

Bruxelles, le 30 mai 2022
(OR. fr, en)

9377/22

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

LIMITE

**JAI 703
FRONT 206
MIGR 151
COVID-19 104
SAN 280
TRANS 309
CODEC 768
COMIX 250**

NOTE

Origine:	la présidence
Destinataire:	Comité des représentants permanents/Conseil
Objet:	Proposition de règlement du Parlement européen et du Conseil modifiant le règlement (UE) 2016/399 concernant un code de l'Union relatif au régime de franchissement des frontières par les personnes - Préparation d'une orientation générale

1. Le 14 décembre 2021, la Commission a présenté une proposition de règlement du Parlement européen et du Conseil modifiant le règlement (UE) 2016/399 concernant un code de l'Union relatif au régime de franchissement des frontières par les personnes (« code frontières Schengen »)¹, accompagnée d'une analyse d'impact ².
2. La proposition s'inscrit dans un cadre plus large visant à rendre l'espace Schengen plus fort et résilient et à améliorer la gouvernance globale de Schengen, notamment la révision du mécanisme d'évaluation et de contrôle destiné à vérifier l'application de l'acquis de Schengen ³, que le Conseil est invité à approuver définitivement (en point A) à l'occasion de la réunion du Conseil JAI des 9 et 10 juin 2022.

¹ COM(2021) 428 final.

² SWD(2021) 462 final.

³ 8130/22.

3. La proposition de révision du « code frontières Schengen » (CFS) s’articule autour de 4 axes principaux. Premièrement, elle renforce les outils juridiques à disposition des États membres pour lutter contre les manœuvres d’instrumentalisation de migrants aux frontières extérieures de l’Union. Deuxièmement, cette révision tire les enseignements de la crise COVID-19 et cherche à donner un fondement juridique plus solide aux mesures de restrictions aux frontières extérieures en cas de crise sanitaire, en créant un cadre au niveau européen. Troisièmement, pour ce qui relève des frontières intérieures, les nouvelles dispositions proposées cherchent à favoriser le recours aux mesures de substitution, notamment en vue d’un usage accru des mesures technologiques. En particulier, cette révision crée un nouveau mécanisme de transfert entre États membres à l’encontre de personnes en situation irrégulière. En parallèle, la Commission a proposé de modifier la Directive 2008/115 du Parlement européen et du Conseil du 16 décembre 2008 relatives aux normes et procédures communes applicables dans les États membres au retour des ressortissants de pays tiers en séjour irrégulier (la ‘directive retour’), en permettant aux États membres de renégocier ou négocier de nouveaux accords de réadmission ⁴. Enfin et quatrièmement, cette révision vient apporter une réponse aux menaces persistantes au sein de l’espace Schengen, en modernisant le cadre de réintroduction et de prolongation des contrôles aux frontières intérieures et en apportant de nouvelles garanties pour préserver la liberté de circulation, et crée à l’article 28 un nouveau mécanisme spécifique de coordination des mesures de rétablissement des contrôles aux frontières intérieures lorsqu’une menace grave pour l’ordre public ou la sécurité intérieure touche plusieurs États membres et met en péril le fonctionnement global de l’espace Schengen.
4. Les travaux sur la proposition, en présence des États associés, ont commencé au Conseil sous la présidence slovène, le 14 décembre 2021, au sein du groupe "Frontières". Les discussions se sont poursuivies sous présidence française lors de huit réunions du groupe de travail et deux réunions de conseillers JAI⁵.

⁴ JO L 348/98, 24.12.2008, p. 98-107.

⁵ De son côté, le Parlement européen a nommé Mme Sylvie Guillaume (S&D, FR) en tant que rapporteure.

Ces travaux dans le cadre des enceintes préparatoires du Conseil, ont permis d'apporter des améliorations au texte, notamment en :

- clarifiant la notion de l'instrumentalisation, par une simplification de la définition et en complétant le texte sur les actions pouvant être conduites par les États membres face à une telle situation. La situation particulière de Chypre a également été prise en compte ;
- répondant, à l'article 21 bis, à la demande de flexibilité exprimée par les États membres en ce qui concerne les mesures de restrictions au voyage et sanitaires pouvant être appliquées aux frontières extérieures et ce dans le respect des compétences nationales en matière de santé. Tout en conservant le principe de catégories essentielles, le compromis proposé par la présidence permet de renvoyer leur définition lors de chaque crise. Les États membres peuvent par ailleurs prendre des mesures de restrictions sanitaires plus strictes sous réserve de ne pas créer un impact négatif sur le fonctionnement de l'espace Schengen. La situation des personnes en transit se voit clarifiée, de même que celle des régions frontalières ;
- clarifiant le recours à la procédure de transfert entre États membres à l'article 23 bis en précisant le critère de coopération policière et en explicitant le caractère volontaire de recours à cette procédure qui s'inscrit dans le cadre d'une coopération bilatérale.

5. Sur l'encadrement de la réintroduction et des prolongations des contrôles aux frontières intérieures, la proposition de la Commission vise à répondre aux menaces persistantes auxquelles les États membres peuvent faire face, tout en renforçant les garanties procédurales. Afin de garantir que cette mesure est de dernier recours, la présidence s'est attachée à renforcer ces garanties:

- en objectivant davantage les critères et les justifications apportées par les États membres en cas de réintroduction et de prolongation des contrôles, notamment au travers de l'analyse du risque à fournir par l'État membre. Couplée avec une gradation dans le temps des obligations des États membres en matière de justification, ceci permettra à la Commission de procéder à une évaluation renforcée de la nécessité et de la proportionnalité de ces contrôles ;

- en rendant obligatoires les consultations entre États membres, lorsqu’elles se font à la demande des États directement affectés ;
 - en rendant obligatoire l’avis de la Commission lorsqu’il existe un doute sur la nécessité ou la proportionnalité de la réintroduction ou de la prolongation. Cet avis doit, en tout état de cause, intervenir après douze mois ;
 - en veillant dans le cadre de ces contrôles à la bonne prise en compte de la situation particulière des régions frontalières.
6. L’arrêt de la grande chambre de la Cour de Justice de l’UE dans les affaires jointes C-368/20 et C-369/20 ⁶, intervenu après la publication de la proposition de la Commission, confirme qu’il appartient aux co-législateurs de définir le cadre général pour la réintroduction et la prolongation des contrôles aux frontières intérieures dans le code frontières Schengen. Un juste équilibre doit être fixé entre, d’un côté, la libre circulation des personnes et, de l’autre, la nécessité d’assurer l’ordre public et la sécurité intérieure au sein des États membres. En outre, la possibilité de réintroduire des contrôles aux frontières intérieures constitue une exception, d’interprétation stricte, au principe de libre circulation.

La Présidence, prenant en compte cet arrêt, a veillé à mieux encadrer les dispositions. Alors que la proposition de la Commission permettait, à l’article 27 bis, paragraphe 5, d’envisager des contrôles aux frontières intérieures sans limitation de durée, la présidence a proposé de limiter ces dispositions aux situations exceptionnelles majeures et de renforcer fortement l’évaluation du risque devant être fournie lors de cette notification de prolongation supplémentaire de 6 mois. De plus, la proposition de compromis prévoit que la Commission doit émettre une recommandation en vue d’identifier les actions et les conditions pour lever ces contrôles, dès lors que la nécessité et proportionnalité sont en cause. Lorsque l’État membre indique être contraint de prolonger ses contrôles au-delà de cette période, il doit préciser la date à laquelle ces contrôles seront levés. Une révision régulière devra être menée pour assurer la nécessité et la proportionnalité de cette mesure, garantissant que celle-ci est de dernier recours.

⁶ Arrêt de la Cour de Justice du 26 avril 2022, affaires jointes C-368/20 et C-369/20, ECLI:EU:C:2022:298.

7. Le Coreper est invité à examiner le projet de compromis figurant en annexe de la présente note en vue de l'adoption ⁷, lors de la session du Conseil "Justice et affaires intérieures" du 10 juin 2022, d'une orientation générale sur la proposition de règlement du Parlement européen et du Conseil modifiant le règlement (UE) 2016/399 concernant un code de l'Union relatif au régime de franchissement des frontières par les personnes.
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⁷ Les amendements apportés au texte original apparaissent en **gras souligné** ou **barrés**. En outre, les changements par rapport aux dernières versions (9008/22 et 9223/22) 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.
- (4a) **European integrated border management, based on the four-tier access control model, comprises measures in third countries, such as under the common visa policy, measures with neighbouring third countries, border control measures at the external borders, risk analysis and measures within the Schengen area and return. 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.**

- (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
- (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.

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.

- (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 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.** 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 should include, 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, students and highly qualified workers whose employment is necessary from an economic, societal and security perspective and whose 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 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) During the application of the Council implementing Regulation setting out temporary travel restrictions and in application of the entry conditions set out in Article 6 of this Regulation, only third-country nationals who are not subject to restrictions on entry and who comply with other health related entry conditions provided for in the implementing Regulation should be allowed entry.**
- (7c) 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 **or non state actor** instigates irregular migratory flows to the Union by actively encourages or facilitates the arrival **movement** of third-country nationals to the external borders **or to a Member State** 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 of migrants when there is no aim to destabilise the Union or 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. Under this Regulation, Although the line does not constitute an external border, it follows 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) **Member States may**, in particular in a situation of instrumentalisation **of migrants or in other situations of emergency at the external border**, 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 **or limit their opening hours**, while guaranteeing genuine and effective access to international protection procedures. **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. When a border crossing point is closed, such categories should use another border crossing point which remains open.** Furthermore, **Member States may, in particular 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. 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 **and measures** 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*.
- (12a) **Without prejudice to the possibility to take measures under this Regulation in the context of instrumentalisation, the Member State concerned should** Any such decision 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
- (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 States should be 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 in particular 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 to persons who may be taken back by a Member State under the conditions laid down in Article 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 **is optional and** 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. **This is without prejudice to the application of Article 6(2).**
- (28) In exceptional cases, addressing threats to the Schengen area may require the adoption, by the Member States, of measures at the internal borders. 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 also result from large-scale unauthorised movements of **third-country nationals** ~~irregular migrants~~ between the Member States where this creates a situation putting a **substantial** strain on the overall resources and capacities of the responsible national services, 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 **as a measure of last resort**.
- (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 mechanism that would apply to situations where, within the Schengen area, a serious threat to internal security or public policy area is affecting **several** ~~a majority of~~ Member States, putting at risk the well-functioning of the Schengen area. The gap should be filled by putting in place a new Schengen area safeguard mechanism permitting 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. 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 **and proportionate**, 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 **and proportionate**, the Commission should, instead, recommend the use of other measures deemed more appropriate to address the identified threat.

- (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. 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. The Member States should immediately notify 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 **several** ~~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. 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.
- (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. 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. 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 context of checks within the territory** ~~exercise of police or other public powers~~ or through forms of police cooperation as provided for under Union law, **including** ~~and~~ the possibility to use the transfer procedure, **or common measures regarding temporary travel restrictions.**

- (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 should also apply the existing guidelines on cross-border workers⁴. 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 information, the Commission should adopt a template for the notification of reintroduction of border controls at internal borders in an implementing act. Member States should be entitled to classify all or parts of the information provided in the notification, without prejudice to the functioning of appropriate and secure ~~police cooperation~~ channels.
- (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, Member States should prepare a risk assessment to be submitted to the Commission when internal border controls are prolonged beyond an initial 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, 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 **request this Member State a resubmission to complete its initial** ~~of the~~ notification.

⁴ 2020/C 102 I/03.

- (42) In order to ensure a sufficient degree of transparency of the actions affecting travel without internal border controls, the Member States should also inform 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 year, pursuant to Article 33 of the Schengen Borders Code, the Commission should present to the European Parliament and to the Council a report on the functioning of the area without internal border control ('State of Schengen report') which should pay particular attention to the situation as regards the unauthorised movements of third country nationals, building on the available information from the relevant Agencies and data analysis from relevant information systems. It should also assess the necessity and proportionality of the reintroductions of border controls in the period covered by that Report. The State of Schengen report shall also cover the reporting obligations resulting from Article 20 of the Schengen Evaluation Mechanism⁵.
- (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 the Commission, to organise consultations between Member States, including at the request of any Member State. **This consultation should be organised by the Commission when a Member State requests it.** 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~~. Where the Commission or a Member State has issued an opinion expressing concerns regarding the reintroduction of border controls, such consultations should be mandatory.

⁵ 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.

- (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 ~~are~~ **is a major** exceptional situations justifying the continued need for internal border controls for a period exceeding two years, **additional safeguards should be set in terms of risk assessment and the notification should include a presentation of the means, actions, conditions and timeline considered with a view to lifting the internal border controls.** The Commission should issue a **new** ~~follow-up~~ opinion. **Where this opinion expresses concerns on the necessity and the proportionality of the prolongation, the Commission should adopt, without undue delay, a recommendation to be addressed to the Member State concerned, identifying means, actions, conditions and a timeline with a view to lifting the internal border controls. Where the Member State considers that this additional period of 6 months is not sufficient, in the light of the persisting threat, to guarantee the availability of effective alternative measures, , it should specify the date on which the controls will be lifted at the latest, consistently with the content of the notification referred to in this paragraph or, where appropriate, taking into the Commission's recommendation. A regular review should be set in order to guarantee the necessity and proportionality.** Such an opinion is without prejudice to the enforcement measures, including infringement actions, which the Commission 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.
- (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 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 ethnic origin, religion or belief, disability, age or sexual orientation.

- (47) The competent authorities shall use their powers to carry out checks within the territory and apply relevant procedures in full 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.
- (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/EC⁶; 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*⁷, which fall within the area referred to in point A of Article 1 of Council Decision 1999/437/EC⁸.

⁶ 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.

⁷ OJ L 176, 10.7.1999, p. 36.

⁸ 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*⁹ which fall within the area referred to in Article 1, point A of Decision 1999/437/EC¹⁰ read in conjunction with Article 3 of Council Decision 2008/146/EC.¹¹
- (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*¹² 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/EU¹³.
- (54) This Regulation is without prejudice to the application of Directive 2004/38/EC¹⁴.
- (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,

⁹ OJ L 53, 27.2.2008, p. 52.

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.

¹¹ 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.

¹² OJ L 160, 18.6.2011, p. 21.

¹³ 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.

¹⁴ 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).

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 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 **or to a Member State**, ~~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~~ ~~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;

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 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.

Member States may, in particular 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/EC¹⁵, 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 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.

¹⁵ 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. 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**.
5. ~~In a situation of instrumentalisation of migrants, Member States concerned shall intensify border surveillance as necessary in order to address the increased threat,~~ **notably when they face a situation of instrumentalisation of migrants**. In particular, ~~the~~ Member States 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 Council¹⁶, 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.

¹⁶ 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~~ 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-isolation. **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.**

Member States may, where justified on public health grounds, adopt stricter temporary travel restrictions than those laid down in the implementing Regulation to be applied on their territory. Any such stricter restrictions shall be proportionate and non-discriminatory. Adoption of stricter restrictions shall not have a 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.
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.**
 - 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

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;**
- 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, including which may include in particular joint police patrols, where the Member States agree to use such a procedure in that bilateral cooperation framework, 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.

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. **Practical modalities can be agreed upon under the bilateral cooperation framework in line with the procedure 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)~~.”

(8) Article 25 is replaced by the following:

“Article 25

General framework for the temporary reintroduction or prolongation of border controls 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 control 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 organised crime;
- (b) large scale public health emergencies;
- (c) an **exceptional** situation characterised by large scale unauthorised movements of third-country nationals between the Member States, ~~putting at risk the overall functioning of the area without internal border controls~~ **putting a substantial strain on the overall resources and capacities of the responsible national services as evidenced by information analysis and all available data, including from EU agencies which is liable to put at risk the overall functioning of the area without internal border controls;**
- (d) large scale or high profile international events ~~such as sporting, trade or political events.~~

2. In all cases, border controls at internal borders shall **only** be reintroduced as a measure of last resort. The scope and duration of the temporary reintroduction of border controls shall not exceed what is strictly necessary to respond to the serious threat identified.

Border controls may only be introduced pursuant to Articles 25a and 28 where a Member State has established that such 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). Border 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.

The same 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 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 controls at internal borders.
2. The Member State shall, at the same time as reintroducing border controls under paragraph 1, notify 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 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 ~~and the Commission~~ in accordance with Article 27(1), at the latest four weeks before the planned reintroduction of border controls, or **as soon as possible** ~~within a shorter period~~ 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 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 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), 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.”

(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(2), a Member State shall in particular **assess** consider:
 - (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;
 - (b) the likely impact of such a measure on:
 - **the** movement of persons within the area without internal border controls and
 - the functioning of the cross-border regions, taking into account the strong social and economic ties between them.
2. Where a Member State decides to prolong the border control at internal borders pursuant to Article 25a(5), it shall also assess in detail whether the objectives pursued by such prolongation could be attained by:
 - a) the use of alternative measures such as proportionate checks carried out in the context of the lawful **checks within the territory** ~~exercise of powers~~ as referred to in Article 23 point (a);
 - ~~b) the use of the procedure as referred to in Article 23a;~~

e)b) ~~forms of~~ **forms of** police cooperation as provided for under Union law, **including the procedure referred to in Article 23a**, ~~including on matters such as joint patrols, joint operations, joint investigation teams, cross border hot pursuits, or cross border surveillance;~~

d)c) **common measures regarding temporary restrictions on travel to the Member States as referred to in Article 21a(2).**

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.**”

(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 **assessment of** ~~considerations as to~~ 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.

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

2. Where border controls have been in place for six months in accordance with Article 25a(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 **Member States** reintroduce or prolong border controls ~~large-scale unauthorised movements~~ **because of a situation** referred to in Article 25(1) point (c), the ~~risk~~ assessment **required by paragraph 1(e) of this Article** shall also provide **a risk assessment and** information on the scale and trends of such 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.
5. 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.

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.”

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, at the request of a Member State directly affected,** establish a consultation process, ~~where appropriate,~~ 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 **is to examine** ~~shall concern~~ in particular the identified threat to public policy or internal security, the ~~relevance~~ **necessity and proportionality** of the intended reintroduction of border controls taking into account the appropriateness of alternative measures, 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 **into utmost** account ~~of~~ the results of such consultation 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 **twelve** ~~eighteen~~ months in total, the Commission shall issue an opinion on necessity and proportionality of such internal border controls. **The opinion of the Commission 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 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 **is** ~~are~~ **a major** exceptional situations **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 Commission **and the other Member States of its intention to prolong its internal border controls, at the latest four weeks before the planned reintroduction prolongation, for an additional period of up to 6 months** ~~in accordance with Article 27(2).~~

The new notification, **taking into account the opinion of the Commission issued pursuant to paragraph 3, shall include a risk assessment in accordance with Article 27** ~~from the Member State shall:~~

- ~~substantiate~~**ing** the continued threat to public policy or internal security, ~~taking into account the opinion of the Commission given pursuant to paragraph 3;~~
- **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 follow-up opinion. Where this opinion expresses concerns on the necessity and the proportionality of the prolongation, the Commission shall adopt, without undue delay, a recommendation to be addressed to the Member State concerned, identifying means, actions, conditions and a timeline with a view to lifting the internal border controls.**

Following the receipt of 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 paragraph 1.

Where the Member State considers that this additional period of 6 months is not sufficient, in light of the persisting threat, to guarantee the availability of effective alternative measures, it shall specify the date on which the controls will be lifted at the latest, consistently with the content of the notification referred to in this paragraph or, where appropriate, taking into the Commission's recommendation. This decision shall fully respect the principles of necessity and proportionality. Until the date of the lifting of the internal border controls, the Member State concerned shall regularly provide a risk assessment as referred to in this paragraph.

(13) Article 28 is replaced by the following:

“Article 28

Specific mechanism where the serious threat to public policy or internal security 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 public policy affects a ~~majority of~~ **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 **21a**, 23 and 23a are not sufficient to address the threat. **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 persists, taking into account the review referred to in paragraph 5.
3. Where Member States reintroduce or prolong border controls because of the threat referred to in paragraph 1, those controls shall, as of the entry into force of the Council decision, be based on that decision.
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 as well as the impact of the measures adopted in accordance with the Council decision referred to in paragraph 1, with a view to **assessing** whether the measures remain justified.

6. Member States shall immediately notify 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 internal border controls ~~or be more suitable to address the identified threat to internal security or public policy as referred to in paragraph 1.~~ **The Commission shall take this into account in the review referred to in paragraph 5**”.

(14) Article 31 is amended as follows:

- a) Article 31 becomes paragraph 1;
- b) the following paragraphs 2 and 3 are 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:
 - a) ~~the details of the internal borders where border control is to be reintroduced~~ **the scope of the proposed reintroduction, specifying at which part(s) of the internal borders 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. Member States shall not be required to provide all the information referred to in the paragraph 2 in cases justified on public security grounds **or confidentiality of ongoing investigations.**

The provision of information may be subject to classification of information by Member States pursuant to Article 27(**5**).

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.”

(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 of border controls and the respect 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 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 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. The Commission shall present to the European Parliament and to the Council, at least annually, a report on the functioning of the area without internal border controls entitled (‘State of Schengen report’). The report shall include a list of all decisions to reintroduce border controls at internal borders taken during the relevant year. 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 Schengen 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. ~~and an assessment of the necessity and proportionality of the reintroductions of border controls in the period covered by that report.”~~

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

- “h) ~~Member States shall notify to the Commission the local administrative 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 ~~six~~ **two** months of the entry into force of this Regulation at the latest, Member States **with common internal borders** shall **in close cooperation determine** ~~notify the Commission 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
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.”~~

(1918) 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) of Article 23a**, 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 :

(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 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 issue a return decision in accordance with paragraph 1. In such cases, the derogation laid down in the first subparagraph shall not apply, **except for the derogation set out in Article 6(2).**

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.
