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

LIMITE

**JAI 630
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MIGR 140
COVID-19 98
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TRANS 280
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COMIX 235**

NOTE

Origine:	la présidence
Destinataire:	Conseillers JAI (Visas, frontières, Schengen)
N° doc. préc.:	8631/22
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 compromis révisé de la présidence portant sur les articles 2, 5, 13, 21a, 23, 23a, 24 du code frontières Schengen, ses annexes XI et XII, ainsi que les articles 2 et 3 de la proposition amendant la directive retour.

Les amendements apportés au texte original apparaissent en **gras souligné** ou ~~barrés~~. En outre, les changements par rapport aux dernières versions (7062/22 et 7771/22) 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

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.
- (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.

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.

- (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.
- (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.
- (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 which should 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 a threat to public health due to** an infectious disease with epidemic potential as **established** identified by **the Commission, following the advice of** the European Centre for Disease Prevention and Control **and taking into account information from the competent national authorities** ~~or the Commission~~. This mechanism should complement the procedures proposed to be established in the Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health² notably in case of the recognition of a public health emergency, and the revised mandate of the European Centre for Disease Control.³

² COM(2020)727.

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) 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 minimum temporary health-related restrictions** ~~any other necessary measures for travel into the European Union~~, 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.
- (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. **The act should lay down minimum temporary health restrictions to which these persons may be subject. In line with the applicable obligations under Union law, travel from Ireland should not be subject to restrictions under this Regulation. As regards residents in Ireland, Member States should on a bilateral and 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 to be adopted through an implementing Regulation.** 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 **define** ~~specify, where relevant, any the~~ categories of **essential** travellers whose travel should be exempted from restrictions on entry **and lay down the conditions under which travel restrictions may exceptionnally be imposed on these travellers. These categories could for example include healthcare professionals, cross-border workers, transport personnel, diplomats or other international staff, passengers in transit, passengers travelling for imperative family reasons, seafarers, third-country nationals seeking international protection, seasonal workers and highly qualified workers whose employment is necessary from an economic perspective and the work cannot be postponed or performed abroad.** 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.

- (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 disproportionately negative impact on the functioning of the area without internal border controls. Such measures may include restrictions on travel against other regions or third countries not covered by the implementing Regulation, if they are based on a national risk assessment and are proportionate. 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 essential categories should not be subject to temporary restrictions on travel in order to allow them to reach their final destination. Temporary restrictions 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 **or non state actor** instigates irregular migratory flows to the Union by actively encourages or facilitates the arrival of third-country nationals to the external borders of the Member States, **with the aim of** where such actions indicate an intention to destabilising the Union as a whole or a Member State, and where the nature of such actions is **are** 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.
- (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 **or non state actor** onto its own a 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 a** 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. Situations in which 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 or a Member State. Furthermore, humanitarian aid operations should not be considered as instrumentalisation.

(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. Under this Regulation, although the line does not constitute an external border, it should be clarified that a situation where a third-country or 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 **of** 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.
- (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 closing some border crossing points, **limit their number or their opening hours**, while guaranteeing genuine and effective access to international protection procedures. **In a situation of instrumentalisation of migrants, and in particular where third-country nationals attempt to force entry *en masse* by using disproportionate violent means, Member States may take the necessary measures in accordance with national law to preserve security, law and order.** 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 **to** an international agreement and third-country nationals who are long-term residents under national or Union law or are holders of long-stay 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.
- (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 in line with EU law**. 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 **may adopt an implementing act** ~~should be empowered to specify, in delegated acts adopted under this Regulation, appropriate~~ **concerning common minimum** standards for border surveillance, ~~concerning in particular the new technologies that Member States may use, while~~ taking 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, **such as geographical particularities** and a specific response to situations of instrumentalisation of migrants.

- (17) In an area without internal border controls, persons 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 their internal borders, 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 powers provided for under national law.
- (18) While the prohibition of internal border controls also extends to checks having equivalent effects, checks by competent authorities 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 information and experience of the competent authorities regarding possible threats to public security or public policy, including where they aim to combat **illegal migration** ~~irregular stay or residence~~ and cross-border crimes linked to irregular migration, 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 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 of illegal **migration** ~~residence or stay~~ and of cross-border crime linked to **illegal** ~~irregular~~ migration such as human trafficking, migrant smuggling and document fraud and other forms of cross-border crime could in particular encompass measures allowing 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 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.
- (23) The prohibition of border controls at internal borders should not limit the carrying out of checks provided for in other instruments of 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.
- (24a) The exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their border areas, should not have a disproportionate impact on fluidity of movement across the internal borders, notably by leading to excessive waiting times. Where appropriate In a spirit of dialogue and cooperation, Member State are invited to may 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.**
- (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 in at the internal borders areas during police checks conducted by the competent authorities within in a bilateral cooperation framework, which may include including joint police patrols, as part of cross-border police operational cooperation 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. In a context of preserving and promoting multilateral police cooperation between Member States, checks conducted by the competent authorities in a multilateral cooperation framework are also covered. The Member State from where the person came directly should in turn be required to receive the apprehended third-country nationals. The transfer should not apply to persons making an application for international protection or being subject to Article 18 24 of Regulation (EU) 604/2013.

- (26) The procedure by which a Member State may transfer apprehended illegally staying third-country nationals 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 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 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 should not affect the existing possibility for Member States to return irregular 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 **areas**. In order to facilitate the application of such agreements, and to complement the objective of protecting the area without internal borders **controls**, 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.

[...]

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~~ **means** ~~refers to~~ a situation where **a third country or non state actor** ~~third country~~ instigates **illegal immigration** ~~migratory flows into the Union, by actively encourages or facilitates~~ 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~~ **with the aim of destabilising** ~~destabilise the Union or a Member State, where such actions~~ **are** 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;⁴
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.**’

⁴ Add at the end of recital 9: **“Situations in which 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 or a Member State. Furthermore, humanitarian aid operations should not be considered as instrumentalisation.”**

(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 other situations of emergency at the external border**, ~~Member States may temporarily close specific~~ **limit the number of** border crossing points as notified pursuant to paragraph 1, ~~limit their number~~ or **limit** their opening hours where the circumstances so require.⁵

In a situation of instrumentalisation of migrants, and in particular where third-country nationals attempt to force entry *en masse* by using disproportionate violent means, Member States may take the necessary measures in accordance with national law to preserve security, law and order.

Any **measures** ~~limitations adopted~~ pursuant to the first **and second** subparagraphs 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/EC⁶, persons deriving their right to reside from other instruments of Union or national law or who hold national long-term ~~stay~~ **stay** visas, as well as their respective family members;
- (c) third-country nationals seeking international protection.’

⁵ Add after the first sentence of recital 12: ‘**In a situation of instrumentalisation of migrants, and in particular where third-country nationals attempt to force entry *en masse* by using disproportionate violent means, Member States may take the necessary measures in accordance with national law to preserve security, law and order.**’

⁶ 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 **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 assessments 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. 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 **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, all types of stationary and mobile infrastructure in line with EU law.**⁷

⁷ Complement the second sentence of recital 15 as follows: ‘Such technical means could include modern technologies including drones and motion sensors, as well as mobile units,

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 Council⁸, 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.

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).**

⁸ 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.

- (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-isolation⁹. **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.**

⁹ **New recital 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 disproportionately negative impact on the functioning of the area without internal border controls. Such measures may include restrictions on travel against other regions or third countries not covered by the implementing Regulation, if they are based on a national risk assessment and are proportionate. 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.”**
New recital 7b: For persons in transit, temporary restrictions on travel should be applied upon arrival at the final destination.”

Member States may, where justified, adopt stricter temporary travel restrictions than those laid down in the implementing Regulation to be applied on their territory. Adoption of stricter restrictions shall not have a disproportionately negative impact on the functioning of the area without controls at internal borders.

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~~ **stay** visas, as well as their respective family members ¹⁰.
4. The implementing Regulation referred to in paragraph 1 ~~2~~ shall, where appropriate:
 - a) **determine** ~~identify~~ any geographical areas or third countries 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 **on entry** applicable to travel **when undertaking non-essential travel.**¹¹

¹⁰ Add in recital 7 after "Residents in the Union should always be permitted to enter the Union": "**In line with the applicable obligations under Union law, travel from Ireland should not be subject to restrictions under this Regulation. As regards third-country nationals legally residing residents in Ireland, Member States should on a bilateral and 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 to be adopted through an implementing Regulation.**"

¹¹ In recital 7, add after 'It should specify, where relevant, any categories of travellers whose travel should be exempted from restrictions on entry.': '**These categories could for example include healthcare professionals, cross-border workers, transport personnel, diplomats or other international staff, passengers in transit, passengers travelling for imperative family reasons, seafarers, third-country nationals seeking international protection, seasonal workers and highly qualified workers whose employment is necessary from an economic perspective and the work cannot be postponed or performed abroad.**'

- 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 paragraph 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. Restrictions on **entry on persons 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

12

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, 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 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;**

¹² Insert a new recital 24a : **‘The exercise of police or other public powers by the competent authorities of the Member States in their territory, including in their border areas, should not have a disproportionate impact on fluidity of movement across the internal borders, notably by leading to excessive waiting times. In a spirit of dialogue and cooperation, Where appropriate Member States are invited to may 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.’**

- 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 the 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 in at the internal borders-areas

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 as referred to in Article 23, 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 police checks conducted by the competent authorities within the a bilateral cooperation framework of police within bilateral or multilateral cooperation framework, which may include including 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 **in 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.** ¹³
 3. Where a **transferring** Member State applies the procedure referred to in paragraph 2, **in the bilateral cooperation framework as referred to in paragraph 1(a)**, 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~~ **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).~~”

[...]

¹³ Add at the end of recital 25: **‘The transfer should not apply to persons making an application for international protection or to persons who may be taken back by a Member State under the conditions laid down in being subject to Article 18 24 of Regulation (EU) 604/2013.’**

(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 in at the
internal borders areas*

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 decision shall ~~collect the following data~~ **inform the Commission yearly on the number of persons transferred to other Member States, indicating the Member State(s) to which the persons were transferred and, where available, the nationality of the third-country nationals apprehended.**
- a) ~~the number of persons refused entry;~~
 - b) ~~the number of persons refused stay;~~
 - e) ~~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, **in the bilateral cooperation framework as referred to in paragraph 1(a)**, 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, **in accordance with national law**, to take charge of the third-country national and transport him or her without delay to the **receiving** 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~~ **absconding**.

PART B

Standard form for transferring **illegally staying third-country nationals** persons apprehended **in** at the internal border **areas**

	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 in accordance with Article 23a 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 :	
<input type="checkbox"/> (A) has no valid travel document(s)	
<input type="checkbox"/> (B) has a false/counterfeit/forged travel document	
<input type="checkbox"/> (C) has no valid visa or residence permit	
<input type="checkbox"/> (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 authorities 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 **apply** ~~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.

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.
