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NOTE

From:	Presidency
To:	Permanent Representatives Committee
Subject:	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 – Analysis of the final compromise text with a view to agreement

I. INTRODUCTION

1. On 16 December 2021 the Commission submitted to the European Parliament and the Council a 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[1].

2. The proposal aims to

   a) establish a new mechanism which should allow for a timely adoption by the Council of a binding instrument setting out temporary travel restrictions at the external borders in case of a pandemic,

[1] 14601/21

b) address the instrumentalisation of migrants, where a third country actor is using human beings to destabilise the Union or its Member States,

c) create a new mechanism allowing for a European response to problems affecting a majority of Member States at the same time and thus putting the overall functioning of the Schengen area at risk,

d) clarify and expand the list of elements that must be assessed by a Member State when taking the decision on temporary reintroduction of border controls,

e) provide that safeguards should always be applied, to limit the negative impact of the temporary reintroduction of border checks at internal borders, should this reintroduction be inevitable.

3. The draft Regulation is based on Articles 77(2) (b) and (e) and 79(2)(c) of the Treaty on the Functioning of the European Union (TFEU).

4. On 10 June 2022, the Council reached a general approach[2] on the abovementioned proposal, which constituted the mandate for negotiations with the European Parliament in the context of the ordinary legislative procedure.

5. On 6 February 2024, a provisional agreement was reached between co-legislators, resulting in the final compromise text as set out in the Annex to this note.

II. MAIN ELEMENTS OF THE COMPROMISE TEXT

6. The key elements of this final compromise text can be summarised as follows:

– Travel restrictions – The definition and concept of "large-scale public health emergency" were agreed and the Parliament accepted that Member States can apply stricter measures than those agreed at EU level. A supplementary list of categories of travellers that could be exempted from travel restrictions was included from which categories of essential travellers could be added to Annex XI by means of an implementing act.

[2] 9937/22

– Alternative police measures – These measures are intended to enable Member States to avoid having to resort to the reintroduction of internal border controls. These provisions were largely maintained in the final agreement. This is an important element since it will expand the toolbox available to Member States to deal with threats before reintroducing internal border controls.

– Transfer procedure – The procedure will take place in the context of a bilateral cooperation framework. Minors will not be exempted from the procedure, but procedural safeguards will be included.

– Instrumentalisation – A cross-reference was made to the definition of instrumentalisation as contained in the Crisis Regulation

– Attempt to cross the external border en masse and using force – The wording of a ruling of the European Court of Human Rights was maintained.

– Reintroduction/prolongation of internal border controls – On the issue of a maximum duration for which Member States can reintroduce internal border controls, an agreement was reached for a total period of two years, with possibility of two additional prolongations of 6 months each. In the case of a situation putting at risk the overall functioning of the area without internal border controls that affects several Member States, the application of the provision will be restricted to large scale public health emergencies.

III. CONCLUSION

7. The Permanent Representatives Committee is therefore invited to:

(a) analyse the final compromise text as set out in the annex to this note with a view to reaching an agreement at first reading with the European Parliament;

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(b) authorise the Chair of the Permanent Representatives Committee to send a letter to inform the Chair of the European Parliament's Civil Liberties, Justice and Home Affairs Committee that, should the European Parliament adopt its position at first reading on the text of the proposal in the exact form as set out in the Annex to this note, and subject to revision of that text by the lawyer-linguists of both institutions, the Council will approve the European Parliament's position and the act will be adopted in the wording which corresponds to the European Parliament's position.

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ANNEX

2021/0428 (COD)

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

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2)(b) and (e) and Article 79(2)(c) 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 accordance with Article 3(2) of the Treaty on European Union ("TEU"), the Union comprises an area of freedom, security and justice that is free of internal border controls, in which the free movement of persons is ensured in conjunction with appropriate measures regarding external border controls, asylum, immigration and the prevention and combating of crime.

(1a) ***The creation of an area in which the free movement of persons across internal borders is ensured is one of the main achievements of the Union. The normal functioning and strengthening of such an area, which is based on trust and solidarity, should be a common objective of the Union and the Member States which have agreed to take part in it. In this respect, the temporary reintroduction of internal border control should be exceptional and used only as a last resort, where appropriate subject to consultation and cooperation between the Member States concerned and the Commission as guardian of the Treaties.***

(2) Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 ("Schengen Borders Code")[1] lays down rules governing the movement of persons to and from the area without controls at internal borders (the "Schengen Area") as well as between the Member States that participate in the Schengen Area.

(3) In recent years, the Schengen area has been subject to unprecedented challenges, which by their nature were not confined to the territory of any single Member State. Such challenges underscored the fact that the preservation of public order and security in the Schengen area is a shared responsibility requiring joined and coordinated action between Member States and at Union level. They also highlighted gaps in the existing rules governing the functioning of the Schengen area both at external and internal borders and the need to create a stronger and more robust framework allowing for a more effective response to challenges faced by the Schengen area ***in order to strengthen mutual trust and solidarity and to ensure the absence of any controls on persons, whatever their nationality, when crossing internal borders while enabling Member States to provide an effective response to challenges they face***.

[1] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1.

(4) Border control at external borders 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 and the Union as a whole. Member States are required to ensure high standards in management of their external borders, including through enhanced cooperation between border guards, police, customs and other relevant authorities. The Union provides active support through the provision of financing support by the Agencies~~, the European Border and Coast Guard in particular~~ and management of the Schengen Evaluation Mechanism. The rules applicable to external borders need to be reinforced in order to better respond to new challenges that have recently emerged at the external borders.

(4a) European integrated border management is based on the four-tier access control model. Border control, including measures to facilitate legitimate border crossings, forms a key part of the European integrated border management. In order to prevent and detect cross-border crime at the external borders, in particular migrant smuggling, trafficking in human beings, and terrorism, Member States together with the European Border and Coast Guard Agency should implement the European integrated border management, based on the four-tier access control model.

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(5) ~~The COVID-19 pandemic has reinforced the need for the Union to be better prepared to respond to crisis situations at the external borders related to situations of diseases with an epidemic potential that are a threat to public health.~~ The COVID-19 pandemic has shown that threats to public health can require uniform rules concerning travel restrictions for travel into the European Union by third country nationals. The adoption of inconsistent and divergent measures at the external borders to address such threats negatively affects the functioning of the entire Schengen area, reduces predictability for third-country travellers and people-to-people contacts with third countries. To prepare the Schengen area for future challenges of a ~~comparable~~ scale ~~related to threats to public health, it is necessary to establish a new mechanism~~***comparable to the Covid-19 pandemic, a new mechanism should be established*** which ~~should~~***would*** allow for a timely adoption and lifting of coordinated measures at Union level. The new procedure at the external border should be applied ~~in a situation of an infectious disease with epidemic potential as identified by the European Centre for Disease Prevention and Control or~~***to a large-scale public health emergency with a serious cross-border threat to health, recognised by*** the Commission~~.~~ ~~This mechanism should complement the procedures proposed to be established in the Proposal for a~~ ***at Union level without prejudice to*** Regulation ~~of the European Parliament and of the Council on serious cross-border threats to health, notably in case of the recognition of a public health emergency, and the revised mandate of the European Centre for Disease Control~~***(EU) 2022/2371[2], taking into account information from competent national authorities***.~~[3]~~

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[2] ~~COM(2020)727~~***Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU (OJ L 314, 6.12.2022, p. 26).***

~~[3] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 851/2004 establishing a European Centre for disease prevention and control, COM(2020)726.~~

(6) ***In case of a large-scale public health emergency,*** the mechanism should provide for the adoption by the Council, upon a proposal by the Commission, of a regulation setting out ***temporary*** restrictions on travel, including restrictions on entry and ~~any other necessary measures for travel into the European Union~~***minimum temporary health-related restrictions***, and the conditions for lifting them. In view of the politically sensitive nature of such measures which concern the right to enter the territory of Member States, implementing powers should be conferred on the Council to adopt such a regulation, acting on a proposal from the Commission.

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(7) Importantly, in line with the applicable obligations under Union and international law, Union citizens and third-country nationals who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens, as well as their respective family members should always be permitted to enter the Union. Residents in the Union should also always be permitted to return to the Union***, and in particular to the Member State in which they legally reside. The act should lay down minimum temporary health restrictions to which these persons may be subject. As regards third-country nationals legally residing in Ireland, Member States should on a reciprocal basis allow those residents to return to Ireland by transiting through the territory of the Member States. Ireland is invited to align its national policy with the restrictions on travel to the European Union***. The act should contain all necessary elements to ensure that restrictions on travel are effective, targeted, non-discriminatory and proportionate to the evolving epidemiological situation. It should ~~specify,~~***identify,*** where ~~relevant, any~~***required by the nature of the large-scale public health emergency, those*** categories of ~~travellers whose~~***persons undertaking essential*** travel ~~should~~***listed in part B of Annex XI to*** be exempted from restrictions on entry~~.~~ ***and lay down the conditions under which travel restrictions may exceptionally be imposed on these travellers.*** In addition, or alternatively, the act should ~~specify~~***determine*** any geographical areas or third countries from which travel may be subject to specific measures ***and define a procedure to periodically review the situation and the travel restrictions***, based on an objective methodology and criteria applicable thereto that should include, in particular, the epidemiological situation. The act could specify the conditions under which travel may be permitted such as testing, quarantine, self-isolation or any other appropriate measures, such as the need to fill in a passenger locator form or other contact tracing tool and having regard, in particular, to any Union systems developed to facilitate travel under safe conditions, such as digital certification systems. Where appropriate, the instrument could also set up a mechanism allowing to take additional measures in case the epidemiological situation dramatically worsens in one or more geographical areas.

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(7a) ***The effectiveness of restrictions on travel to the European Union is premised on applying uniform rules to third countries and third-country nationals. The application of uniform rules through the implementing Regulation should ensure the protection of public health and thus preserve the functioning of the area without internal border controls. Member States could adopt stricter temporary health and other related restrictions than those laid down in the implementing Regulation provided that such restrictions do not have a negative impact on the functioning of the area without internal border controls. In addition, Member States may adopt restrictions on travel in the absence of a Council implementing Regulation. The implementing Regulation should take into account the specific situation of the Overseas Countries or Territories referred to in Article 355(2) TFEU and listed in Annex II thereto.***

(7b) ***Transit inside the EU for EU citizens and their family members as well as for categories of essential travellers should not be subject to temporary health related restrictions on travel in order to allow them to reach their final destination. Temporary health related restrictions, where imposed, should be applied upon arrival at the final destination.***

(8) It is also necessary to reinforce the rules and safeguards in Union law in order to allow Member States to act swiftly to counter instances of instrumentalisation of migrants. Such instrumentalisation should be understood ~~as referring to a situation where a third country instigates irregular migratory flows to the Union by actively encouraging or facilitating the arrival of third country nationals to the external borders of the Member States, where such actions indicate an intention~~***within the meaning of Article 1(4)b first subparagraph of the Crisis Regulation. Situations in which hostile non state actors are involved in organised crime, in particular smuggling, should not be considered as instrumentalisation of migrants when there is no aim*** to destabilise the Union ~~as a whole~~ or a Member State***. Furthermore, humanitarian assistance operations should not be considered as instrumentalisation of migrants when there is no aim to destabilise the Union or a Member State*** ~~and where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security~~.

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~~(9) Instrumentalisation of migrants can refer to situations where irregular travel of third country nationals has been actively encouraged or facilitated by a third country onto its own territory to reach the external border of the Member States but can equally refer to the active encouragement or facilitation of irregular travel of third country nationals already present in that third country. Instrumentalisation of migrants may also entail the imposition of coercive measures, intended to prevent the third country nationals from leaving the border areas of the instrumentalising third country, in a direction other than through a Member State.~~

(9a) As regards Cyprus, Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession provides for specific rules that apply to the line between the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus exercises effective control and those areas in which the Government of the Republic of Cyprus does not exercise effective control. Although the line does not constitute an external border, it follows that a situation where a third-country or hostile non state actor encourages or facilitates the movement of third country nationals to cross the line should be considered as instrumentalisation.

~~(10) The Union should mobilise all tools from its toolbox of diplomatic, financial and operational measures to support the Member States confronted with instrumentalisation. Diplomatic efforts by the Union or the Member State concerned, should be given priority as the means of addressing the phenomenon of instrumentalisation. This may be supplemented, where appropriate, by the imposition of restrictive measures by the Union.~~

~~(11) At the same time, in addition to these measures, it is equally necessary to further reinforce the current rules in relation to external border controls and border surveillance. To further assist the Member State facing an instrumentalisation of migrants, Regulation (EU) XXX/XXX complements the rules on border control by providing for specific measures in the area of asylum and return, while respecting the fundamental rights the individuals concerned and in particular by ensuring the respect of the right to asylum and providing the necessary assistance by the UN agencies and other relevant organisations.~~

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(12) In particular, in a situation of instrumentalisation, it should, where necessary, be possible for the Member State concerned, to limit border traffic to the minimum by temporarily closing some border crossing points, while guaranteeing genuine and effective access to international protection procedures. Any such decision should take into account whether the European Council has acknowledged that the Union or one or more of its Member States are facing a situation of instrumentalisation of migrants. Furthermore, any such limitations should take full account of the rights of Union citizens, third country nationals who are beneficiaries of the right of free movement pursuant an international agreement and third-country nationals who are long-term residents under national or Union law or are holders of long-term visas, as well as their respective family members. Such limitations should also be applied in a manner that ensures respect for obligations related to access to international protection, in particular the principle of non-refoulement.

(13) The European Border and Coast Guard Agency assists Member States with implementing the operational aspects of external border management, including information exchange, the provision of equipment, capacity building and training to national border guards, targeted information and risk analysis, ~~as well as~~ the deployment of the Standing Corps~~. The Agency's new mandate offers considerable opportunities to support border control activities, including screening and return operations and a launch of rapid border intervention and/or return intervention at the request and on the territory of the host Member State concerned~~***, as well as assistance in search and rescue operations for persons in distress at sea launched and carried out in accordance with Regulation (EU) No 656/2014[4]. The Agency's new mandate offers considerable opportunities for Member States to be assisted in their border control activities, with regard to screening and return operations***.

[4] ***Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189, 27.6.2014, p. 93).***

~~(14) By virtue of Article 41(1) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency is required to recommend to a Member State that it request the Agency to initiate, carry out or adjust the Agency's support, in order to address identified threats and challenges at the external borders, where the conditions laid down in that provision are met. In particular, the need for Agency support may become apparent in situations where the European Border and Coast Guard Agency has carried out a dedicated vulnerability assessment in connection with the instrumentalisation of migrants. On the basis of the results of such a vulnerability assessment or where a critical impact level is attributed to one or more external border sections and taking into account the relevant elements in the Member State's contingency plans, the Agency's risk analysis and the analysis layer of the European situational picture, the Executive Director should recommend to the Member State concerned to request that the Agency initiate, carry out or adjust the Agency's support in accordance with Article 41(1) of Regulation (EU) 2019/1896. This competence of the Executive Director is without prejudice to the general support that the Agency may be providing to the Member States.~~

(15) ~~Moreover, in the event of instrumentalisation of migrants, the Member State concerned should reinforce border control, including, as appropriate, through additional measures preventing illegal crossings and the deployment of additional resources and~~ Technical means to prevent unauthorised crossing of the border~~. Such technical means~~ could include modern technologies including drones and motion sensors, as well as mobile units***, and, where appropriate, all types of stationary and mobile infrastructure***. The use of such technical means, in particular, any technologies capable of collecting personal data, needs to be based on and exercised in accordance with clearly defined provisions of national law.

(16) The Commission should be empowered to ~~specify, in~~***adopt*** delegated acts ~~adopted under this Regulation, appropriate standards for border i~~***n accordance with Article 37 concerning additional measures governing*** surveillance, ~~concerning in particular the new technologies that Member States may use, while taking~~***including the development of common minimum standards for border surveillance. These common minimum standards should take*** into account the type of borders (land, sea or air), the impact levels attributed to each external border section in accordance with Article 34 of Regulation (EU) 2019/1896 and other relevant factors, ~~as a specific response to situations of instrumentalisation of migrants~~***such as geographical particularities***.

(17) In an area without internal border controls, persons***, whatever their nationality,*** should be able to move freely, and in security between Member States. In this regard, it should be clarified that the prohibition of controls at internal borders does not affect the competence of Member States to carry out checks on their territory~~,~~ including ~~at~~***in*** their ~~internal borders,~~***border areas*** for purposes other than border control. It should, in particular, be clarified that national competent authorities, including health or law enforcement authorities, remain, in principle~~, free to carry out checks in the exercise of public~~ ***entitled to exercise public powers provided for under national law provided that the effect of those*** powers ~~provided for under national law~~***is not equivalent to internal border control***.

(18) While the prohibition of internal border controls also extends to checks having equivalent effects, checks by competent authorities ***of the Member States*** should not be considered equivalent to the exercise of border checks where they do not have border control as an objective, where they are based on general ***police*** information and experience ~~of the competent authorities~~***or public health information*** regarding possible threats to public security or public policy, ~~including~~ where they aim ***in particular*** to combat ~~irregular stay or residence and cross-border crimes linked to irregular migration~~***cross-border crime, reduce illegal immigration or contain the spread of an infectious disease with epidemic potential as identified by the European Centre for Disease Control***, where they are devised and executed in a manner clearly distinct from systematic checks on persons at the ~~external~~ borders, and where they are conducted at transport hubs, such as ports, train or bus stations and airports ***as well as freight terminals*** or directly on board of passenger transport services, and where they are based on ***a risk assessment*** ~~risk analysis~~.

~~(19) While irregular migratory flows should not, per se, be considered to be a threat to public policy or internal security, they may require additional measures to ensure the functioning of the Schengen area.~~

(20) The ~~combatting~~***reduction*** of illegal ~~residence or stay~~***immigration*** and of cross-border crime linked to ~~irregular migration~~***it*** such as human trafficking, migrant smuggling and document fraud and other forms of cross-border crime could ~~in particular~~ encompass measures allowing ***for*** the verification of the identity, nationality and residence status of persons provided that such verifications are non-systematic and carried out on the basis of ***a risk assessment*** ~~risk analysis~~.

(21) The use of modern technologies to monitor traffic flows, notably on motorways and other important roads determined by the Member States, can be instrumental in addressing threats to public policy or internal security. The prohibition of internal border controls should not be understood as preventing the lawful exercise of police or other public powers to carry out checks in the internal border areas. This includes checks that entail the use of monitoring and surveillance technologies which are generally used in the territory or that are based on a risk assessment for the purpose of protecting internal security. ~~The use of such technologies for checks should therefore not be considered as equivalent to border controls.~~

(22) In order to allow for such technologies to be effective, it should be possible to apply proportionate speed limits at road crossings.

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(22a) ***In the exercise of police or other public powers by the competent authorities of the Member States in their territory, in particular in their border areas, it is important that the exercise of those powers does not have a disproportionate impact on the fluid traffic flow at road crossing-points at internal borders, in particular, by leading to excessive waiting times. In a spirit of dialogue and cooperation, Member States should inform the neighbouring Member State of their actions, in particular when the action is expected to have a more significant effect on cross-border traffic.***

(23) The prohibition of border controls at internal borders should not limit the carrying out of checks provided for ~~in other instruments of~~***under*** Union law. The rules provided for in this Regulation, should not therefore, affect the applicable rules regarding the carrying out of checks on passenger data against relevant databases in advance of arrival.

(24) It is necessary to ensure that checks carried out by Member States in exercise of national competences remain fully consistent with an area that is free of internal border controls. In accordance with the case law of the Court of Justice, the more extensive the indications are that checks conducted by Member States at their border areas have an equivalent effect to border control, having regard to the objective of such checks, their territorial scope and possible differences compared to checks carried out in the remainder of the territory of the Member State concerned, the greater the need for strict and detailed rules and limitations laying down the conditions for the exercise, by the Member States, of their police powers in a border area.

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(25) ~~Measures need to be taken to address unauthorised movements of illegally staying third country nationals in an area without internal border controls.~~ In order to strengthen the functioning of the Schengen area, Member States should be able to take additional measures to counter irregular movements between Member States~~, and combat illegal stays~~. Where national law enforcement authorities of a Member State apprehend ~~illegally staying~~ third-country nationals ***with no right to stay*** ~~at the internal borders as part of cross-border police operational cooperation~~***in border areas during checks conducted by the competent authorities within a bilateral cooperation framework, which may include in particular joint police patrols,*** it should be possible for those authorities to ~~refuse such persons the right to enter or remain in their territory and to transfer them to the Member State from which they entered~~***to transfer them to the Member State from which they entered provided that they have no right to stay in the transferring Member State***. The Member State from where the person came directly should in turn be required to receive the apprehended ~~third country~~***third-country*** nationals.

(25a) The transfer procedure should not apply to third-country nationals who are holders of EU long-term residence permits and their family members in accordance with Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, third-country national family members of Union citizens enjoying the right to free movement in accordance with Directive 2004/38, third-country nationals who are holders of a valid long-stay visa and their family members in accordance with national law, third-country nationals who are holders of a valid short-stay visa, third-country nationals who are entitled to visa-free travel within the Schengen area for a 90-day period in any 180-day period, in so far as they have not exceeded that 90-day period, applicants for international protection within the meaning of Article 4 of Regulation xxx/xxx (the Asylum Procedure Regulation) and beneficiaries of international protection within the meaning of Article 2 of Regulation xxx/xxx (the Qualification Regulation). With regard to applicants for international protection apprehended in the framework of bilateral cooperation, the relevant provisions of Regulation xx/xxx (the Asylum and Migration Management Regulation) should apply.

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(26) The procedure by which a Member State may transfer apprehended ~~illegally staying~~ third-country nationals ***with no right to stay*** to a Member State from where the person came directly should take place swiftly but be subject to safeguards and carried out in full respect of fundamental rights and the principle of non-discrimination enshrined in Article 21 of the Charter, to prevent racial profiling. It should be possible for the authorities to carry out a verification of relevant information immediately available to the authorities concerning the movements of the persons concerned. Such information may include objective elements that would allow the authorities to conclude that the person had recently travelled from another Member States, such as the possession of documents, including receipts or invoices, evidencing recent travel from another Member State. ~~Third country~~***Third-country*** nationals subject to the transfer procedure should be provided with a reasoned decision in writing. While the decision should be immediately enforceable, the ~~third country~~***third-country*** national should be afforded an effective remedy to appeal against or seek review of the transfer decision. This remedy should not have suspensive effect.

(27) The transfer procedure provided for under this Regulation ***is optional and*** should not affect the existing possibility for Member States to return ~~irregular third country~~***illegally staying third-country*** nationals in accordance with bilateral agreements or arrangements referred to in Article 6(3) of Directive 2008/115/EC (the "Return Directive"), where such persons are detected outside of ~~the vicinity of internal borders. In order to facilitate the application of such agreements, and to complement the objective of protecting the area without internal borders, the Member States should be afforded the possibility to conclude new agreements or arrangements and update existing ones. The Commission should be notified of any such modifications or updates of new agreements or arrangements. Where a Member State has taken back a third country national under the procedure provided for in this Regulation or on the basis of a bilateral agreement or arrangement, the Member State concerned should be required to issue a return decision in accordance with the Return Directive. In order to ensure consistency between the new procedures provided for in this Regulation and existing rules on the return of third country nationals, a targeted modification of Article 6(3) of the Return Directive is therefore necessary~~***border areas***.

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(27a) When making use of the transfer procedure provided for under this Regulation, Member States should define practical modalities under their bilateral cooperation frameworks, including with a view to, as a rule, avoiding the use of this transfer procedure, in particular on the sections of the internal borders where controls have been reintroduced or prolonged.

(27b) If a third-country national who has been subject to a transfer decision is brought to the border by a carrier, the competent authority may, in accordance with national law, make arrangements with the carrier so that the third-country national is transported without delay to the receiving Member State.

(27c) In the context of unannounced visits pursuant to Article 4(3) of Council Regulation (EU) 2022/922[5], it is important that the Commission pay particular attention to the implementation of the transfer procedure.

(27d) In an area where persons may move freely, without internal frontiers, which constitutes one of the main achievements of the European Union in accordance with Article 3(2) TEU, the reintroduction of internal border controls should remain an exception and should only be effected as a measure of last resort. Exceptions to and derogations from the free movement of persons are to be interpreted strictly. In order not to compromise the very principle that there is to be no internal border control, as enshrined in Article 3(2) TEU and reiterated in Article 67(2) TFEU, the reintroduction of internal border controls on account of the same threat should be for clearly defined periods in accordance with this Regulation.

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[5] *Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013 (OJ L 160, 15.6.2022, p. 1).*

(28) In exceptional cases, addressing threats to the Schengen area may***, as a last resort,*** require the adoption, by the Member States, of measures at the internal borders***. As free movement of persons is affected by the temporary reintroduction of internal border control, any decision to reintroduce such control should be taken in accordance with commonly agreed criteria and should be duly notified to the Commission, the Parliament and the Council or be recommended by a Union institution***. Member States remain competent to determine the need for the temporary reintroduction or prolongation of border controls. Under the existing rules, the reintroduction of controls at internal borders is provided for in circumstances where a serious threat to internal security or public policy manifests itself in a single Member State for a limited period of time. In particular, terrorism and organised crime, large scale public health emergencies or large scale or high profile international events such as sporting, trade or political events can amount to a serious threat to public policy or internal security.

(29) Furthermore, a serious threat to public policy or internal security ~~can~~***could*** also result from large**-** scale unauthorised movements of ~~irregular migrants~~***third-country nationals*** between the Member States***,*** where this creates a situation putting a ***substantial*** strain on the overall resources and capacities of ***well-prepared competent authorities and which is likely to put at risk the overall functioning of the area without internal border control***~~the responsible national services~~, ***and*** where the other means provided for under this Regulation are not sufficient to address these inflows and movements. In this context, Member States should be able to rely on objective and quantified reports on unauthorised– movements whenever available, in particular, when produced on a regular basis by the competent Union agencies in line with their respective mandates. ~~It should be possible for a Member State to use the information provided by the agencies to demonstrate the exceptional character of the identified threat caused by unauthorised movement in the risk assessment, in order to justify the reintroduction of internal border controls on this ground.~~

(30) ~~While action at Union level is provided for in circumstances where the nature of a threat derives from persistent serious deficiencies at the external borders, there is no Union-wide~~***The COVID-19 pandemic demonstrated the need for a Union wide*** mechanism that would apply to situations where, within the Schengen area, a ~~serious threat to internal security or~~***large scale*** public ~~policy area~~***health emergency*** is affecting ~~a majority of~~***several*** Member States ***at the same time***, putting at risk the well-functioning of the Schengen area. The ~~gap should be filled by putting in place a~~ new Schengen area ~~safeguards~~***safeguarding*** mechanism ~~permitting~~***should permit*** coordinated solutions to protect the interests of persons entitled to benefit from the area without controls at internal borders, by maximising the effectiveness of the measures taken while minimising their negative side-effects.

(31) The new Schengen area safeguard mechanism should allow the Council to adopt, upon a proposal by the Commission, a decision authorising the reintroduction or prolongation of internal border controls, where ~~this is justified by a particular threat, identified on the basis of notifications received from individual Member States, or other available information, in particular a risk assessment, in case of prolongation of internal border controls beyond six months~~***a large scale public health emergency has been recognised at Union level***. Given the politically sensitive nature of such a decision which regulates the possibility for Member States to reintroduce or prolong internal border control in particular circumstances, implementing powers to adopt a decision should be conferred on the Council, acting on a proposal from the Commission. ***This decision should include any appropriate mitigating measures.***

(32) ~~In determining whether a reintroduction or prolongation of internal border controls by the Member States is justified, the Council should take into account whether any other measures that could ensure a high level of security within the territory, such as reinforced checks in the internal border areas by the competent authorities, are available. In the event that a prolongation of the controls is not considered justified, the Commission should, instead, recommend the use of other measures deemed more appropriate to address the identified threat.~~

PUBLIC

(33) The establishment of the new Schengen area safeguard mechanism should not affect the right of Member States to have prior recourse to unilateral measures in accordance with the Regulation, where the situation so requires. However, once adopted, the Union measure should become the single basis for a coordinated response to the threat identified.

(34) In order to ensure compliance with the principle of proportionality, the decision of the Council should be adopted for a limited period of time of up to six months that may be prolonged subject to regular review upon a proposal from the Commission, as long as the ~~threat is found to persist~~***large scale public health emergency persists***. The initial decision should include an assessment of the expected impact of the measures adopted, including its adverse side-effects, with a view to determining if controls at internal borders are justified or whether less restrictive measures could be applied in their place in an effective manner. Subsequent decisions should take account of the evolution of the ~~identified threat~~***threat to public health***. The Member States should immediately notify ***the Parliament***, the Commission and the Member States of the reintroduction of internal border controls in accordance with the decision of the Council.

~~(35) Reintroduction of internal border controls should also remain possible where serious deficiencies in the management of the external borders persist, putting at risk the overall functioning of the area without internal border control. Periods where the border controls were introduced by Member States because the urgency of the situation required it or where the Council takes a decision to recommend the reintroduction because a threat affects a significant number of Member States, should not be included in the two years' period applicable to reintroductions based on serious deficiencies at the external borders.~~

(36) The reintroduction of border controls at internal borders, whether on the basis of unilateral decisions of the Member States or at a Union level, has serious implications for the functioning of the Schengen area ***and the right to free movement***. In order to ensure that any decision to reintroduce border controls is only taken where necessary, as a measure of last resort, the decision on temporary reintroduction or prolongation of border controls should be based on common criteria, ~~putting an emphasis on necessity and proportionality. The proportionality principle requires that the reintroduction of internal border controls be subject to safeguards that increase over time~~ ***and be strictly necessary and proportionate***.

(36a) In accordance with the case-law of the Court of Justice of the European Union, a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

(37) In the first instance, Member States should assess the appropriateness of internal border controls having regard to the nature of the serious threat identified ***as well as the appropriateness of alternative measures to pursue the same objectives as internal border controls, such as proportionate checks as carried out in the exercise of police or other public powers or through forms of police cooperation as provided for under Union law, including the possibility to use the transfer procedure, or common measures regarding temporary travel restrictions***. In this context, the Member States should pay particular attention to and assess the likely impact of internal border controls on the movement of persons within the area without internal border controls and the functioning of the cross-border regions. This assessment should be part of the notification that Member States are required to transmit to the Commission***, the Parliament and the Council***. In case of prolongation of internal border controls for foreseeable events beyond an initial period of six months, the Member State should also ~~assess the appropriateness of alternative measures to pursue the same objectives as internal border controls, such as proportionate checks as carried out in the exercise of police or~~***carry out a risk assessment. That risk assessment should include details on the scale and anticipated evolution of the identified serious threat, information on how long that serious threat is expected to persist and which sections of the internal borders are affected, information on coordination measures with*** other ~~public powers or through forms of police cooperation as provided for under Union law, and the possibility to use the transfer procedure~~***Member States impacted by such measures and the measures that the Member State concerned has taken and intends to take to alleviate the identified serious threat, with a view to lifting internal border controls in order to maintain the principle of free movement***.

(38) In order to limit harmful consequences resulting from the reintroduction of internal border controls, any decision to reintroduce internal border controls should be accompanied by mitigating measures ~~if needed~~. Such measures should include measures to assure a smooth operation of transit of goods and transport personnel and seafarers by the establishment of 'green lanes'. In addition, and to take account of the need to ensure the movement of persons whose activities may be essential for preserving the supply chain or the provision of essential services, Member States could also apply the existing guidelines on cross-border workers[6]. Against this background, the rules for the reintroduction of border controls at internal borders should take account of the guidelines and recommendations adopted throughout the COVID-19 pandemic as a solid safety net for the Single Market, for the purpose of assuring that they are applied by the Member States~~, where appropriate,~~ as mitigating measures during reintroduced internal border controls. Measures should in particular be identified with a view to ensuring the uninterrupted functioning of the Single Market and safeguarding the interests of cross-border regions and of 'twin cities' including for instance authorisations or derogations for the inhabitants of cross-border regions.

(39) The notification to be provided by the Member States should be decisive when assessing compliance with the criteria and conditions for a temporary reintroduction of internal border controls. In order to ensure ~~a comparable set of~~ ***proper monitoring of internal border controls that have been reintroduced, and to improve the quality of the*** information ***it receives***, the Commission should adopt a template for the notification of reintroduction of border controls at internal borders in an implementing act. Member States should ***not be required to provide all the information in cases justified on public security grounds, taking into account the confidentiality of ongoing investigations. Member States should*** be entitled to classify ***all or*** ~~all or~~ parts of the information provided in the notification, without prejudice to the functioning of appropriate and secure ~~police cooperation~~ channels~~.~~

[6] 2020/C 102 I/03.

(40) In order to ensure that internal border controls are truly a last resort measure applied only for as long as necessary and in order to allow for assessing the necessity and proportionality of internal border controls to address foreseeable threats ***and to allow the Commission to assess that such controls are an exceptional measure***, Member States should prepare a risk assessment to be submitted to the Commission when internal border controls are prolonged beyond an initial ***period of*** six months in response to foreseeable threats. The Member States must in particular, explain, the scale and evolution of the identified serious threat, including how long the identified serious threat is expected to persist and which sections of the internal borders may be affected***, why alternative measures will not resolve the identified threat***, as well as their coordination measures with the other Member States that are impacted or likely to be impacted by such measures.

(41) The Commission should be entitled to request additional information based on the notification received, including on the risk assessment or cooperation and coordination measures with the Member States affected by the planned prolongation of border control at internal borders. Where the notification does not comply with the minimum requirements, the Commission should discuss the notification with the Member State concerned and request additional information or ~~a resubmission of the~~***request this Member State to complete its initial*** notification.

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(42) ~~In order to ensure a sufficient degree of transparency of the actions affecting travel~~***At least once per year, the Commission should report to the European Parliament and to the Council jointly on the functioning of the area*** without internal border ~~controls, the Member States should also inform~~***control ('State of Schengen report'). The Commission may also discuss that report separately with*** the European Parliament and the Council ~~about the main elements concerning the planned reintroduction of border controls. In justified cases, Member States may also classify such information. Every~~***. The report shall include a list of all decisions to reintroduce border controls at internal borders taken during the relevant*** year, ~~pursuant to Article 33 of the Schengen Borders Code,~~***as well as the actions taken by*** the Commission ~~should present to the European Parliament and~~***with regard to internal border controls reintroduced. The report should pay particular attention*** to the ~~Council a report on the functioning~~***border controls that have been in place for longer than twelve months. It shall also include an assessment of the necessity and proportionality*** of the ~~area without internal~~***reintroductions and prolongations of*** border ~~control ('State of Schengen~~***controls in the period covered by that*** report~~') which should pay particular attention to the situation~~ ***as well as information on the trends within the area without internal border control*** as regards the unauthorised movements of third country nationals, ~~building on the~~***taking into account*** available information from the relevant ***Union*** agencies and data analysis from relevant information systems. ~~It~~***The State of Schengen report*** should also ~~assess the necessity and proportionality~~***cover the reporting obligations resulting from Article 20*** of the ~~reintroductions of border controls in the period covered by that Report. The State of~~ ***Evaluation Mechanism[1].*** ~~[7]~~.

~~[7] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27. (reference to be updated)~~

(42a) The report should be accompanied by the report to be provided pursuant to Article 25 of Regulation (EU) 2022/922 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013.

(43) The mechanism for the temporary reintroduction of border controls at internal borders in urgent situations or to address foreseeable threats should ***provide for a possibility, for***~~provide for a possibility, for~~ the Commission~~,~~ to organise consultations between Member States~~, including at the request of any~~***. A consultation should be organised by the Commission where a*** Member State ***directly affected so requests***. Relevant Union Agencies should be involved in this process in order to share their expertise, where appropriate. Such consultations should look ~~into the modalities of carrying out internal border controls and their time-line, possible mitigating measures as well as the possibilities of applying alternative measures instead~~***at the possibility of applying alternative measures, and if necessary the modalities of carrying out internal border controls and their time-line***. Where the Commission or a Member State has issued an opinion expressing concerns regarding the reintroduction of border controls, such consultations should be mandatory.

(44) The Commission and Member States should retain the possibility to express any concern as regards the necessity and proportionality of a decision of a Member State to reintroduce internal border controls for reason of urgency or to address a foreseeable threat. In case controls at internal borders are reintroduced and prolonged for foreseeable threats for combined periods exceeding ~~eighteen~~ ***twelve*** months, it should be a requirement for the Commission to issue an opinion assessing the necessity and proportionality of such internal border controls. ***Where a Member State considers that there is a major exceptional situation justifying the continued need for internal border controls for a period exceeding two years, additional safeguards should be set in terms of risk assessment. The notification by the Member State concerned should include the measures it intends to adopt, in cooperation with other Member States where appropriate, enabling the threat to be met as well as a presentation of the means, actions, conditions and timeline considered with a view to lifting the internal border controls as soon as possible in order for the principle of free movement to be maintained.*** ~~Where a Member State considers that there are exceptional situations justifying the continued need for internal border controls for a period exceeding two years,~~ The Commission should issue a ~~follow up~~***new*** opinion. ~~-~~Such an opinion is without prejudice to the enforcement measures, including infringement actions, which the Commission***, in its role as guardian of the Treaties,*** may take at any time against any Member State for failure to comply with its obligations under Union law. Where an opinion is issued, the Commission should launch consultations with the Member States concerned. ***While in the area without internal border control a serious threat to public policy or internal security in a Member State is not necessarily limited in time, in order to maintain the principle of free movement, it is necessary to limit the maximum duration of internal border controls based on the same serious threat, which should not exceed two years. In exceptional circumstances and under certain conditions Member States may extend internal border controls for two further periods of six months. In any event, internal border control based on the same serious threat should not exceed three years in total.***

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(45) In order to enable the post factum analysis of the decision on the temporary reintroduction of border controls at the internal borders, Member States should remain obliged to submit a report on the reintroduction of border control at internal borders to the European Parliament, the Council and the Commission once they lift the controls. Where the controls are kept in place for prolonged periods of time, such a report should also be submitted after twelve months, and ***twelve months*** ~~every year~~ thereafter if exceptionally controls are maintained ~~and for as long as the controls are maintained~~. The report should outline, in particular, the initial and follow-up assessment of the necessity of internal border controls and the respect of the criteria for reintroduction of ~~border~~ controls at internal borders. The Commission should adopt in an implementing act a template and make it available online.

(46) When implementing this Regulation, Member States shall not discriminate against persons on grounds of sex, ~~racial or~~***race, colour,*** ethnic ***or social*** origin, ***genetic features, language,*** religion or belief***, political or any other opinion, membership of a national minority, property, birth***, disability, age or sexual orientation.

(47) The competent authorities ***referred to in this Regulation*** shall ~~use~~***in all*** their ~~powers to carry out checks within the territory and apply relevant procedures in full~~***activities undertaken in accordance with this Regulation, including when using their powers to carry out checks, fully*** respect ~~of~~ the rules on data protection under Union law. Regulation (EU) 2016/679 of the European Parliament and of the Council or Directive (EU) 2016/680 of the European Parliament and of the Council apply to the processing of personal data by competent national authorities for the purposes of this Regulation, in their respective field of application.

(48) The objective of this Regulation is to strengthen the functioning of the Schengen area. This objective cannot be achieved by Member States acting alone. Therefore, 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.

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(49) 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.

(50) 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[8]; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(51) 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[9], which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC[10].

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8 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.

9 OJ L 176, 10.7.1999, p. 36.

10 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.

(52) 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[11] which fall within the area referred to in Article 1, point A of Decision 1999/437/EC[12] read in conjunction with Article 3 of Council Decision 2008/146/EC.[13]

(53) 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[14] 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[15].

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11 OJ L 53, 27.2.2008, p. 52.

12 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.

13 Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53, 27.2.2008, p. 1.

14 OJ L 160, 18.6.2011, p. 21.

15 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.

(54) This Regulation is without prejudice to the application of Directive 2004/38/EC[16].

(55) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(56) Regulation (EU) No 2016/399 ~~and Directive 2008/115/EC~~ should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

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

(1) Article 2 ~~is modified~~ ***is amended*** as follows:

a) point 12 is replaced by the following:

'12. 'border surveillance' means the surveillance of borders between ***border*** crossing points and ***the surveillance*** of border crossing points outside fixed opening hours, including preventative measures***, to prevent or detect*** ~~to detect and prevent~~ unauthorised border crossings or the circumvention of border checks***, to contribute to raising of situational awareness, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. It shall also involve the carrying out of risk analyses***.'

[16] 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 (OJ L 158 30.4.2004, p. 77).

b) the following points ~~27~~***27a*** to 30 are added:

‘~~27. ‘instrumentalisation of migrants’ refers to a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security;~~

27a. ‘large scale public health emergency’ means a public health emergency, recognised at Union level by the Commission, taking into account information from competent national authorities, where a serious cross-border threat to health could have large-scale repercussions related to free movement.

28. ‘essential travel’ means travel in connection with an essential function or need, taking into account any applicable international obligations of the Union and of the Member States ~~and listed in Annex XI~~;

29. ‘non-essential travel’ means travel for purposes other than essential travel;

30. ‘transport hubs’ means airports, sea or river ports, train or bus stations ***as well as freight terminals***.’

(1a) In Article 5, the following subparagraph is added to paragraph 3:

"Member States may, where a large number of migrants attempt to cross the external border in an unauthorised manner, en masse and using force, take the necessary measures to preserve security, law and order."’

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(2) In Article 5, ~~a new~~***the following*** paragraph 4 is added:

'4. ***Member States may, in particular*** in a situation of instrumentalisation of migrants~~,~~ ~~Member States may limit the number of~~ ***as referred to in Article 1(4)b first subparagraph of the Crisis Regulation, temporarily close specific*** border crossing points as notified pursuant to paragraph 1***, or limit*** ~~or~~ their opening hours where the circumstances so require.

Any ~~limitations adopted~~ ***measures*** pursuant to the first subparagraph ***and paragraph 3, second subparagraph,*** shall be implemented in a manner that is proportionate and that takes full account of the rights of:

(a) the persons enjoying the right of free movement under Union law;

(b) third-country nationals who are long-term residents under Council Directive 2003/109/EC[17], persons deriving their right to reside from other instruments of Union or national law or who hold national ~~long-term~~***long-stay*** visas, as well as their respective family members;

(c) third-country nationals seeking international protection.***'***

[17] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44).'

(3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to ~~detect and~~ prevent ***or detect*** unauthorised border crossings, to ***contribute to raising of situational awareness, to*** counter cross-border criminality and to take measures against persons who have crossed the border illegally. ***It shall also involve the carrying out of risk analyses. Without prejudice to Articles 3 and 4,*** a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

2. The border guards shall use ***all necessary resources, including*** stationary or mobile units to carry out border surveillance.
That surveillance shall be carried out in such a way as to prevent and discourage persons from unauthorised border crossings between border crossing points ~~and~~***or*** from circumventing the checks at border crossing points***, while complying fully with the obligations laid down in Article 4***.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall ***make use of situational pictures to be better able to reduce the loss of lives of migrants at, along or in the proximity of the external borders. It shall*** involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings ~~are~~***may be*** effectively detected or prevented.

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4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive~~,~~. The aim of such surveillance ~~being~~***is*** to prevent unauthorised border crossings or apprehend individuals ***in connection with an unauthorised*** crossing ***of the external***~~the~~ border ~~illegally~~. Surveillance may also be carried out by technical means, including electronic means, equipment***, surveillance systems and, where appropriate, all types of stationary and mobile infrastructure*** ~~and surveillance systems~~.

~~5. In a situation of instrumentalisation of migrants, the Member State concerned shall intensify border surveillance as necessary in order to address the increased threat. In particular, the Member State shall enhance, as appropriate, the resources and technical means to prevent an unauthorised crossing of the border.~~

~~Those technical means may include modern technologies including drones and motion sensors, as well as mobile units to prevent unauthorised border crossings into the Union.~~

~~6. Without prejudice to the support that the European Border and Coast Guard Agency may provide to the Member States, in the event of a situation of instrumentalisation of migrants, the Agency may carry out a vulnerability assessment as provided for in Articles 10(1), point (c), and Article 32 of Regulation (EU) 2019/1896 of the European Parliament and Council[18], with a view to providing the necessary support to the Member State concerned.~~

~~On the basis of the results of that assessment or any other relevant vulnerability assessment or the attribution of a critical impact level to the border section concerned within the meaning of Article 35(1)(d) of Regulation (EU) 2019/1896, the Executive Director of the European Border and Coast Guard Agency shall make recommendations, in accordance with Article 41(1) of that Regulation to any Member State concerned.~~

~~[18] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019.'~~

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 concerning additional measures governing surveillance, including the development of ***common minimum*** standards for border surveillance~~, in particular the use of surveillance and monitoring technologies at the external borders, taking~~. ***These common minimum standards shall take*** into account the type of borders ***(land, sea or air)***, the impact levels attributed to each external border section in accordance with Article 34 of ~~the~~ Regulation (EU) 2019/1896 and other relevant factors***, such as geographical particularities***.

(4) Chapter V is renamed as follows: "Specific measures relating to the external borders"

~~In Chapter V,~~ The following Article ~~21a~~ is inserted:

"Article 21a

Restrictions on travel to the European Union

1. This Article shall apply to ~~situations where the European Centre for Disease Prevention and Control or the Commission identify the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World~~***large- scale public*** health ~~Organization~~***emergencies***.

2. The Council, on the basis of a proposal by the Commission, may adopt an implementing Regulation, providing for temporary restrictions on travel to the Member States~~.~~ ***applied at the external borders***

~~Such~~ Temporary restrictions on travel may include restrictions on entry to the Member States and ***temporary health related restrictions which are*** ~~other measures considered~~ necessary for the protection of public health in the area without controls at internal borders~~, such as for instance~~***.*** ***These measures may include*** testing, quarantine, and self-isolation. ***Temporary restrictions on travel shall be proportionate and non-discriminatory. Where a Member State adopts stricter measures than those laid down in the implementing act, those measures shall not have a negative impact on the functioning of the area without internal border controls. Temporary health-related restrictions on persons enjoying the right of free movement under Union law shall at all times comply with Directive 2004/38/EC ('the Free Movement Directive').***

3. The following categories of persons shall be exempted from the restrictions on entry, independent of the purpose of their travel:

a) persons enjoying the right of free movement under Union law;

b) third-country nationals who are long-term residents under Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union law or national law***, including beneficiaries of international protection or persons*** ~~or~~ who hold national ~~long term~~***long-stay*** visas, as well as their respective family members.

3a As regards persons undertaking essential travel, the following applies: (a) the categories listed in part A of Annex XI shall be exempted from restrictions on entry; (b) any category listed in part B of Annex XI shall be exempted from restrictions on entry where such a category is included in the implementing regulation referred to in paragraph 2.

4. The implementing Regulation referred to in paragraph ~~1~~***2*** shall, where appropriate:

a) ~~define any~~***identify, where required by the nature of the large-scale health emergency situation, the*** categories of persons undertaking ~~non-essential~~***essential*** travel ***listed in part B of Annex XI*** to be exempted from ~~any~~ restrictions ~~applicable to travel~~***on entry***;

b) ~~identify~~ ***determine*** any geographical areas or third countries from which ~~non-essential~~ travel may be subject to restrictions or exemptions from restrictions, ~~having regard to the particular~~ ***and define a procedure to periodically review the*** situation of the areas or countries concerned ***and the restrictions on travel imposed*** on the basis of objective methodology and criteria, including, in particular, the epidemiological situation;

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c) lay down the conditions under which non-essential travel ~~as referred to under points (a) and (b)~~ may be restricted or exempt from restrictions, including proof to be presented to support the exemption and the conditions relating to the duration and nature of stay in the areas or countries referred to in point (b);

ca) refer to minimum temporary health related restrictions to which persons referred to in paragraph 3 a) and b) may be subject;

d) ***by way of derogation from paragraph 3a,*** lay down the conditions under which travel restrictions may be imposed, ~~exceptionally,~~ on persons undertaking essential travel~~, in the event that the epidemiological situation worsens quickly and, in particular where a variant of concern or variant of interest has been detected.~~***;***

5. Restrictions on ***entry on persons undertaking*** essential travel ***may only be imposed exceptionally, for a strictly limited period of time, until sufficient information about the disease*** ~~referred to in paragraph 4(d) may not include~~***1 or a new variant thereof is available and until other health related*** restrictions***, to be applied to those persons, necessary to protect public health, are identified and adopted by the Council on a proposal by the Commission*** ~~on entry as regards travellers listed in point i. and points iv. to viii. of Annex XI~~.'

(5) Article 23 is replaced by the following:

"Article 23

~~Exercise of public powers~~***Checks within the territory***

The absence of border control at internal borders shall not affect:

a) the exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their internal border areas, as conferred on them under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.- ***The exercice of powers may include, where appropriate, the use of monitoring and surveillance technologies generally used in the territory, for the purposes of addressing threats to public security or public policy.*** The exercise by competent authorities of their powers ~~may~~ ***shall*** not, in particular, be considered equivalent to the exercise of border checks when the measures ***fulfil each of the following conditions***:

   i) do not have border control as an objective;

   ii) are based on general ***police*** information ***or, in the event that the aim is to contain the spread of an infectious disease, on public health information,*** and experience of the competent authorities regarding possible threats to public security or public policy and aim, in particular, to:

      - combat cross-border crime;

      - ~~combat irregular residence or stay, linked to irregular migration~~***reduce illegal immigration***; or

      - contain the spread of an infectious disease with epidemic potential as ~~detected~~***established*** by the European Centre for Disease Control;

iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, including where they are conducted at transport hubs or directly on board of passenger ***transport*** services and when they are based on ***a risk assessment*** ~~risk analysis;~~

~~iv) are carried out, where appropriate, on the basis of monitoring and surveillance technologies generally used in the territory, for the purposes of addressing threats to public security or public policy as set out under ii);~~

b) the possibility for a Member State to carry out security checks on persons ~~carried out~~ at transport hubs by the competent authorities ***or by carriers*** under the law of each Member State, ~~by their competent authorities or by carriers~~ , provided that such checks are also carried out on persons travelling within a Member State;

c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

d) the possibility for a Member State to provide by law for an obligation on third-country nationals to report their presence on its territory ***and the obligation for managers of establishments providing accommodation to see to it that third-country nationals complete and sign registration forms, with the exception of accompanying spouses or accompanying minors or members of travel groups,*** pursuant ***respectively*** to the provisions of ~~Article 22~~***Articles 22 and 45*** of the 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 ('the Schengen Convention');

~~e) checks for security purposes of passenger data against relevant databases on persons traveling in the area without controls at internal borders which can be carried out by the competent authorities under the applicable law.'~~

PUBLIC

(6) The following Article ~~23a~~ is inserted:

"Article 23a

Procedure for transferring persons apprehended ~~at the internal borders~~ ***in border areas***

1. ***Without prejudice to Article 22,*** this Article ~~applies to the apprehension~~***lays down the procedure for the transfer*** of a third-country national ***apprehended in border areas as referred to in Article 23*** ~~in the vicinity of internal borders~~, in circumstances where ~~all of~~ the following conditions are fulfilled:

~~a) the third country national concerned does not or no longer fulfils the entry conditions laid down in Article 6(1);~~

~~b) the third country national is not covered by the derogation laid down in Article 6(5) point (a);~~

c) the third country national is apprehended ~~as part of cross-border police operational~~ ***during checks involving the competent authorities of both Member States within the framework of bilateral*** cooperation, ***which may include,*** in particular, ~~during~~ joint police patrols~~;~~***, where the Member States have agreed to use such a procedure within that bilateral cooperation framework, and***

d) there are clear indications that the third country national has arrived directly from ~~another~~***the other Member State, and where it is established that the third-country national has no right to stay on the territory of the*** Member State ***in which he or she has arrived***, on the basis of information immediately available to the apprehending authorities, including statements from the person concerned, identity, travel or other documents found on that person or the results of searches carried out in relevant national and Union databases.

PUBLIC

The procedure laid down in paragraphs 1 and 2 shall not apply to applicants for international protection within the meaning of Article 4(x) of Regulation xxx/xxx ('the Asylum Procedure Regulation') or to beneficiaries of international protection within the meaning of the Qualification Regulation.

When transferring a third country national who the transferring Member State presumes to be a minor, the transferring Member State shall inform the receiving Member State of this presumed status and both Member States shall ensure that all measures in the best interests of the child are taken in accordance with their respective national laws.

2. ***By way of derogation from Article 6(1) of Directive 2008/115/EC,*** the competent authorities of ~~the~~***a*** Member State may, ~~based on a finding that the third country national concerned has no right to stay on its territory~~***where the conditions laid down in paragraph 1 are met***, decide to immediately– transfer the ~~person~~***third- country national concerned*** to the Member State from which the person ***arrived*** ~~entered or sought to enter~~, in accordance with the procedure set out in Annex XII.

2a. Third-country nationals apprehended in border areas and transferred under this procedure shall have the right to appeal. Appeals against the transfer decision shall be conducted in accordance with national law. The third country nationals shall be provided with an effective remedy in accordance with Article 47 of the Charter. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national in a language that they understand or are reasonably supposed to understand. Lodging such an appeal shall not have suspensive effect.

3. Where a ***transferring*** Member State applies the procedure referred to in paragraph 2, the receiving Member State shall be required to take all measures necessary to receive the third country national concerned in accordance with the procedures set out in Annex XII.

All relevant provisions of Directive 2008/115/EC shall apply in the receiving Member State.

3a. Member States shall define practical modalities under their bilateral cooperation frameworks, including with a view to, as a rule, avoiding the use of the procedure referred to in paragraph 2, in particular on the sections of the internal borders where controls have been reintroduced or prolonged.

4. ***The procedure laid down in this Article is without prejudice to existing bilateral agreements or arrangements as referred to in Article 6(3) of Directive 2008/115/EC.***

4a. From ~~[~~one year following the entry into force of the Regulation~~]~~ and annually thereafter, Member States shall submit to the Commission the data recorded in accordance with point 3 of Annex XII~~, regarding the application of paragraphs 1, 2 and 3~~.***"'***

(7) ~~At the end of~~ The first paragraph of Article 24~~, the first paragraph~~ is replaced by the following:

'Member States shall remove all obstacles to fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations or required for the use of the technologies referred to in Article 23, point (a)~~(iv).” .~~***"***

(8) Article 25 is replaced by the following:

"Article 25

General framework for the temporary reintroduction or prolongation of border control at internal borders

1. Where, in the area without internal border controls, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border controls at all or specific parts of its internal borders.

A serious threat to public policy or internal security may be considered to arise from, in particular:

(a) ~~activities relating to terrorism or~~***terrorist incidents or threats and including those posed by serious*** organised crime~~;~~

(b) large scale public health emergencies;

(c) ~~a~~***an exceptional*** situation characterised by ***sudden*** large scale unauthorised movements of third-country nationals between the Member States, ***putting a substantial strain on the overall resources and capacities of well-prepared competent authorities and which is likely to put*** ~~putting~~ at risk the overall functioning of the area without internal border ~~control;~~***controls, as evidenced by information analysis and all available data, including from EU agencies.***

(d) large scale or high profile international events ~~such as sporting, trade or political events.~~

2. ~~Border controls may only be introduced pursuant to Articles 25a and 28 where a Member State has established that such~~ ***In all cases, border controls at internal borders shall only be reintroduced as*** a measure ~~is necessary and proportionate, taking into account the criteria referred to in Article 26(1), and, in case such controls are prolonged, also the criteria referred to in Article 26(2).~~***of last resort. The scope and duration of the temporary reintroduction of*** border controls ~~may also be reintroduced in accordance with Article 29, taking into account the criteria referred to in Article 30~~***shall not exceed what is strictly necessary to respond to the serious threat identified***.

PUBLIC

~~In all cases, border controls at internal borders shall be reintroduced as~~***Border controls may only be introduced or prolonged pursuant to Articles 25a and 28 where a Member State has established that such*** a measure ~~of last resort. The scope and duration of the temporary reintroduction of~~***is necessary and proportionate, taking into account the criteria referred to in Article 26(1), and, in case such controls are prolonged, also the risk assessment referred to in Article 26(2).*** Border ~~control shall not exceed what is strictly necessary to respond to the serious threat identified~~***controls may also be reintroduced in accordance with Article 29, taking into account the criteria referred to in Article 30***.

3. Where the same threat continues to persist, border controls at internal borders may be prolonged in accordance with Articles 25a~~, 28~~ or 29***, or, when the threat relates to large scale public health emergencies, Article 28***.

The same ***serious*** threat shall be considered to exist where the justification advanced by the Member State for prolonging border controls is based on the ~~determination of the continuation of the same threat~~ ***same grounds as those*** that had justified the initial reintroduction of the border controls.***"'***

(9) A new Article 25a is inserted after Article 25:

"Article 25a

Procedure for cases requiring action due to unforeseeable or foreseeable events

1. Where a serious threat to public policy or internal security in a Member State is unforeseeable and requires immediate action, the Member State may, on an exceptional basis, immediately reintroduce border ~~control~~***controls*** at internal borders.

2. The Member State shall, at the same time as reintroducing border ~~control~~***controls*** under paragraph 1, notify ***the European Parliament, the Council,*** the Commission and the other Member States of the reintroduction of border controls, in accordance with Article 27(1).

3. For the purposes of paragraph 1, border ~~control~~***controls*** at internal borders may be immediately reintroduced for a limited period of up to one month. If the serious threat to public policy or internal security persists beyond that period, the Member State may prolong the border control at internal borders for further periods, leading to a maximum duration not exceeding three months.

4. Where a serious threat to public policy or internal security is foreseeable in a Member State, the Member State shall notify the ~~Commission and the other Member States~~***European Parliament, the Council, the Commission*** and the ~~Commission~~ ***other Member States*** in accordance with Article 27(1), at the latest four weeks before the planned reintroduction of border controls, or ~~within a shorter period~~ ***as soon as possible*** where the circumstances giving rise to the need to reintroduce border controls at internal borders become known less than four weeks before the planned reintroduction.

5. ~~For the purposes of~~***Where*** paragraph 4 ***applies***, and without prejudice to Article ***25a(6a)*** ~~27a(4)~~, border control at internal borders may be reintroduced for a period of up to six months. Where the serious threat to public policy or internal security persists beyond that period, the Member State may prolong the border control at internal borders for renewable periods of up to six months.- Any prolongation shall be notified to the ***European Parliament, the Council and the*** Commission and the other Member States in accordance with Article 27 and within the time limits referred to in paragraph 4. Subject to ~~Article~~ 27a~~(5)~~ ***paragraph 6a***, the maximum duration of border control at internal borders shall not exceed two years.

~~6. The period referred to in paragraph 5 shall not include periods referred to in paragraph 3.~~

6a. Where a Member State considers that there is a major exceptional situation in respect to a persisting threat justifying the continued need for internal border controls, in excess of the maximum period referred to in Article 25a(5), it shall notify the Parliament, the Commission and the other Member States of its intention to prolong its internal border controls, at the latest four weeks before the planned prolongation, for an additional period of up to 6 months. The new notification, taking into account the opinion of the Commission issued pursuant to Article 27a, shall include a risk assessment in accordance with Article 26(2):

- substantiating the continued threat to public policy or internal security;

- substantiating that alternative measures to remedy the threat are deemed or have been found to be ineffective at the time of the notification;

- presenting the mitigating measures considered to accompany the controls;

- including, where appropriate, a presentation of the means, actions, conditions and timeline considered with a view to lifting the internal border controls. Within three months after this notification, the Commission shall issue a new opinion. Following the receipt of this notification, the Commission may on its own initiative, or shall at the request of the Member State directly affected establish a consultation process, in accordance with Article 27(1).

Where, in a major exceptional situation, the continued need for internal border controls is confirmed as a result of the procedure referred to in this paragraph and the additional period of six months referred to therein is not sufficient to ensure the availability of effective alternative measures to address the persisting threat, a Member State may decide to prolong internal border control for a further final additional period of up to six months, in line with the risk assessment as referred to in the second subparagraph. Should it decide to do so, the Member State concerned shall notify the Commission without delay of its intention to prolong its internal border controls. The Commission shall adopt without delay a recommendation on the compatibility with the Treaties of such a final prolongation, in particular with the principles of necessity and proportionality. The recommendation shall also identify, where appropriate with other Member States, the effective compensatory measures to be implemented.'

PUBLIC

(10) Article 26 is replaced by the following:

"Article 26

Criteria for the temporary reintroduction and prolongation of border control at internal borders

1. To establish whether the reintroduction of border control at internal borders is necessary and proportionate in accordance with Article ~~25~~***25(2)***, a Member State shall in particular ~~consider~~***assess*** :

(a) the appropriateness of the measure of reintroducing border controls at internal border, having regard to the nature of the serious threat identified and in particular, whether the reintroduction of border controls at internal borders is likely to adequately remedy the threat to public policy**,** or internal security ***and whether the objectives pursued by such reintroduction could be attained by: (i) the use of alternative measures such as proportionate checks carried out in the context of checks within the territory as referred to in Article 23 point (a)***; ***ii) the use of the procedure laid down in Article 23a; iii) other forms of police cooperation as provided for under Union law, ; iv) common measures regarding temporary restrictions on travel to the Member States as referred to in Article 21a(2).***

(b) the likely impact of such a measure on:

- ***the*** movement of persons within the area without internal border ~~control~~***controls*** and

- the functioning of the cross-border regions, taking into account the strong social and economic ties between them.

PUBLIC

2. Where ~~a Member States decides to prolong the border control at internal borders pursuant to~~***controls at internal borders have been in place for six months in accordance with*** Article 25a(5), ~~it~~***the Member State concerned*** shall ~~also assess in detail whether the objectives pursued by such prolongation could be attained by:~~***carry out a risk assessment, which in addition to the elements contained in Article 27, paragraphs 2 and 3, shall also include a reassessment of the criteria laid down in paragraph 1 of this Article.***

a) ~~the use of alternative measures such as proportionate checks carried out in the context of the lawful exercise of powers as referred to in Article 23 point (a);~~

b) ~~the use of the procedure as referred to in Article 23a;~~

c) ~~forms of police cooperation as provided for under Union law, including on matters such as joint patrols, joint operations, joint investigation teams, cross-border hot pursuits, or cross-border surveillance.~~

3. Where border controls at internal borders have been reintroduced or prolonged, the Member States concerned shall~~, where necessary,~~ ensure that they are accompanied by appropriate measures that mitigate the impacts resulting from the reintroduction of border controls on persons and the transport of goods, giving particular consideration to the ***strong social and economic ties between*** cross-border regions***, and to persons undertaking essential travel***.***"'***

PUBLIC

(11) Article 27 is replaced by the following:

"Article 27

Notification of temporary reintroduction of internal border controls and risk assessment

1. Notifications by Member States of the reintroduction or prolongation of internal border controls shall contain the following information:

(a) the reasons for the reintroduction or prolongation, including all relevant data detailing the events that constitute a serious threat to its public policy or internal security;

(b) the scope of the proposed reintroduction or prolongation, specifying at which part or parts of the internal borders border control is to be reintroduced, or prolonged;

(c) the names of the authorised crossing-points;

(d) the date and duration of the planned reintroduction or prolongation;

(e) the ~~considerations as to~~ ***assessment of*** the necessity and proportionality referred to in Article 26(1) and, in the case of a prolongation, in Article 26(2);

(f) where appropriate, the measures to be taken by ~~the~~ other Member States.

A notification may be submitted jointly by two or more Member States.

~~The notification~~ ***Member States*** shall ~~be provided in accordance with~~ ***submit the notification using*** a template to be established ~~by the Commission by an implementing act and to be~~ ***and*** made available online~~. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 38(2).~~" ***by the Commission.***

PUBLIC

2. Where border controls have been in place for six months in accordance with Article 25~~a(4)~~***a(5)***, any subsequent notification for the prolongation of such controls shall include a risk assessment. The risk assessment shall present the scale and anticipated evolution of the identified serious threat, in particular how long the identified serious threat is expected to persist and which sections of the internal borders may be affected, as well as information regarding coordination measures with the other Member States impacted or likely to be impacted by such measures.

3. Where ~~the reintroduction of border controls or its prolongation refers to large scale unauthorised movements~~***Member States reintroduce or prolong border controls because of a situation*** referred to in Article 25(1) point ~~(b), the risk~~ ***(c), the*** assessment ***required by paragraph 1(e) of this Article*** shall also ~~provide information on the scale and trends of such~~***include a risk assessment and information on the sudden large-scale*** unauthorised movements, including any information obtained from the relevant EU agencies in line with their respective mandates and data analysis from relevant information systems.

4. The Member State concerned shall upon request by the Commission, provide any further information, including on the coordination measures with the Member States affected by the planned prolongation of border control at internal borders as well as further information needed to assess the possible use of measures referred to in Article 23 and 23a .

PUBLIC

5. ***Member States shall not be required to provide all the information referred to in paragraphs 1 to 4 of this Article in cases justified on public security grounds, taking into account the confidentiality of ongoing investigations.*** Member States submitting a notification under paragraphs 1 or 2 may, where necessary and in accordance with national law, decide to classify all or parts of the notified information***, in particular the risk assessments***. Such classification shall not preclude access to information, through appropriate and secure ~~police cooperation~~ channels, by the other Member States affected by the temporary reintroduction of border controls at internal borders. ***Such classification shall not preclude information from being made available to the European Parliament. The transmission and handling of information and documents transmitted to the European Parliament under this article shall not include the risk assessments referred to in paragraph 2 and shall comply with rules concerning the forwarding and handling of classified information.***

6. The Commission shall adopt an implementing act to establish the template referred to in the third subparagraph of paragraph 1. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 38(2).”’

(12) The following Article 27a is inserted:

“Article 27a

Consultation with the Member States and opinion of the Commission

1. Following receipt of notifications, submitted under Article 27(1), the Commission may***, on its own initiative, or shall*** ~~establish a consultation process, where appropriate~~, ***at the request of a Member State directly affected, establish a consultation process*** including joint meetings between the Member State that is planning to reintroduce or prolong border control at internal borders, and the other Member States, especially those directly affected by such measures and the relevant Union agencies.

The objective of the consultation ~~shall concern~~ ***is to examine*** in particular the identified threat to public policy or internal security, the ***necessity and proportionality*** ~~relevance~~ of the intended reintroduction of border controls taking into account the appropriateness of alternative measures, ***the impact of such border controls where they have already been reintroduced,*** as well as the ways of ensuring implementation of the mutual cooperation between the Member States in relation to the reintroduced border controls.

The Member State planning to reintroduce or prolong border control at internal borders shall take ~~utmost~~***into*** account ~~of~~ the results of such consultation ***when deciding whether to reintroduce or prolong internal border control and*** when carrying out border control at the internal border.

2. Following the receipt of notifications, submitted in relation to the reintroduction or prolongation of border controls at internal borders, the Commission ***shall,*** or any other Member State may, without prejudice to Article 72 TFEU, issue an opinion, if, based on the information contained in the notification and risk assessment, where appropriate, or any additional information, they have concerns as regards the necessity or proportionality of the planned reintroduction or prolongation of border control at internal borders.

3. Following receipt of notifications submitted in relation to a prolongation of border control at the internal border under Article 25a(4) which leads to the continuation of border controls at internal borders for ~~eighteen~~***twelve*** months in total, the Commission shall issue an opinion on necessity and proportionality of such internal border controls.

The opinion of the Commission shall include at least:

(a) an assessment of whether the reintroduction or prolongation of internal border control complies with the principles of necessity and proportionality;

(b) an assessment whether alternative measures to remedy the serious threat identified were sufficiently explored;

PUBLIC

Where the reintroduction of internal border control is assessed and is considered to have complied with the principles of necessity and proportionality, the opinion shall contain recommendations, where appropriate, on the improvement of the cooperation between Member States in order to limit the impact of the internal border controls and contribute to the reduction of the persisting threat.

4. Where an opinion referred to in paragraphs 2 or 3 is issued, the Commission ~~may~~***shall*** establish a consultation process***, in accordance with paragraph 1,*** in order to discuss the opinion with the Member States. ~~Where the Commission or a Member State issues an opinion expressing concerns on the necessity or proportionality of reintroduced internal border controls the Commission shall launch such a process.~~

~~5. Where a Member State considers that there are exceptional situations justifying the continued need for internal border controls in excess of the maximum period referred to in Article 25(5), it shall notify the Commission in accordance with Article 27(2). The new notification from the Member State shall substantiate the continued threat to public policy or internal security, taking into account the opinion of the Commission given pursuant to paragraph 3. The Commission shall issue a follow up opinion.~~***'***

PUBLIC

(13) Article 28 is replaced by the following:

"Article 28

Specific mechanism where ~~the serious threat to~~***a large-scale*** public ~~policy or internal security~~***health emergency*** puts at risk the overall functioning of the area without internal border controls

1. Where the Commission~~,~~ establishes that the same ~~serious threat to internal security or~~***large-scale*** public ~~policy affects a majority of~~***health emergency affects several*** Member States, putting at risk the overall functioning of the area without internal border ***controls***, it may~~,~~ make a proposal to the Council to adopt an implementing decision authorising the reintroduction of border controls by Member States***, including any appropriate mitigating measures to be established at national and EU level,*** where the available measures referred to in Articles ~~23 and 23a~~***21a and 23*** are not sufficient to address the ~~threat~~***public health emergency***. ***The Member States may request the Commission to submit such a proposal to the Council.***

2. The decision shall cover a period of up to six months and may be renewed, upon proposal from the Commission, for further periods of up to six months as long as the ~~threat~~ ***large-scale public health emergency*** persists, taking into account the review referred to in paragraph 5.

3. Where Member States reintroduce or prolong border controls because of the ~~threat~~ ***large-scale public health emergency*** referred to in paragraph 1, those controls shall, as of the entry into force of the Council decision, be based on that decision.

PUBLIC

~~4. The decision of the Council referred to in paragraph 1 shall also refer to any appropriate mitigating measures that shall be established at national and Union level in order to minimise the impacts caused by the reintroduction of border controls.~~

5. The Commission shall ***regularly*** review the evolution of the identified ~~threat~~***large-scale public health emergency*** as well as the impact of the measures adopted in accordance with the Council decision referred to in paragraph 1, with a view to ~~assess~~***assessing*** whether the measures remain justified ***or to proposing the lifting of internal border controls as soon as possible***.

6. Member States shall immediately notify ***the European Parliament, the Council,*** the Commission***,*** and the other Member States ~~in the Council~~ of a reintroduction of border controls in accordance with the decision referred to in paragraph 1.

7. ~~The Commission may issue a recommendation indicating~~***Member States may take*** other measures***,*** as referred to in ~~Articles 23 and 23a that could complement~~ ***Article 23, in order to limit the scope of*** internal border controls ~~or be more suitable to address the identified threat to internal security or public policy as~~ ***The Commission shall take this into account in the review*** referred to in paragraph ~~1~~***5"***.'

~~(14) Article 31 is amended as follows:~~

~~a) Article 31 becomes paragraph 1;~~

~~b) the following paragraph 2 is added:~~

~~'2. Where a Member State notifies the Commission and the other Member States of the reintroduction of border controls in accordance with Article 27(1), it shall at the same time inform the European Parliament and the Council of the following:~~

PUBLIC

a) the details of the internal borders where border control is to be reintroduced;

b) the reasons for the proposed reintroduction;

c) the names of the authorised crossing-points;

d) the date and duration of the planned reintroduction;

e) where appropriate, the measures to be taken by the other Member State.

3. The provision of information may be subject to classification of information by Member States pursuant to Article 27(4).

Member States shall not be required to provide all the information referred to in the paragraph 2 in cases justified on public security grounds.

The classification of information shall not preclude information from being made available by the Commission to the European Parliament. The transmission and handling of information and documents transmitted to the European Parliament under this Article shall comply with rules concerning the forwarding and handling of classified information which are applicable between the European Parliament and the Commission.'

PUBLIC

(15) Article 33 is replaced by the following:

"Article 33

Report on the reintroduction of border control at internal borders

1. Within four weeks of the lifting of border control at internal borders, Member States which have carried out border controls at internal borders shall present a report to the European Parliament, the Council and the Commission on the reintroduction and, where applicable, the prolongation of border control at internal borders.

2. Without prejudice to the first paragraph 1, where border controls are prolonged as referred to in Article 25a(5), the Member State concerned shall submit a report at the expiry of twelve months and ~~every~~ twelve months thereafter if border control is exceptionally maintained.

3. The report shall outline, in particular, the initial and follow-up assessment of the necessity ***and proportionality*** of border controls ~~and the respect~~***, the fulfilment*** of the criteria referred to in Articles 26, the operation of the checks, the practical cooperation with neighbouring Member States, the resulting impact on the ***free*** movement of persons in particular in the cross-border regions, the effectiveness of the reintroduction of border control at internal borders, including an ex-post assessment of the ***necessity and*** proportionality of the reintroduction of border control.

4. The Commission shall adopt a uniform format for such report ***to be established by an implementing act*** and make it available online. ***That implementing act shall be adopted in accordance with the examination procedure referred to in Article 38(2).***

5. The Commission may issue an opinion on that ex-post assessment of the temporary reintroduction of border control at one or more internal borders or at parts thereof.

6. ***At least once per year,*** the Commission shall ~~present~~***report*** to the European Parliament and to the Council~~, at least annually, a report~~ ***jointly*** on the functioning of the area without internal border control ~~entitled~~ ('State of Schengen report')***. The Commission may also discuss that report separately with the European Parliament and the Council***. The report shall include a list of all decisions to reintroduce border ~~control~~***controls*** at internal borders taken during the relevant year~~. It shall also include information on the trends within the Schengen area as regards the unauthorised movements of third country nationals, taking into account available information from the relevant Union agencies, data analysis from relevant information systems and~~***, as well as the actions taken by the Commission with regard to internal border controls reintroduced. The report shall pay particular attention to the border controls that have been in place for longer than twelve month. It shall also include*** an assessment of the necessity and proportionality of the reintroductions ***and prolongations*** of border controls in the period covered by that report ***as well as information on the trends within the area without internal border control as regards the unauthorised movements of third country nationals, taking into account available information from the relevant Union agencies and data analysis from relevant information systems***."

(15a) The following paragraphs are added to Article 36:

"2. The Commission shall be empowered to adopt delegated acts in accordance with Article 37 to supplement this Regulation by adding in part B of Annex XI categories of persons undertaking essential travel.

3. Where, in duly justified cases, regarding the nature of the large-scale public health emergency, imperative grounds of urgency so require, the procedure provided for in Article 37a shall apply to delegated acts adopted pursuant to paragraph 2."

PUBLIC

(15b) The following Article 37a is inserted :

Article 37a

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply for as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 37(5). In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the European Parliament or by the Council.

(16) In Article 39 (1), the following point (h) is added:

"h) ~~Member States shall notify to the Commission the local administrative~~ ***the*** areas considered as ~~the~~ cross-border regions and any relevant changes thereto.***"'***

(17) The following Article 42b is added:

"Article 42b

Notification of cross-border regions

By ~~[two~~***six*** months of the entry into force of this Regulation~~]~~ at the latest, ***all*** Member States ***with common internal borders*** shall ~~notify the Commission~~***in close cooperation determine*** the areas of their territory considered as ~~the~~ cross-border regions***, taking into account the strong social and economic ties between them, and notify the Commission thereof***.

Member States shall also inform the Commission of any relevant changes thereto.'

(18) The following Annex XI is added:

"ANNEX XI

PART A

Essential Travel

Essential functions or needs referred to in Article 2, point (23) refers to travel for any of the following function or needs:

i. Healthcare professionals, health researchers, and elderly care professionals;

ii. Frontier workers;

iii. Transport personnel;

iv. Diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and humanitarian aid workers and civil protection personnel in the exercise of their functions;

v. Passengers in transit;

vi. Passengers travelling for imperative family reasons;

vii. Seafarers;

viii. Persons in need of international protection or for other humanitarian reasons.

PUBLIC

PART B

1. ***children in preschool education or pupils in education in a neighbouring country and their guardians who cross the border with their children for the purpose of receiving such education as well as students / persons travelling for educational purposes;***

2. ***seasonal workers, including food producing workers;***

3. ***persons travelling for compelling reasons of animal care or for measures necessary for agriculture and forestry in individual cases;***

4. ***highly qualified workers as well as key and scientific staff whose employment is necessary from an economic, societal and security perspective and whose work cannot be postponed or performed abroad;***

5. ***personnel of the public authorities for defence, public order, public health and national security - i.e. staff of police, border police, immigration, public health civil protection departments etc./ representatives of law enforcement authorities, if it is related to the performance of official duties, including personnel responsible for operating and maintaining critical infrastructure;***

6. ***fishermen and persons performing work or providing services on ships or offshore mining and drilling platforms, based on an employment relationship other than a maritime employment contract;***

7. ***persons entering the Member State for the purpose of receiving essential medical services, including occupants of emergency vehicles;***

8. ***spouses (married, civil partner, cohabiting partner) and children of an essential traveller, including third country nationals traveling for family reunification;***

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9. third- country nationals traveling to respond to a summons by a judicial authority;

10. persons in possession of an International Press Card issued by the International Federation for Journalists;

11. care-dependent persons travelling to their care-takers; '

(19) A new Annex XII is added:

'ANNEX XII

PART A

Procedure for transferring persons apprehended ~~at the internal borders~~***in border areas***

1. ***Transfer*** decisions ***pursuant to Article 23a(2)*** shall ~~state the grounds for finding that a person has no right to stay~~***be issued by means of a standard form, as set out in Part B, completed by the competent national authority***. They shall take effect immediately.

2. ~~The decision shall be issued by means of a standard form, as set out in Part B, completed by the competent national authority.~~

   The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the ***transfer*** decision by signing the form and shall be given a copy of the signed form.

   Where the third-country national refuses to sign the standard form, the competent authority shall indicate this refusal in the form under the section 'comments'.

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3. The national authorities issuing a ~~refusal~~ ***transfer*** decision shall record the ~~following data:~~***data on the form referred to in Part B of this Annex.***

a) ~~to the extent that these can be established by them, the identity and nationality of the third-country national concerned,~~

b) ~~the references of the identity document, if any,~~

c) ~~where available, copies of any documents or data relating to the identity or nationality of the third country national concerned, in combination with the relevant national and Union databases.~~

d) ~~the grounds for refusal,~~

e) ~~the date of refusal,~~

f) ~~the Member States to which the third country national was sent back.~~

4. The national authorities issuing a ~~refusal~~ ***transfer*** decision shall ***inform the Commission yearly on the number of persons transferred to other Member States, indicating the Member State(s) to which the persons where transferred, grounds for finding that those persons had no right to stay in the Member State and, where available, the nationality of the third-country nationals apprehended.*** ~~collect the following data:~~

~~a) the number of persons refused entry;~~

~~b) the number of persons refused stay;~~

~~c) the number of persons sent back;~~

~~d) the Member State(s) to which persons were sent back;~~

~~e) where this information is available, the nationality of the third country nationals apprehended;~~

~~f) the grounds for refusal of entry and stay;~~

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~~g) the type of border as specified in Article 2 point 1 of Regulation (EU) 2016/399 at which the third-country nationals were sent back.~~

5. ~~Persons refused entry or the right to stay~~***Third-country nationals apprehended in border areas and transferred under this procedure*** shall have the right to appeal. Appeals ***against the transfer decision*** shall be conducted in accordance with national law***. The third country nationals shall be provided with an effective remedy in accordance with Article 47 of the Charter***. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national in a language that they understand or are reasonably supposed to understand. Lodging such an appeal shall not have suspensive effect.

6. The ~~authorities empowered under~~***competent*** national ~~law~~ ***authorities*** shall ensure that the third-country national subject to a ~~refusal~~***transfer*** decision is transferred***, in the framework of bilateral cooperation as referred to in paragraph 1(a) of Article 23a,*** to the competent authorities of the ~~neighbouring~~***receiving*** Member State***. The transfer shall take place*** immediately and within 24 hours at the latest. ***After that, the transfer procedure cannot take place and the relevant provisions of the Return Directive shall apply where appropriate.*** The authorities empowered under national law in the ~~neighbouring~~***receiving*** Member State shall cooperate with the authorities of the ***transferring*** Member State to that end.

~~7. If a third-country national who has been subject to a decision referred to in paragraph 1 is brought to the border by a carrier, the authority responsible locally may:~~

~~(a) order the carrier to take charge of the third-country national and transport him or her without delay to the Member State from which he or she was brought;~~

~~(b) pending onward transportation, take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally.~~

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PART B

Standard form for transferring persons apprehended ~~at the internal borders~~***in border areas***

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Name of State

Logo of State (Name of Office)

_____

_____[1]

TRANSFER PROCEDURE ~~AT THE~~***IN*** INTERNAL BORDER ***AREAS***

On _____ at (time) _____ at the location (indicate type of the internal border nearby or other relevant information related to the apprehension ~~by a joint patrol~~***in accordance with Article 23a of the Schengen Borders Code***)_____

We, the undersigned, _____have before us~~:~~

Personal data (subject to availability)

Surname_____ First name _____

Date of birth_____ Place of birth _____ Sex _____

Nationality _____ Resident in _____

Type of identity document _____ number_____

Issued in _____ on _____

Visa number, if any _____ type _____ issued by
_____

Valid from _____ until _____

For a period of _____ days: _____

Coming from _____ by means of _____ (indicate means of transport used, e.g. flight number), he/she is hereby informed that he/she ~~has no right to stay in the country and~~ will be transferred to _____ pursuant to ***Article 23a of the Schengen Borders Code*** ~~(indicate references to the national la in force), for the following reasons:~~

~~☐ (A) has no valid travel document(s)~~

~~☐ (B) has a false/counterfeit/forged travel document~~

~~☐ (C) has no valid visa or residence permit~~

~~☐ (D) has a false/counterfeit/forged visa or residence permit~~

~~☐ (E) has no appropriate documentation justifying the purpose and conditions of stay~~

~~The following document(s) could not be provided:~~ _____

~~☐ (F) has already stayed for 90 days in the preceding 180 day period on the territory of the Member States of the European Union~~

~~☐ (G) does not have sufficient means of subsistence in relation to the period and form of stay, or the means to return to the county of~~

~~origin or transit~~

~~□ (H) is~~
Grounds for finding that a person ~~for whom an alert has been issued for the purposes of refusing entry □ in the SIS □~~***has no right to stay*** in the ~~national register~~

~~□ (I) is considered to be a threat to public policy, internal security, public health or the international relations of one or more of the~~ Member ~~States of the European Union (each~~ State ~~must indicate the references to national law relating to such transfer~~)***:***

Comments

□ The person concerned declined to sign the form.

Person Concerned~~ Officer~~ Responsible ~~for checks~~***authorities***

The person concerned may appeal against the ~~decision that he/she has no right to stay as provided for in~~***transfer in accordance with*** national law. The person concerned receives a copy of this document (***each State must indicate the references to the national law and procedure relating to the right of appeal as well as contact points able to provide information on representatives competent to act on behalf of the third-country national***~~each State must indicate the references to the national law and procedure relating to the right of appeal~~).'

~~Article 2~~

~~Amendment to Directive 2008/115/EC~~

~~1. Article 6(3) of Directive 2008/115/EC is replaced by the following:~~

~~'3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State in accordance with the procedure provided for in Article 23a of the Regulation (EU) 2016/399 of the European Parliament and of the Council* or under bilateral agreements or arrangements.~~

~~The Member State which has taken back the third-country national concerned in accordance with the first subparagraph shall issue a return decision in accordance with paragraph 1. In such cases, the derogation laid down in the first subparagraph shall not apply.~~

~~Member States shall without delay notify any existing, amended or new bilateral agreements or arrangements to the Commission.''~~

~~* 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 077 23.3.2016, p. 1).'~~

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~~*Article 3*~~

~~**Transposition of amendment to Directive 2008/115/EC**~~

~~1. Member States shall adopt and publish, by [6 months from entry into force of this Regulation] at the latest, the laws, regulations and administrative provisions necessary to comply with Article 2. They shall forthwith communicate to the Commission the text of those provisions.~~

~~They shall apply those provisions from [6 months from entry into force].~~

~~When Member States adopt those provisions, they shall contain a reference to Article 2 of this Regulation or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.~~

Article 4

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

~~However, Article 1, point 6, shall apply from [the date at which the amendments provided for in Article 2 apply in the Member States].~~

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

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President