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2016/0347 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Introduction

On 12 May 2016, the Council adopted, on a proposal by the Commission, an Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. It was the first time that the safeguard procedure of Article 29 of the Schengen Borders Code was used. The combination of serious deficiencies in the management of the external border by Greece at that time and the important number of unregistered migrants present in Greece who may have sought to move irregularly to other Member States created exceptional circumstances constituting a serious threat to public policy and internal security and endangering the overall functioning of the Schengen area.

This Recommendation was addressed to five Schengen States (Austria, Germany, Denmark, Sweden and Norway) and concerned a limited number of internal border sections in these States.

The Recommendation allowed for the maintenance of targeted and proportionate controls for a period of six months, namely until 12 November 2016.

Under Article 29 of the Schengen Borders Code, this period can be prolonged in accordance with the conditions and procedure set out in the same Article.

Current situation

Following the Council Recommendation of 12 May, the five Schengen States concerned notified the Commission that they would carry out the recommended temporary internal border control.

In its report of 28 September 2016, which built on information received from the Schengen States concerned, as foreseen by the Recommendation, the Commission found that the border controls have remained within the limits of the Recommendation: controls were limited to the identified migratory routes and threats, they were targeted and limited in scope, frequency, location and time, to what was strictly necessary to address the threat identified, and, while a certain economic impact could not be excluded, they affected as little as possible the crossing of the internal borders by the general public. Furthermore, based on the information at its disposal at that time, the Commission concluded that it saw no need for proposing amendments to the Recommendation.

On 18 and 21 October 2016, the Schengen States concerned reported for the second time to the Commission on the implementation of the Council Recommendation. The information provided follows a trend similar to the data provided for the first report (reduction in the number of persons to whom entry is refused, as well as in the number of asylum applications received) and thus shows a progressive stabilisation of the situation. On 20 October the five Schengen States wrote to the Commission stressing the need for allowing the continuation of the temporary border controls. Slovenia wrote to the Commission as well on 6 October to

express concern about the possible continuation of border controls at the Austrian-Slovenian border.

The triggering of Article 29 of the Schengen Borders Code and the adoption of a coordinated approach at EU level to temporary border controls were among the initiatives envisaged by the Back to Schengen Roadmap[1] and which aimed at creating conditions for lifting all internal border controls and returning to a normally functioning Schengen area by the end of 2016.

Despite the sharp decrease in the number of arrivals of irregular migrants and asylum seekers in the European Union notably due to the implementation of the EU-Turkey Statement, there is still a significant number of irregular migrants (about 60 000) stranded in Greece who may reasonably be expected to seek to move irregularly to other Member States.

In addition, the total number of asylum applications received by the Schengen States concerned by the Recommendation remains a relevant factor, even if it is not comparable with the number of applications received at the same moment last year. The large numbers of arrivals of irregular migrants and asylum seekers in the European Union since autumn 2015 have posed substantial challenges to all EU Member States which must be taken into account. These challenges related to ensuring proper housing and access to education and health systems to those who have arrived since last year. Moreover, the processing of the remaining backlog and further arrivals and requests for protection put a continuous strain on the functioning of the administrations of these States.

Furthermore, other actions foreseen by the Back to Schengen Roadmap, despite significant progress, still need time to be fully implemented and the corresponding results confirmed.

In this regard, the European Border and Coast Guard has been adopted and entered into force within record time. However the rapid reaction pools (human resources and technical equipment) and the rapid return pools need to be established and operational by, respectively, 7 December 2016 and 7 January 2017. The first vulnerability assessments should be concluded in the first three months of 2017.

The implementation of EU-Turkey Statement continues to deliver results. Nevertheless on average 107 persons continue arriving daily at the Greek islands. It is important to continue to ensure that the Statement functions on a sustained basis. Moreover, there remains an on-going need for the cooperation agreed upon in the Statement of the Western Balkans Route Leaders meeting, as evidenced by the continuing number of arrivals in Serbia.

The exceptional circumstances that constitute a serious threat to public policy and internal security and put at the risk the functioning of the whole Schengen area thus persist.

Way forward

In light of the facts exposed above, it appears that the conditions which the Roadmap "Back to Schengen" aimed at creating in order to allow a lifting of all internal border controls and a return to a normally functioning Schengen area are not fully present yet. There have nevertheless been steady and important achievements on the road back to a fully functioning Schengen area. However, at this stage, the situation in Greece and along the Western Balkans route remains fragile and there is an important pressure in the Member States most affected by

[1] Communication from the Commission to the European Parliament, the European Council and the Council "Back to Schengen – A Roadmap", COM(2016) 120 final.

the secondary movements of irregular migrants coming from Greece. The full implementation of the European Border and Coast Guard, which would further strengthen the protection of the EU external borders, will be completed by January 2017. The further implementation of the EU-Turkey Statement will help in further diminishing the number of arrivals in the EU and provide a space for the national systems to further process and absorb the backlog of asylum applications and solidify their reception capacities.

The full application of the existing Dublin rules must be progressively restored, with the full participation of Greece, in line with the Commission's recommendations[2], whilst improving these rules for the future based on solidarity and responsibility. In addition, the emergency relocation schemes already in place since September 2015 should continue to deliver concrete results in terms of numbers of relocated persons. Finally, returns of persons not having the right to stay in the European Union must be further stepped up.

It is therefore justified to allow the Member States concerned to prolong the current internal border controls as an exceptional measure for a further proportionate period. Based on the factual indicators available at this stage, the prolongation should not exceed three months.

Scope of the proposal

The Schengen States currently carrying out temporary internal border control pursuant to the Council Recommendation of 12 May 2016 should be permitted to continue doing so.

However, given the progressive stabilisation of the situation, border checks should only be adopted as a measure of last resort when other measures, less restrictive of cross-border traffic, such as police checks consistent with Article 23 of the Schengen Borders Code, cannot sufficiently address the threats identified. Accordingly, the Member States that decide to maintain internal border control pursuant to the present Recommendation should, before opting for continuation, examine all available alternative measures to border controls. The Member States concerned should inform of the outcome of this examination in their notification on the maintenance of internal border controls to the other Member States, the European Parliament and the Commission.

As stated in the European Council conclusions on migration of 20 October 2016, the process of getting "back to Schengen" entails adjusting the temporary internal border controls to reflect the current needs. Internal border control should be carried out only on the basis of risk analysis and intelligence, and should be limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security. The Member State that carries out internal border control pursuant to the present Recommendation should review weekly the necessity, frequency, location and time of controls, adjust the controls to the level of the threat addressed, and phase them out wherever appropriate. The Member State that carries out internal border control pursuant to the present Recommendation should also regularly consult with the relevant Member State(s) with a view to ensure that internal border controls are only carried out at those parts of the internal border

[2] Commission Recommendation of 10.2.2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013 (C(2016) 871 final); Commission Recommendation of 15.6.2016 addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013 (C(2016) 3805 final); Commission Recommendation of 28.9.2016 addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013 (C(2016) 6311 final).

where it is considered necessary and proportionate in accordance with the Schengen Borders Code.

A more detailed reporting obligation should also be introduced. After each month of implementation of the present Recommendation, the Member States concerned should report to the Commission on the outcome of the controls carried out and on the assessment concerning the continued necessity of such controls, when applicable. This report should at least include the total number of persons checked, the total number of refusals of entry following the checks, the total number of return decisions issued following the checks and the total number of asylum applications received at the internal borders where the checks take place.

The Commission will closely monitor the application of the Recommendation and the situation on the ground.

- **Consistency with existing policy provisions in the policy area**

This Recommendation serves to implement the existing provisions in the policy area.

- **Consistency with other Union policies**

This recommendation has links with the Union's internal market and migration and asylum policy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 29 of Regulation (EU) No 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).

- **Subsidiarity (for non-exclusive competence)**

Article 29 of Regulation (EU) No 2016/399 specifies that the Council shall adopt a recommendation for temporary internal border control on the basis of a Commission proposal.

Action at Union level is required where the overall functioning of the area without internal border controls is put at risk.

- **Proportionality**

The present proposal does not go beyond what is necessary to achieve the objective pursued.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

n.a.

- **Stakeholder consultations**

Given the urgency of the proposal, a stakeholder consultation was not feasible.

- **Collection and use of expertise**

n.a.

- **Impact assessment**

In view of the limited time frame envisaged and considering the data submitted by the Member States concerned and those available concerning the situation in Greece, a fully-fledged impact assessment was not prepared.

- **Regulatory fitness and simplification**

n.a.

- **Fundamental rights**

The protection of fundamental rights was taken into account during the drafting of the proposal.

4. BUDGETARY IMPLICATIONS

The proposed measure has no implications for the EU budget.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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)[3], and in particular Article 29 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) In accordance with Article 29 of the Schengen Borders Code, the Council adopted on 12 May 2016 an Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk.

(2) The Council recommended to five Schengen States (Austria, Germany, Denmark, Sweden and Norway) to maintain proportionate temporary border controls for a maximum period of six months as from the day of adoption of the Implementing Decision, to address the serious threat to public policy or internal security posed in these States by the combination of deficiencies in external border control in Greece and the secondary movements of irregular migrants entering via Greece and who intend to move to other Schengen States.

(3) On 28 September 2016, the Commission issued its Report on the implementation of the Implementing Decision. It concluded that the internal border controls carried out by Austria, Germany, Denmark, Sweden and Norway have been proportionate and in line with the Council Recommendation. The Commission further concluded that, based on the information available and the reports received from the States concerned, it saw no need for proposing amendments to the Implementing Decision at the time of reporting.

(4) On 18 and 21 October 2016, the Schengen States concerned reported for the second time to the Commission on the implementation of the Council Recommendation. The information provided follows a trend similar to the data provided for the first report (reduction in the number of persons to whom entry is refused, as well as in the number of asylum applications received) and thus shows a progressive stabilisation of the situation.

(5) However, despite a sharp drop in the number of arrivals of irregular migrants and asylum seekers in the European Union, an important number of irregular migrants still remains in Greece as well as in the Member States most affected by the secondary

[3] OJ L 77, 23.3.2016, p. 1.

movements of irregular migrants coming from Greece. Based on the trends observed in the past, it is justified to expect that these persons may want to move irregularly to other Member States when the border checks, which hinder their secondary movement, are lifted.

(6) The cumulated number of asylum applications received since the beginning of the migratory crisis and the still incoming applications have put an important strain on the national administrations and services in all EU Member States and specifically in the Schengen States concerned by the Implementing Decision.

(7) Internal border controls cannot be viewed in isolation from other important factors. In its Communication "Back to Schengen – A Roadmap"[4], the Commission identified the different policies to be put in place to return to a fully functioning Schengen Area.

(8) The Roadmap notably included the adoption and the implementation of the European Border and Coast Guard. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 17 September 2016 on the European Border and Coast Guard[5] entered into force on 6 October 2016, within a nine months' timeframe since the presentation of the Commission proposal, showing the commitment of all actors involved. It is expected that the rapid reaction pools, covering both human resources and technical equipment, and the rapid return pools will be established and operational by, respectively, 7 December 2016 and 7 January 2017.

(9) Another element identified in the Back to Schengen Roadmap is the successful implementation of the EU-Turkey Statement. While the implementation of the Statement, as set out in the third progress report[6], continues to deliver results, it is important to continue to ensure that the Statement functions on a sustained basis. Moreover, there remains an on-going need for the cooperation agreed upon in the Statement of the Western Balkans Route Leaders meeting.

(10) It follows from the above that despite the steady and important progress in the fields identified by the Back to Schengen Roadmap and a progressive stabilisation of the situation, these actions still need time to be fully implemented and the corresponding results to be confirmed.

(11) Exceptional circumstances constituting a serious threat to public policy and internal security and putting at risk the overall functioning of the Schengen area therefore still persist.

(12) Given the current fragile situation in Greece and the residue of pressure remaining in the Member States most affected by the secondary movements of irregular migrants coming from Greece, it therefore appears justified to allow a proportionate prolongation of the temporary internal border controls by the Schengen States currently carrying out such controls as a last resort measure in response to a serious threat to their public policy or internal security, namely Austria, Germany, Denmark, Sweden and the associated country Norway, in accordance with Article 29 of the Schengen Borders Code.

(13) Based on the factual indicators available at this stage, this prolongation should not exceed three months as from the date of adoption of the present Implementing Decision.

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4 COM(2016) 120 final.

5 OJ L 251, 16.9.2016, p. 1–76.

6 Third Report on the Progress made in the implementation of the EU-Turkey Statement (COM(2016) 634).

(14) The Member States that decide to continue carrying out internal border control following the present Implementing Decision should notify the other Member States, the European Parliament and the Commission accordingly.

(15) Before opting for such controls, the Member States concerned should examine whether other measures alternative to border controls could not be used to effectively remedy the identified threat. The Member States concerned should inform of the outcome of this reflection and the reasons for opting for border controls in their notifications.

(16) As stated in the European Council conclusions on migration of 20 October 2016, the process of getting "back to Schengen" entails adjusting the temporary internal border controls to reflect the current needs. The controls under the present Implementing Decision should be carried out only to the necessary extent, limited in their intensity to the absolute minimum necessary. For example, when during a given period there is an insignificant flow, controls at certain border sections may then not even be necessary. In order to impede as little as possible the crossing of the relevant internal borders for the general public, only targeted, risk analysis and intelligence based controls can take place. Furthermore, the necessity of these controls at the relevant border sections should be examined and re-evaluated regularly in cooperation with all the Member States affected with the objective of progressively reducing them.

(17) At the end of each month of implementation of the present Implementing Decision, a complete report on the results of the checks carried out should be sent to the Commission, together with an assessment of their continuous necessity when applicable. This report should include the total number of persons checked, the total number of refusals of entry following the checks, the total number of return decisions issued following the checks and the total number of asylum applications received at the internal borders where the checks take place.

(18) The Council takes note that the Commission has announced that it will closely monitor the application of this Implementing Decision.

HEREBY RECOMMENDS:

1. Austria, Germany, Denmark, Sweden and Norway to prolong proportionate, temporary border controls for a maximum period of three months, starting from the day of adoption of this Implementing Decision, at the following internal borders

- Austria at the Austrian-Hungarian land border and Austrian-Slovenian land border;

- Germany at the German-Austrian land border;

- Denmark in the Danish ports with ferry connections to Germany and at the Danish-German land border;

- Sweden in the Swedish harbours in the Police Region South and West and at the Öresund bridge;

- Norway in the Norwegian ports with ferry connections to Denmark, Germany and Sweden.

2. Before prolonging such controls, the Member States concerned should exchange views with the relevant Member State(s) with a view to ensuring that internal border controls are carried out only where it is considered necessary and proportionate. Furthermore, the Member

States concerned should ensure that internal border controls are only carried out as a last resort measure when other alternative measures cannot achieve the same effect, and only at those parts of the internal border where it is considered necessary and proportionate, in accordance with the Schengen Borders Code. The Member States concerned should notify the other Member States, the European Parliament and the Commission accordingly.

3. Border control should remain targeted, based on risk analysis and intelligence, and limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security. The Member State that carries out internal border control pursuant to the present Implementing Decision should review weekly the necessity, frequency, location and time of controls, adjust the intensity of the controls to the level of the threat addressed, phasing them out wherever appropriate, and report to the Commission every month.

Done at Strasbourg,

For the Council
The President