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**Dossier interinstitutionnel:
2021/0428(COD)**

LIMITE

**JAI 428
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MIGR 107
COVID-19 77
SAN 198
TRANS 203
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COMIX 160**

NOTE

Origine:	la présidence
Destinataire:	Groupe Frontières - Comité Mixte (UE-Islande/Norvège et Suisse/Liechtenstein)
N° doc. préc.:	6366/22, 7062/22
Objet:	Proposition de règlement du Parlement européen et du Conseil amendant le règlement (UE) 2016/399 concernant un code de l'Union relatif au régime de franchissement des frontières par les personnes - Compromis partiel de la présidence

Les délégations trouveront ci-joint le deuxième compromis de la Présidence portant sur les articles 2, 5, 13, 21a, 23, 23a, 24, 25, 25a, 26, 27, 27a, 28, 31, 33, 39 et 42b du code frontières Schengen, ainsi que ses annexes XI et XII.

Les amendements apportés au texte original apparaissent en **gras souligné** ou ~~barrés~~. En outre, les changements par rapport à la dernière version (6366/22 et 7062/22) apparaissent en **grisé**.

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**

,THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

HAVE ADOPTED THIS REGULATION:

Article 1

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

(1) Article 2 is **amended** ~~modified~~ 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** ~~detect and prevent~~ unauthorised border crossings or the circumvention of border checks.

b) the following points 27 to 30 are added:

27. ‘instrumentalisation of migrants’ **means** ~~refers to~~ a situation where **a third state or non state actor** ~~third country~~ instigates **illegal immigration** migratory flows into the Union, by ~~actively~~ encouraging or facilitating the movement of third country nationals to the external borders, ~~onto or from within a its territory and then onwards to those external borders~~ where such actions are indicative of an intention of a third country **state or non state actor** to destabilise the Union or a Member State, where the nature of such actions **are aimed at destabilising** ~~destabilise the Union or a Member State, and~~ **are** ~~is~~ liable to put at risk essential **State functions of a Member State**, including ~~its territorial integrity~~, the maintenance of law and order or the safeguard of its national security;¹

1 Deleted part is included in recital 8.

Add at the end of recital 9: “Instrumentalisation of migrants does not refer to situations where non state actors are involved in organised crime, in particular smuggling. Humanitarian aid operations should not be considered as instrumentalisation.”

28. ‘essential travel’ means travel in connection with an essential function or need ~~listed in Annex XI~~, 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.**

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

- ‘4. **Member States** may, **in particular** in a situation of instrumentalisation of migrants **or in a situation of emergency at the external border**, ~~Member States may~~ limit the number of border crossing points as notified pursuant to paragraph 1 or their opening hours where the circumstances so require.

Any limitations ~~adopted~~ pursuant to the first 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/EC², persons deriving their right to reside from other instruments of Union or national law or who hold national long-term ~~stay~~ visas, as well as their respective family members;
- (c) third-country nationals seeking international protection.’

(3) Article 13 is replaced by the following:

‘Article 13

Border surveillance

1. The main purpose of border surveillance shall be to **prevent or detect** ~~detect and prevent~~ unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally. **In addition, border surveillance shall enable information gathering which contributes to raising situational awareness and carrying out risk analyses.**

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 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).

2. The border guards shall use **all necessary resources, including** stationary or mobile units³ 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 **or and** from circumventing the checks at border crossing points.

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 involve frequent and sudden changes to surveillance periods and other methods or techniques, so that unauthorised border crossings are effectively **prevented or detected** ~~detected or prevented~~.
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 to prevent unauthorised border crossings or apprehend individuals crossing **or having crossed** the border illegally. Surveillance may also be carried out by technical means, including electronic means, equipment, **and** surveillance systems **and where appropriate stationary and mobile infrastructure**.
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 **border** crossings ~~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 Council³, 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.

3 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 ~~may~~ shall be empowered to adopt ~~delegated acts~~ **an implementing act** in accordance with Article 37 concerning additional measures governing surveillance, including the development of **common minimum** standards for border surveillance, and in particular the use of surveillance and monitoring technologies at the external borders, **These common minimum standards shall take into account** taking into account the type of borders, 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**. **That implementing act shall be adopted in accordance with the examination procedure referred to in Article 38(2).**

- (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 **of a threat to public health due to** the existence in one or more third countries of an infectious disease with epidemic potential as defined by the relevant instruments of the World Health Organization where the Commission, **following the advice of** the European Centre for Disease Prevention and Control ~~or the Commission,~~ **and in close cooperation with taking into account information from the competent national authorities, establishes identify that such a threat may have a negative impact on the area without controls at internal borders.**
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 other ~~proportionate~~ measures **minimum temporary health related restrictions** which are considered necessary for the protection of public health in the area without controls at internal borders, such as for instance testing, quarantine, and self-isolation⁴. **Temporary restrictions on travel shall be proportionate and non-discriminatory. Persons undertaking essential travel and categories listed in paragraph 3 can be subject to these proportionate measures.**

4 **Member States may, where justified, adopt stricter minimum temporary health related restrictions than those laid down in the implementation regulation.**

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 **as defined in** ~~under~~ Directive 2003/109/EC, persons deriving their right to reside from other instruments of Union law or national law or who hold national long-term ~~stay~~ visas, as well as their respective family members ⁵.
4. The implementing Regulation referred to in paragraph 1 ~~2~~ shall, where appropriate:
- a) identify any geographical areas or third countries⁶ from which ~~non-essential~~ travel may be subject to restrictions or exemptions from restrictions, **and define a procedure to periodically review the** ~~having regard to the particular~~ 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;
 - b) define ~~the any~~ categories of persons ~~undertaking non-~~essential travel to be exempted from any restrictions applicable to travel ~~when undertaking non-essential travel.~~
 - c) ~~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. ;~~
 - d) **lay down minimum temporary health related restrictions to which persons referred to in Article 3 a) and b) may be subject;**
 - e) lay down the conditions under which non-essential travel as referred to under points (a) and (b) may be restricted or exempt from restrictions **as referred to under points (a) and (b)**, 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);
 - e) ~~lay down the conditions of review of the proportionality and the necessity of these restrictions.~~

⁵ PM: recital IE status.

⁶ **Amendment to recital 7: Member States may adopt, at the national level, restrictions on travel against other regions or other third countries not covered by the implementing regulation, based on their national risk assessment. Such measures shall remain proportionate.**

5. Restrictions on **entry on person undertaking** essential travel referred to in paragraph 4(d) may ~~shall~~ not include restrictions on entry as regards travellers listed in point i. and points iv. to viii. of Annex XI.” **only be imposed exceptionally, for a strictly limited period of time, until sufficient information about the disease referred to in paragraph 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.**

(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 exercise of powers may include the use of monitoring and surveillance technologies 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 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 **illegal** migration; or
 - contain the spread of an infectious disease with epidemic potential, **the existence of which has been established** as detected by **the Commission, following the advice of** the European Centre for Disease Control, **and taking into account information from in close cooperation with the competent national authorities;**

- 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** 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, 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 for an obligation for managers of establishments providing accommodation to see to it that third-country nationals complete and sign registration forms** pursuant **respectively** to the provisions of 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."

(6) The following Article 23a is inserted:

“Article 23a
*Procedure for transferring **illegally staying third-country nationals** apprehended at the internal borders*”

1. This Article **lays down the procedure for the transfer** ~~applies to the apprehension of~~ **an illegally staying** third-country national **apprehended** ~~in the vicinity of internal borders~~ **internal border areas, 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,** 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);~~
- a e) the third country national is apprehended **as part of joint operations** ~~cross-border police operational cooperation, in particular, during joint police patrols or police checks conducted within a bilateral cooperation framework, including joint police patrols ; and~~
- b d) there are clear indications that the **illegally staying** third country national has arrived directly from the other Member State, 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.

2. The competent authorities of a Member State may, ~~based on a finding~~ **after having apprehended that the an illegally staying** third country national **at the internal border areas** ~~concerned has no right to stay on its territory~~ , decide to immediately transfer the person to the Member State from which the person entered or sought to enter, in accordance with the procedure set out in Annex XII. **This transfer is without prejudice to bilateral agreements or arrangements as referred to in Article 6(3) of Directive 2008/115/EC.**⁷
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.
4. 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 t~~**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).**”

(18) The following Annex XI is added:

“ANNEX XI

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. **Cross-border** 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. **Third-country nationals** Persons **seeking** in need of international protection or **travelling** for other humanitarian reasons.”

(19) A new Annex XII is added:

“ANNEX XII

PART A

Procedure for transferring ~~illegally staying third-country nationals~~ ~~persons~~ apprehended at the internal borders

1. **Transfer** ~~Decisions~~ **issued pursuant to Article 23a(2)** shall ~~state the grounds for finding~~ that a person has no right to stay **in the transferring Member State** 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 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’.
3. The national authorities issuing a ~~refusal~~ **transfer** decision shall record the following data:
 - 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 **transfer refusal**,
 - e) the date of **transfer refusal**,
 - f) the **receiving** Member States ~~to which the third country national was sent back~~.
4. The national authorities issuing a ~~transfer refusal~~ **transfer** decision shall collect the following data **and submit them yearly to the Commission**:
 - a) ~~the number of persons refused entry;~~
 - b) ~~the number of persons refused stay;~~

- c) the number of persons **transferred** ~~sent back~~;
 - d) the Member State(s) to which persons were **transferred** ~~sent back~~;
 - e) where this information is available, the nationality of the third-country nationals apprehended;
 - f) the grounds for **transfer** ~~refusal of entry and stay~~;
 - g) the type of border as specified in Article 2 point 1 of Regulation (EU) 2016/399 at which the third-country nationals were **transferred** ~~sent back~~.
5. **Third-country nationals** Persons **subject to a transfer decision** ~~refused entry or the right to stay~~ shall have the right to appeal. Appeals **against the transfer decision** shall be conducted in accordance with national law. 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 national law shall ensure that the third-country national subject to a **transfer refusal** decision is transferred to the competent authorities of the **receiving neighbouring** Member State immediately and within 24 hours at the latest. The authorities empowered under national law in the **receiving neighbouring** 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 **authority** ~~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 **subject to a transfer decision** ~~refused entry~~ from **re-entering** illegally.

PART B

Standard form for transferring persons apprehended at the internal borders



Name of State

Logo of State (Name of Office)

_____ (1)

TRANSFER PROCEDURE AT THE INTERNAL BORDER

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 operation**) _____

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 law in force), for the following reasons:

Where applicable, grounds, in accordance with national law, stating that a person has no right to stay in the Member State :

- (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 country of origin or transit
- (H) is a person for whom an alert has been issued for the purposes of refusing entry
 - in the SIS
 - 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

The person concerned may appeal against the ~~transfer decision that he/she has no right to stay as provided for~~ **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*).

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).

Article 3

Transposition of amendment to Directive 2008/115/EC

~~2-~~Member States shall adopt and publish, by ~~6~~ **[12]** 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~~ **[12]** 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.
