch-franzoesisches-testzentrum\\_node.html](https://www.saarland.de/DE/portale/corona/impfungstest/testzentrum/testzentrum-dt-fr/deutsch-franzoesisches-testzentrum/deutsch-franzoesisches-testzentrum_node.html)

<sup>148</sup> § 4(6) 1) CoronaEinrVO NRW of 15 January 2021, last amendment on 27 March 2021.

citizens. The extension of the validity of test results of these groups of persons is seen as a “proportionate balance” between infection control and the mobility of these groups of persons. “The mobility of employees and close relatives should not be restricted at the expense of companies in border regions and families.”<sup>149</sup>

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<sup>149</sup> Allgemeinverfügung zur Regelung von Ausnahmen von der Testpflicht bei Einreise aus Hochinzidenzgebieten nach § 4 Absatz 2 Nummer 5 der Coronavirus-Einreiseverordnung, Allgemeinverfügung des Ministeriums für Arbeit, Gesundheit und Soziales vom 4. April 2021, [https://www.mags.nrw/sites/default/files/asset/document/210404\\_av\\_hochinzidenzgebiete.pdf](https://www.mags.nrw/sites/default/files/asset/document/210404_av_hochinzidenzgebiete.pdf)





	<ul style="list-style-type: none"> <li>- license plate recognition,</li> <li>- drones</li> <li>- facial recognition.</li> </ul>	<p>possible during the temporary reintroduction of border control</p> <ul style="list-style-type: none"> <li>• Entry may be refused during the temporary reintroduction of border control</li> <li>• Checks of residence and other police checks are carried out at all times, are targeted at security and migratory situation, and may only be conducted based on reasonable suspicion.</li> </ul>
Germany	<ul style="list-style-type: none"> <li>- Germany implements (border) police measures in the border regions (so-called “Schleierfahndung”) in close cooperation with the police authorities of the neighbouring countries. In view of migratory and security challenges, these measures were intensified in 2019.</li> </ul>	<p>Germany does not consider the so-called “Schleierfahndung” a substitute for internal border controls, but an instrument of daily practice, without the existence of a special danger/threat situation. (Border) police measures below the threshold of temporary reintroduction of internal border controls cannot be equated with temporary internal border controls due to the different prerequisites and legal consequences.</p>





	<p>- use of systematic license plate recognition on the border and in the border region.</p>	<p>become unlawful border controls is the impact that these checks have overall on cross-border traffic in the concerned region. Police and customs checks are carried out on a risk-based approach. Switzerland is of the opinion that checks that only affect a fraction of the traffic and / or persons crossing a specific border do not constitute unlawful border checks at internal borders</p> <p>It is used as a tactical tool for analysis, investigations and the search for persons</p>
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\* period before COVID

## FACTSHEET on the use of the @MIGO-BORAS system

This factsheet provides information about the aim of and methods used by the camera surveillance system developed by the Royal Marechaussee (*Koninklijke Marechaussee*; KMAR) to support mobile supervision controls. The system is called @MIGO-BORAS – a Dutch/English acronym which stands for Mobile Information-Driven Action – Better Operational Results and Advanced Security. The system has been operational since 1 August 2012.

### Aim

The system will provide technical support to mobile supervision controls conducted by the KMAR. It will make these controls more information-driven and allow them to be conducted more efficiently and effectively.

### Legal framework

The crossing of internal borders between EU member states is governed by the Schengen Borders Code.<sup>150</sup> Under Article 22 of the Code, ‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’ Article 23 of the Code provides that ‘The abolition of border control at internal borders shall not affect the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.’ This also applies explicitly in border areas.

In the Netherlands, police controls in the border areas are carried out by the KMAR. The KMAR is a military police organisation under the responsibility of the Minister of Defence. However, the predominantly civil police tasks for which it is responsible fall within the remit of the civil authorities. Under section 6 of the Police Act 1993 and

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<sup>150</sup> 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 EU 2006, L 105/1. Amended Regulation (EU) 2016/399, OJ EU 2016 L77/1

section 47 of the Aliens Act 2000, the KMAR is responsible for supervising compliance with the statutory provisions relating to aliens in the Netherlands. The Minister for Migration (the State Secretary of Security and Justice of the Netherlands) has authority over the KMAR in this respect. Within this framework the KMAR conducts operational supervision of aliens (i.e. the mobile supervision operations mentioned above) in the internal border area with Belgium and Germany that extends 20 km into the Netherlands from the border.<sup>151</sup>

Mobile supervision controls conducted by the KMAR are intended:

1. to combat illegal residence, organised or otherwise (human trafficking or people smuggling) at the earliest possible stage and to prevent and discourage other prospective migrants from travelling to the Netherlands illegally;
2. to help combat cross-border crime and migration-related crime.

The timing, duration and frequency of these controls fall within the framework of the Schengen Borders Code and the case law of the Court of Justice of the European Union.<sup>152 153</sup>

The Schengen Borders Code contains no specific rules governing camera surveillance in border areas. In draft guidelines on the functioning of the Schengen area, the European Commission recently turned its attention to the use of camera surveillance in internal border areas, and specifically automatic number plate recognition. In the Commission's view, camera surveillance is permissible in these areas under European law as long as it is compatible with the Schengen Borders Code and does not have an effect equivalent to border checks.

The national legal framework for mobile supervision operations applies fully to the support provided by the @MIGO-BORAS surveillance system. The legal framework for the intensity and frequency of the controls is laid down in Dutch immigration legislation. Mobile supervision controls can be carried out in Dutch territory in areas up to 20 km

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<sup>151</sup> Section 50 of the Aliens Act 2000 in conjunction with article 4.17a and b of the Aliens Decree

<sup>152</sup> ECJ, judgment in Melki (C-188/10) and Abdeli (C-189/10).

<sup>153</sup> Section 50 of the Aliens Act 2000 in conjunction with article 4.17a (and 4.17b) of the Aliens Decree.

from the border with Belgium and Germany. On a given road, they may be carried out for up to six hours per day and for a maximum of 90 hours per month.

Mobile supervision controls are conducted on the basis of section 50 of the Aliens Act 2000 and article 4.17a (and b) of the Aliens Decree 2000. The powers laid down in immigration legislation do not provide a specific basis for the use of camera surveillance or number plate recognition.

The @MIGO-BORAS system has three functions:

1. to collect anonymous data for analysis and the construction of traffic profiles;
2. to observe vehicles and select those to be stopped and examined on the basis of analysis;
3. to respond to quick alerts in situations where there has been a serious or large-scale breach of the legal order or public order or in the interests of emergency assistance (as in the case of an amber alert).

For immigration law purposes, anonymous data only will be used for the first two functions (analysis and surveillance). The data stored will not be traceable to individuals since the list of characteristics that forms the basis for data collection and vehicle surveillance and selection is limited. Any data traceable to individuals (such as number plates) will be encrypted before they are processed. In the case of the third application, quick alerts, the data in question *is* traceable to individual motorists, since in an emergency scenario, one or more specific number plates will be sought. This third application does therefore constitute an infringement (albeit limited) of the right to privacy as laid down in article 10 of the Dutch Constitution, article 8 of the European Convention on Human Rights and articles 7 and 8 of the EU Charter of Fundamental Rights. The statutory basis for the processing of personal data in the context of quick alerts can be found in section 2 of the Police Act. The Data Protection Authority (CBP) recognises this application in its guidelines on automatic number plate recognition systems. This infringement is proportionate given the purpose of quick alerts. Such operations serve a justifiable purpose, i.e. investigating and preventing serious criminal offences (in situations where the assistance of the emergency services is required or there has been a particularly serious or large-scale breach of the legal order or of public order).



The number plate data collected for quick alert purposes is handled by a very small number of KMAR staff, limiting the infringement of privacy rights. Strict criteria have been laid down in respect of who may access the data and under what conditions. The data may be processed provided this is essential for investigative purposes or emergency services assistance.

### **Organisation and design**

@MIGO-BORAS is a modular system, which can be operated according to the different functions for which it is designed.<sup>154</sup>

The system consists of 15 fixed camera (or sensor) installations and six vehicle-mounted mobile sensors plus a central control application to which all data is sent and processed. The fixed sensors are positioned in the main through routes in the border area with Belgium and Germany and are used exclusively in Dutch territory.

The system can be used both for data collection and for surveillance. These specific functions are described in the section below on 'Use'.

During data collection (function 1), traffic patterns are observed in accordance with a data collection plan. Smart sensors classify every passing vehicle by category (e.g. heavy goods vehicle, standard car or SUV), colour, country/region of origin and time and location. Vehicle and traffic-pattern risk profiles are then developed on the basis of these data. No number plates or other data that can be traced to individual persons will be processed.

When function 2 (surveillance) is used, the system observes characteristics of passing vehicles during the limited periods in which it is operating as part of mobile supervision operations. The system then uses existing risk profiles to establish whether a passing vehicle is a likely candidate for a vehicle check. In doing so the system makes the selection of vehicles for examination quicker and more objective. It is therefore a useful

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<sup>154</sup> The CBP's guidelines on automatic number plate recognition systems and the Brouwer-Korf Committee's recommendations were specifically considered throughout the design process.

addition to existing KMAR practice based on the professional experience of its staff. It helps optimise implementation of KMAR tasks and makes staff deployment more efficient. It also increases the likelihood of identifying suspect vehicles, which in turn will reduce the number of checks to which bona fide motorists are subjected. With assistance from @MIGO-BORAS the KMAR attempts wherever possible to conduct its controls in the right place, at the right time and on the right vehicles.

When function 3 (Quick Alert) is used in exceptional situations, one or more specific number plates is searched for in the system.

### **Use**

In accordance with recently-amended national legislation, mobile supervision operations are conducted as far as possible on the basis of intelligence held and/or empirical information on illegal residence. To a limited extent, mobile supervision controls are conducted with a view to gathering intelligence on illegal residence.<sup>155</sup> During the limited period in which mobile supervision operations can be conducted, the @MIGO-BORAS system will provide direct support by comparing characteristics of passing vehicles with existing risk profiles. In addition, the system will be used (on the basis of the data collection plan) to gather anonymous traffic-flow data which will help analysts when drawing up new risk profiles or improving existing ones.

The three functions are explained in more detail below:

#### *1. Anonymous data collection and analysis*

The data collected on each passing vehicle is made anonymous. This ensures that the vehicle (and its passing the location in question) can no longer be traced back to an individual. Once this data is anonymous, it is analysed and then used to draw up risk profiles. It is also used to help analysts recognise trends and developments in traffic patterns. The latter helps KMAR plan and manage its subsequent mobile supervision controls. The risk profiles will be used to support the system of aliens supervision. The legal basis for this process lies in the general power to supervise aliens in the

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<sup>155</sup> Article 4.17a of the Aliens Decree 2000.

Netherlands. The profiles resulting from the collection and analysis of anonymous data comply with applicable anti-discrimination legislation. The purpose of this function is to collect information that can be used for data analysis. No immediate follow-up takes place in the context of this function and thus no individual vehicle is subjected to a check directly as a result of it.

### *2. Observing vehicles and selecting those to be stopped and examined*

The KMAR observes vehicles and selects those to be stopped and examined using risk profiles drawn up on the basis of the analysis of the data obtained by @MIGO-BORAS (see function 1) and any other information at the KMAR's disposal. The deployment of @MIGO-BORAS is based on a surveillance plan which specifies what sensors are to be activated and when. The use of @MIGO-BORAS is thus compatible with the provisions of article 4.17a of the Aliens Decree 2000. If a particular vehicle matches a particular risk profile, the controller receives a signal (a 'hit'). The controller can then advise a mobile KMAR officer which vehicle should be subjected to a check. After making visual contact with the vehicle the officer will then either stop the vehicle in question or decide not to perform a check.

It is technically possible to use @MIGO-BORAS in conjunction with police information to investigate crime and enforce criminal law. This is not being done for the time being until the legal framework surrounding the statutory basis for such use has been determined more fully. Under the general police powers as laid down in the Police Act,<sup>156</sup> the system may be used for quick alerts in exceptional or urgent situations.

### *3. Providing assistance when a quick alert is issued*

Under section 2 of the Police Act 1993, a quick alert (such as an amber alert or terrorist threat) may be issued in the interests of emergency assistance or if there has been a serious or large-scale breach of the legal order or of public order. In such cases, @MIGO-BORAS may be used to follow up on an alert.

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<sup>156</sup> Sections 2 and 6 of the Police Act 1993.

Inherent in the system's design are a number of options that fulfil the principle of 'privacy by design'. In addition, design choices were made to maximise the system's compatibility with the KMAR's operational processes while taking account of current legislation and anticipated developments in the law. Examples of the choices underpinning the system's design include:

- The distinction between data collection and surveillance:
  - When in **data collection** mode, @MIGO-BORAS registers every vehicle that passes its sensors. Before the data is saved it is made anonymous. This means that the number plate is converted to a code that cannot be traced to an individual person.
  - When in **surveillance** mode, the system compares the characteristics of a vehicle recorded by the sensors with those contained in a risk profile. Using the profiling model, passing vehicles can be observed and compared with a set of vehicle characteristics without the need to reveal number plates.
- Data collection and surveillance are always performed on the basis of plans for each activity. If no plan is active the central application will receive no data on passing vehicles.
  - The **data collection plan** contains the specifications of the sensors to be deployed (e.g. the location, time and duration of their use). It also contains the address to which the data obtained are to be delivered.
  - **The surveillance plan** contains the same type of sensor specifications as those included in the data collection plan. The surveillance plan specifies the risk profiles with which the characteristics of passing vehicles are to be compared. It too contains the address to which vehicle data are to be delivered if they correspond to those contained in the risk profile.
- The system distinguishes between several types of target-group definitions to identify relevant vehicles as specifically as possible. It is possible both to specify known number plates and to specify risk profiles that contain characteristics relating to vehicles in a given target group.

### **Fictitious scenario**

A combination of empirical information, KMAR intelligence and general police data analysis has revealed that illegal migrants are being transported to Westland to work in

commercial glasshouses there. Intelligence suggests that white minibuses, mostly from country X, region Y, are being used for this purpose. The illegal aliens are often smuggled into the Netherlands in the early hours of the morning. It then emerges from @MIGO-BORAS data collection that a noticeably high number of white passenger vans from country X, region Y has been observed moving in convoy between 01.00 and 02.00 on Tuesday mornings, usually a quiet time. This turns out to be a weekly pattern – at the same location and the same time – which is at odds with the usual traffic pattern on other days of the week.

The KMAR decides to plan a mobile supervision control at this time and draws up a risk profile based on the characteristics of such vehicles. When a certain vehicle passes, the system produces a hit matching the profile vehicle. The controller alerts a mobile officer to the hit. The officer then follows the vehicle in question and provides visual confirmation of the passenger complement. The vehicle is then subjected to a check.

### **Protection of privacy**

When control is carried out using risk profiles, officers may check a vehicle on the basis of a single hit. Should this lead to follow-up action provided for by law, the system will provide visual footage of the vehicle in question, plus the date, time and location of the check. The whole data set, including reference to the risk profile employed, is stored as part of the official report arising from the vehicle check. These data (which are traceable to the individual concerned) will thereafter be stored in the KMAR's operational processing system and not in the @MIGO-BORAS system. Under section 8 of the Police Data Act, these data may be stored for up to five years. Non-hits are not stored.

If a particular vehicle is being sought in the context of a quick alert, the cooperation and assistance involved in processing data traceable to the individual concerned takes place in the context of national security and public order. If a hit is identified in the context of a quick alert, the system will generate footage of the vehicle and the date, time and location. The whole data set relating to the hit will be transferred to the requesting party (i.e. the Public Prosecution Service or the police) and stored in accordance with national legislation under that party's responsibility. The KMAR does not store this data itself.

Since the system uses digital technology, it was registered with the Data Protection Authority (CBP) when it was developed in 2005. Throughout the development process designers took account of the CBP's guidelines on automatic number plate recognition. The CBP has indicated that in line with established procedure, it waits until systems are operational before assessing whether they meet, statutory requirements.

Everyone is legally entitled to ascertain whether KMAR has processed any of their personal data and, if so, which personal data it has processed.<sup>157</sup> KMAR announces the presence of permanent cameras by signs at the side of the road. Information about the system and privacy issues is also publicly available online.

### **Cooperation with neighbouring countries**

Neighbouring countries and the Commission has been informed about the implementation and function of the system.

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<sup>157</sup> Sections 25 and 28 of the Police Data Act.

**ANNEX 12: REPORTS RECEIVED BY MEMBER STATES WITH INTERNAL BORDER CONTROL IN PLACE BETWEEN MARCH AND JUNE 2020 IN ACCORDANCE WITH ARTICLE 33 SBC**

Reintroducing Member State	Report received (yes/no)	Comments
Austria	no	-
Belgium	Yes	20/03/2020 – 14/06/2020; comprehensive report, covering all requested aspects and including statistical data
Czech Republic	yes	14/03/2020 – 30/06/2020; comprehensive report, covering all requested aspects and including statistical data
Denmark	no	-
Estonia	yes	17/03/2020 – 16/06/2020; the report covers all requested aspects, including basic statistical data
Finland	yes	19/03/2020 – 18/09/2020; the report covers all requested aspects
France	no	-
Germany	no	-
Hungary	yes	12/03/2020 – 30/06/2020; the report covers all requested aspects (some very shortly) and includes statistical data
Iceland	yes	24/04/2020 – 22/06/2020; the report does not cover all respected aspects (no information regarding the impact on freedom of movement, the ex-post assessment of the proportionality) and some aspects are only shortly addressed
Lithuania	yes	14/03/2020 – 14/09/2021; comprehensive report, covering all requested aspects, including statistical data and an additional section on lessons learnt
Norway	no	-
Poland	yes	15/03/2020 – 12/06/2020; comprehensive report including statistical data
Portugal	yes	16/03/2020 – 30/06/2020; the report does not cover all respected aspects (no information regarding the impact on freedom of movement and the ex-post assessment of the proportionality) and some aspects are only shortly addressed, it includes statistical data
Slovakia	yes	08/04/2020 – 26/06/2020; the report covers all requested aspects, although some aspects are only shortly addressed

Spain	yes	14/03/2020 – 30/06/2020; the report covers all requested aspects, although some aspects are only shortly addressed and includes statistical data
Switzerland	yes	13/03/2020 – 15/06/2020; the report does not cover all respected aspects (no information regarding the operation of the controls, the impact on freedom of movement, the ex-post assessment of the proportionality), including statistical data

General observations:

- Most reports were in large parts rather descriptive, particularly regarding the initial assessment of the criteria of the SBC. In general, the content and shared information varies greatly, from detailed statistics to very general statements that a certain criterion is fulfilled.
- The reports did not assess the effectivity and the proportionality of the reintroductions in a uniform manner. Particularly the assessment of the proportionality is not based on a common definition of “proportionate”. Only very few reports referred to the possible use of alternative measures, but only assessed their viability and effectivity very briefly.
- Some reports did not draw a clear line between entry restrictions and border control, in essence assessing the criteria for the entry restrictions, not for the reintroduced border control.
- Apart from one report, which included a section on lessons learnt from the reintroduction, no issues or problems during the reintroduction were raised in the reports.



### ANNEX 13: API AND PNR

API data refers to the passengers' identity, usually taken from their official documents, as well as the flight information for passengers, including the number and type of travel document used, nationality, full names, the date of birth, the border crossing point of entry into the territory of the Schengen Member States, mode of transport, departure and arrival time of the transportation, total number of passengers carried on that transport, and the initial point of embarkation<sup>158</sup>. API data is highly valuable for internal security due to its accuracy and reliability. Carriers are obliged to transmit this data, by end of check-in, at their request to the responsible authorities of the Member State that the passengers will enter through the authorised border crossing point to which the carrier will transport them. Under Union law, however, air companies only transmit API data of passengers travelling into the European Union to the border control authorities at destination, and only for border control purposes.<sup>159</sup> This means API data are not available for other security purposes, and notably cannot be collected for intra-Schengen flights.

PNR data<sup>160</sup> is provided by passengers at the moment of booking and contain, apart from passenger's name and surname, information such as payment details, contact details or luggage information. It must be borne in mind that PNR data is collected for commercial purposes and data crucial for the use for law enforcement purposes, such as passenger's date of birth, are often missing. This is particularly relevant for the processing of PNR data against databases such as SIS: the processing of incomplete data may lead to a high number of false positive hits. Law enforcement practitioners have stressed that the best operational results are often achieved by the joint processing of the more reliable API data which enables the confirmation of the identity of passengers, together with richer PNR, which reveals important information about passengers' travel behaviour<sup>161</sup>. API also allow the authorities to ensure that the system works in a targeted manner so that only those passengers who are genuinely suspicious are identified<sup>162</sup>.

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<sup>158</sup> For more information see Directive 2004/82/EC on the obligation of carriers to communicate passenger data, Study on Advance Passenger Information (API) – Evaluation of Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data: <https://op.europa.eu/en/publication-detail/-/publication/3ef3a394-5dcb-11ea-b735-01aa75ed71a1/language-en/format-PDF>

<sup>159</sup> See Directive 2004/82/EC. For full reference see Annex 16

<sup>160</sup> The collection and processing of PNR data in the EU is regulated by the Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132.

<sup>161</sup> SWD(2020) 128 final, p.43.

<sup>162</sup> Ibidem, p.26.

#### ANNEX 14: NEW IT ARCHITECTURE AT THE EXTERNAL BORDERS

The **Entry/Exit System (EES)** is a new automated IT system for registering travellers from third-countries, both short-stay visa holders and visa-exempt travellers, each time they cross an EU external border and will replace the current system of manually stamping passports.

**ETIAS** is also a new, largely automated IT system created to identify security, irregular migration or high epidemic risks posed by visa-exempt visitors travelling to the Member States, whilst at the same time facilitate crossing borders for the vast majority of travellers who do not pose such risks. Non-EU nationals who do not need a visa to travel to Schengen will have to apply for a travel authorisation through the ETIAS system prior to their trip. EES and ETIAS are to be operational in 2022.

The **Interoperability Regulations** establish a framework for the interoperability of the six central large-scale IT systems in the field of borders, security and migration, namely EES, VIS, ETIAS, Eurodac, SIS, and ECRIS-TCN. It will be operational from 2023.

## ANNEX 15: BORDER AREAS

In the absence of a definition of the border area in the Schengen Borders Code, any future reference to the border areas could be constructed as referring to one of the following:

### **Local Border Traffic (Regulation 1931/2006)**<sup>163</sup>

The 2006 Regulation laying down rules on local border traffic at the external land borders of the Member States allows derogating, for persons living in a border area, from the general rules on border checks set out in the Schengen Borders Code. The aim is to avoid creating barriers to trade, social and cultural interchange or regional cooperation with neighbouring countries. The Regulation authorises Member States to conclude bilateral agreements with neighbouring non-EU countries, provided these agreements fully comply with the parameters set by the Regulation.

In the regulation, the border area has been defined as “an area that extends no more than 30 kilometres from the border. The local administrative districts that are to be considered as the border area shall be specified by the States concerned in their bilateral Agreements as referred to in Article 13. If part of any such district lies between 30 and 50 kilometres from the border line, it shall nevertheless be considered as part of the border area”. However, this definition has been extended in 2011 in view of the specific situation of the Kaliningrad Oblast, to avoid the division of integrated areas and excludes political and economic centres. According to Regulation 1342/2011<sup>164</sup>, the border area include also specific districts and cities (e.g. Gdansk which is >100km from the border).

### **NUTS**

In accordance with Regulation No 1059/2003 of 26 May 2003<sup>165</sup>, the NUTS classification (nomenclature of territorial units for statistics) subdivides the economic territory of the Member States, as defined in Decision 91/450/EEC, into territorial units. It ascribes to each territorial unit a specific code and name. The NUTS classification is hierarchical. It subdivides each Member State into NUTS level 1 territorial units, each of which is subdivided into NUTS level 2 territorial units, these in turn each being subdivided into NUTS level 3 territorial units (Article 1). Regulation (EU) 2017/2391 of 12 December 2017 amending Regulation (EC) No 1059/2003 as regards the territorial typologies (Tercet) specifies that the common statistical classification of territorial units (NUTS) has been established in order to enable the collection, compilation and dissemination of European statistics at different territorial levels of the Union (Article 1). While this system is well-known to Member States it should be noted that its design is not based on purely geographical criteria. Instead, the

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<sup>163</sup> Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention OJ L 405, 30.12.2006, p. 1–22

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006R1931>

<sup>164</sup> Regulation (EU) No 1342/2011 of the European Parliament and of the Council of 13 December 2011 amending Regulation (EC) No 1931/2006 as regards the inclusion of the Kaliningrad oblast and certain Polish administrative districts in the eligible border area, OJ L 347, 30.12.2011, p. 41–43

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011R1342>

<sup>165</sup> Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) OJ L 154, 21.6.2003, p. 1–41, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R1059>.

classification of NUTS territorial units is based on existing administrative units in the Member States and on their respective population numbers. While administrative units which reach the agreed thresholds for the respective NUTS level constitute a NUTS territorial unit by themselves, administrative units with low population numbers are combined with others until they reach the required threshold, taking into consideration other relevant criteria, such as geographical, socio-economic, historical, cultural or environmental circumstances<sup>166</sup>. Consequently, the size of these units varies greatly between and also within the Member States<sup>167</sup> depending on the population density in the areas concerned. Therefore, an approach based on NUTS territorial units does not appear suitable as a point of reference for the definition of border areas.

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<sup>166</sup> Regulation (EC) No 1059/2003, Article 3.

<sup>167</sup> See maps on the NUTS classification of the territories of the different Member States at <https://ec.europa.eu/eurostat/web/nuts/nuts-maps>.

**ANNEX 16: LIST OF LEGAL ACTS AND PROPOSALS MENTIONED IN THE IMPACT ASSESSMENT**

Title/Link	Page
<p>Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States OJ L 337, 12.12.1998, p. 8–9  <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998R2679">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998R2679</a></p>	53
<p>Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders OJ L 239, 22.9.2000, p. 13  <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2000.239.01.0001.01.ENG&amp;toc=OJ%3AL%3A2000%3A239%3ATOC">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2000.239.01.0001.01.ENG&amp;toc=OJ%3AL%3A2000%3A239%3ATOC</a></p>	4
<p>Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 19  <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2000.239.01.0001.01.ENG&amp;toc=OJ%3AL%3A2000%3A239%3ATOC">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2000.239.01.0001.01.ENG&amp;toc=OJ%3AL%3A2000%3A239%3ATOC</a></p>	4, 47
<p>Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 OJ L 187, 10.7.2001  <a href="https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0051">https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0051</a></p>	47
<p>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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77–123  <a href="https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0038">https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0038</a></p>	10
<p>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, 6.11.2013, p. 27–37  <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1053">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1053</a></p>	4
<p>C(2015)7100 Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)  <a href="https://ec.europa.eu/home-affairs/sites/default/files/e-library/documents/policies/borders-and-visas/general/docs/commission_opinion_necessity_proportionality_controls_internal_borders_germany_austria_en.pdf">https://ec.europa.eu/home-affairs/sites/default/files/e-library/documents/policies/borders-and-visas/general/docs/commission_opinion_necessity_proportionality_controls_internal_borders_germany_austria_en.pdf</a></p>	31
<p>Communication from the Commission to the European Parliament and the Council: Back to Schengen - A Roadmap, 4 March 2016, COM(2016) 120 final</p>	21, 31,

<a href="https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf">https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf</a>	37, 38
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), OJ L 77, 23.3.2016  <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399</a>  (codifying first Schengen Borders Code: 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. 1–32, and subsequent amendments)	4
Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk; OJ L 151, 8.6.2016, p. 8–11 <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0894">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0894</a>	17, Anne x 7, p.50
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Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk OJ L 122, 13.5.2017, p. 73–75 <a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2017.122.01.0073.01.ENG">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2017.122.01.0073.01.ENG</a>	Anne x 7, p. 50
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The purpose of the 2017 proposal was threefold:

- to update the time limits applicable to foreseeable events posing a serious threat to internal security and public policy offering also a solution to those Member States who may need to maintain border controls in parallel to national measures;
- to underline the need of taking into account the voice of the Member States affected by the intended reintroduction of border controls, and finally;
- to reinforce the existing procedural safeguards to assure that reintroduction of border controls is a last resort measure, applied only for as long as necessary and justified.

Specific proposals:

Article 25: The proposed changes concerned the length of the maximum time limit for reintroduction of border controls (1 year instead of 6 months)

Article 27: The proposed changes in Article 27 aimed at reinforcing or introducing new procedural guarantees for the neighbouring Member States and ensuring that border controls are a last resort measure. They concerned, among others the following aspects:

- Member States have been obliged to submit risk assessment for all notifications concerning temporary reintroduction of border checks at internal borders,
- the Commission has been obliged to issue an opinion on necessity and proportionality of decisions on reintroduction of border control by the Commission in case of prolongations beyond 6 months;

Article 27a: This was a new provision providing for a new special procedure where the serious threat to public policy or internal security exceeds one year. This procedure was to be used where the Member State is confronted with the same serious threat to the public policy or internal security beyond 1 year and where ‘commensurate exceptional national measures’ are taken within the territory (e.g. state of emergency). It assumed that the Commission would issue an opinion with regard to such notification and that the Council, taking into account the said opinion, could recommend a further prolongation of border control for 6 months renewable no more than 3 times.



Brussels, 27.9.2017  
COM(2017) 571 final

2017/0245 (COD)

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>168</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>169</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>170</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

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<sup>168</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>169</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>170</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.

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 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>171</sup>. The costs of a non-Schengen simulation clearly demonstrate that this is always a costly decision for the economy<sup>172</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)

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<sup>171</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>172</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.

and the limit for the length of prolongation periods is increased from up to 30 days to up to 6 months.

- 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>173</sup>, where the 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>174</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

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<sup>173</sup> C(2017) 3349 final.

<sup>174</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 L58/77 of 30.4.2004.

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.

## **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.

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>175</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>176</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 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

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<sup>175</sup> OJ L 77, 23.3.2016, p.1.

<sup>176</sup> C(2017) 3349 final of 12.05.2017.

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>177</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>178</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 development of the Schengen acquis<sup>179</sup>, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC.<sup>180</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>181</sup> which fall within the area referred to in Article 1, point A of Decision 1999/437/EC<sup>182</sup> read in conjunction with Article 3 of Council Decision 2008/146/EC.<sup>183</sup>

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<sup>177</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>178</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).

<sup>179</sup> OJ L 176, 10.7.1999, p. 36.

<sup>180</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>181</sup> OJ L 53, 27.2.2008, p. 52.

<sup>182</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>183</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

- (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>184</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>185</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:

*"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*

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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>184</sup> OJ L 160, 18.6.2011, p. 21.

<sup>185</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).

*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*