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COVER NOTE

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2021) 463 final
Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE 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

Delegations will find attached document SWD(2021) 463 final.

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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE 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) 462 final}

Executive Summary Sheet
Impact assessment : Proposal to amend the Schengen Borders Code
A. Need for action
Why? What is the problem being addressed?
Schengen is an area without internal border controls between Member States where persons and goods can circulate freely. Europeans value Schengen, in particular the advantages it brings for trade and the absence of passport control when crossing internal borders, making travel easier. Schengen is crucial for the functioning of the Single Market. Its creation has brought significant social and economic benefits to Europeans and helped the cross-border regions to develop. Over the last six years, Schengen has been exposed, successively, to a number of challenges: extraordinary migratory pressure in 2015, terrorist attacks and, most recently, COVID-19. In response, some Member States decided to reintroduce border checks at their internal borders. While at first such decisions responded to clearly identifiable events, now they often appear to have become a permanent precautionary measure. In some cases the decision on reintroduction of border checks has been taken as if it was a 'first aid' measure and not the last resort it should be. Moreover, Member States have applied measures that were agreed in order to protect the external borders in relation to COVID-19 in an incoherent manner, thus undermining the trust between the Member States and impacting the credibility of the Schengen area vis-à-vis third countries. The Impact assessment does not look into the instrumentalization of irregular migration, which has manifested in the summer at the land borders with Belarus, i.e. after the work on this document has been completed.
What is this initiative expected to achieve?
In response to the identified challenges, the Commission has adopted on 2 June the 'Schengen Strategy' combining legislative and operational initiatives to make Schengen stronger and more resilient. One of the deliverables of the said Strategy is the modification of the Schengen Borders Code, with a view to provide solutions to ensure that persons and goods can move freely without unjustified or disproportionate hurdles within the Schengen area and that extraordinary measures related to threats to public health are uniformly applied at all external borders.
What is the value added of action at the EU level?
The Schengen area presupposes the absence of checks at internal borders while ensuring a high level of security, thanks to a variety of measures which should compensate for the absence of such checks. In order to preserve the Schengen area, the conditions on the use of such checks by the Member States in exceptional situations as well as the use of compensatory measures must be determined at the EU level. Also the uniform application of measures at the external borders in response to a threat to public health requires EU action. It concerns trust between Member States, which is a precondition of Schengen.
B. Solutions
What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?
Three comprehensive approaches addressing all identified problems have been envisaged: Option 1 - to adopt only soft law measures, together with the Schengen Strategy (soft law measures). Option 2 – to propose a targeted amendment of the Schengen Borders Code, accompanied by some soft law measures (mixed option). In particular, a new procedure of contingency planning would be proposed concerning border checks at internal borders being reintroduced in response to threats affecting several or all Member States at the same time. The guidance and recommendations adopted in response to COVID-19 would contribute to 'mitigating measures' which would need to be taken into account whenever a reintroduction of border checks is inevitable. In order to limit the use of border checks as the most intrusive measure, the concept of the 'measure of last resort' already contained in the Schengen Borders Code would be developed to include a reference to measures available to Member States to compensate for the absence of border checks. Furthermore, the Commission would receive better tools to monitor why the Member States want to reintroduce border checks and how they carry them out. Finally, adopting an 'entry ban' to the EU in the case of a threat to public health would receive a solid legal basis, to ensure uniformity at the external borders. Option 3 - is more ambitious in terms of amending the existing rules. It would require the decision on reintroducing controls to be taken at EU level, with approval from one of the EU institutions or would simply remove the current possibility to reintroduce border checks at internal borders by unilateral decision of a Member State and impose using compensatory measures instead. Following a detailed assessment of the impact of all policy options and consultation of all stakeholders involved, Option 2 is the preferred policy option. This choice is based on the fact that this option scores, overall, best as regards effectiveness, efficiency and proportionality. It draws on 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 the legitimate expectations of EU citizens and other persons benefiting from the absence of border checks at internal borders.

Who supports which option?

All different categories of stakeholders (European Parliament, Member States, citizens, business and academia) see the need for measures to make Schengen stronger and more resilient. The support of Member States is split between Option 1 and Option 2. Option 2 is likely to receive also the support from the European Parliament and from businesses as it strikes the right balance between the necessary level of ambition and the necessary pragmatism, based on the experience made during the negotiations on the 2017 Commission proposal to amend the Schengen Borders Code. Option 3 is a logical consequence of the development of the Schengen area but has not received explicit support from any of the groups.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

The preferred policy option has the best chances to respond effectively to the identified problems. It provides the necessary tools to ensure the well-functioning of Schengen. In this sense, the range of potential impacts of this option is very wide, including positive economic and social impacts. However, the scope of these impacts will depend ultimately on the success of other envisaged initiatives, in particular as regards the reform of the Schengen Evaluation Mechanism (to be also presented together with the Schengen Strategy), as well as the progress in implementing the already adopted and the newly proposed measures at the external borders and within the territory, allowing for a better use of other compensatory measures, to ensure a high level of security in the Schengen area.

By bringing more predictability to the management of crisis situations, the preferred option brings benefits to the EU citizens and residents when moving within the Schengen area for professional purposes, shopping or leisure. At the same time it brings economic benefits to the entire Schengen area as it reduces the cost caused by internal border checks. It also explicitly recognises the interests of cross-border regions and as such may limit the impact, on these regions, of measures taken in crisis situations at the central level. Finally, it increases the credibility of the EU at the international level, by clarifying the application of the measures at the external borders that are adopted specifically to address threats to public health.

What are the costs of the preferred option (if any, otherwise main ones)?

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.

The preferred option has the best chances to succeed in reaching that objective and thus also to reduce the costs currently incurred by those Member States carrying out border checks at their internal borders to ensure the desired level of security, as well as the costs for those Member States that are affected by these checks. Some costs will be caused for national administrations in order to implement the preferred option, due to the new obligations (risk assessment, regular reporting) included in the preferred policy option which aim at making border checks a truly last resort measure. As regards 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 a whole.

How will businesses, SMEs and micro-enterprises be affected?

The success in limiting the use of border checks at internal borders and restoring trust between the Member States will reduce the risk of obstacles affecting business, in particular for those operating cross-border. The better predictability of measures applicable in a crisis situation should help in preventing long queues of trucks at the borders and absenteeism of cross-border workers, whenever a reintroduction of border checks at internal borders is inevitable. The preferred option does not generate per se costs for the carriers. Any possible costs concerning the need to collect API data will result from a new legal act, still to be proposed. The Schengen Borders Code will provide only an opening in this regard. The measures concerning the external borders will also simplify the procedures which carriers have to apply to avoid carriers' liability, which currently may differ from one Member State to another in view of the divergent application of travel restrictions.

Will there be significant impacts on national budgets and administrations?

The costs of police checks, police cooperation or use of new technologies which are promoted by the preferred option as an alternative to border checks at internal borders are difficult to calculate given that they concern the maintenance of law and order which are under the sole responsibility of the Member States. Therefore, the Commission does not have any data on this at its disposal.

Will there be other significant impacts?
The possible increased use of compensatory measures such as police checks would have an overall positive impact on fundamental rights as most travellers would again benefit from the absence of checks at internal borders. In order to limit the risk of any possible abuses, for example as regards racial profiling underpinning the police checks in the border areas (already prohibited under current rules), it will be necessary to increase the monitoring measure, e.g. in the context of Schengen Evaluations. The impacts of the increased use of new technologies should be addressed as the current EU rules on data protection will continue to apply.
D. Follow up
When will the policy be reviewed?
The proposed option addresses exceptional situations. Therefore, a regular measurement of the indicators is not possible. However, based on the Roadmap that should accompany the Schengen Strategy 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.