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PROPOSAL

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Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2011) 560 final



EUROPEAN COMMISSION

Brussels, 16.9.2011
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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Schengen governance – strengthening the area without internal border control

As regards the context and rationale for the amendments contained in the present proposal, and for a detailed explanation of how they are intended to function in practice, reference is made to the Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions entitled '*Schengen governance – strengthening the area without internal border control*', which is adopted together with this proposal.

1.2. Legislative changes

In order to provide for the necessary legal framework to respond to the request of the European Council of 23-24 June to provide for a mechanism to respond to truly critical situations, the Schengen Borders Code established by Regulation (EC) No 562/2006 which lays down, on the one hand, the rules on border control at the external borders and, on the other hand, provides for the abolition of border control at internal borders and the possibility for its reintroduction in limited cases, needs to be amended.

Since the free movement of persons within the area without internal borders is a key Union achievement, the benefits of which are enjoyed by all the persons living in this area, it should require a decision to be taken at the Union level if this free movement is liable to be affected by a unilateral and sometimes opaque national decision.

Therefore, as a general rule, the reintroduction of controls at internal borders should be based on a decision proposed and adopted by the Commission as an implementing act following the positions expressed by Member States in the examination procedure laid down by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers¹. The decision shall specify where border control at internal borders can exceptionally be reintroduced and be based on renewable periods of 30 days, with a maximum of six months. Only in cases where the reintroduction of border control at internal borders results from an adverse finding under the Schengen evaluation mechanism on account of a Member State's persistent failure to adequately protect its section of the external border can this period be extended.

Nevertheless, for unforeseeable events, Member States retain the possibility to unilaterally reintroduce border control at internal borders, if immediate action is needed. Such a decision enters into force immediately and it is notified to the Commission, the European Parliament and the other Member States. The reintroduction of border control at internal borders in such circumstances is, however, limited to five days. In such a case, the Commission may consult all Member States in order to assess the appropriateness of the measure taken. Such a consultation does not suspend the decision taken by the Member State. If need be, the reintroduction of border control at internal borders can be prolonged, but in that case needs to

¹ OJ L 55 of 28.2.2011, p. 13.

be based on a Commission decision taken as implementing act *via* the urgency procedure laid down in Article 8 of the above mentioned Regulation No 182/2011.

A coordinated, EU-based response would allow all European interests to be taken into account. Such a response would address situations where a Member State faces a serious short-term, largely localised, threat to public policy or internal security, as well as situations with wider and longer-term implications. In both instances, a coordinated European response is warranted, as it is inherent in any decision to reintroduce internal controls at internal borders – even for a limited period of time and within a limited geographic area – that the human and economic implications will be felt beyond the Member State resorting to such measures. The case for such a coordinated European approach is all the more compelling where a section of the external border comes under unexpected and heavy pressure, or where a Member State has been persistently failing to control its section of the external border, and where the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level. Any decision on the reintroduction of border control at internal borders has a direct impact on all travellers and on the common interests of all Member States.

Border control at internal borders should only be reintroduced as a last resort in these circumstances, and only until other measures have been taken to stabilise the situation at the relevant external border section either at the European level, in a spirit of solidarity, and/or at national level, to ensure better compliance with the common rules.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

In its Communication on migration² the Commission suggested the possibility of the introduction of a mechanism allowing for a decision at the European level defining which Member States would exceptionally reintroduce border control at internal borders and for how long. The Communication contained ideas regarding the possibility to provide for a mechanism for responding to exceptional circumstances, including by a possible coordinated EU-based temporary reintroduction of border control at internal borders as a measure of last resort.

These ideas were welcomed by the Justice and Home Affairs Council on 12 May 2011 and by the European Council in its meeting on 23-24 June 2011 where it called for a mechanism to be "introduced in order to respond to exceptional circumstances putting the overall functioning of the Schengen cooperation at risk, without jeopardising the principle of free movement of persons."

3. LEGAL ELEMENTS OF THE PROPOSAL

Article 77 (1) and (2) of the Treaty on the Functioning of the European Union is the legal basis for the proposal.

This proposal amends Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the

² COM (2011) 248 of 4.5.2011

movement of persons across borders (Schengen Borders Code) which was based on the equivalent provisions of the Treaty establishing the European Community, i.e. Articles 62(1) (internal borders) and (2)(a) (external borders) respectively.

4. BUDGETARY IMPLICATION

The proposed amendment has no implications for the EU budget.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances

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 (1) and (2) 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) The creation of an area in which the free movement of persons across internal borders is ensured is one of the main achievements of the European Union. In such an area without controls at internal borders, it is necessary to have a common response to situations seriously affecting the public policy or internal security of the European Union or of one or more Member States by allowing for the reintroduction of border control at internal borders in exceptional circumstances, but without jeopardising the principle of the free movement of persons. A common Union response is therefore needed, given the impact that such measures of last resort may have on all persons having the right to circulate within this area without border control at internal borders.
- (2) Free movement within the area without internal border controls is a key Union achievement. As free movement is affected by the temporary reintroduction of border control at internal borders, any decision to do so should be taken at the Union level. In any case, reintroduction of border control at internal borders should only take place as a measure of last resort, for a strictly limited scope and period of time, based on specific objective criteria and on an assessment of its necessity which should be made at Union level. In cases where the serious threat to public policy or internal security requires immediate action, a Member State should be able to reintroduce border control at its internal borders for a period not exceeding five days, any prolongation of which needs to be decided at Union level.
- (3) When decisions on the reintroduction of border control at internal borders are taken, the necessity and proportionality of the measure should be considered compared to the threat to public policy or internal security triggering the request to reintroduce border control at internal borders, as should alternative measures which could be taken at

national and/or Union level, as well as the impact of such a measure on free movement within the area without internal borders.

- (4) Reintroduction of border control at internal borders might exceptionally be necessary in case of a serious threat to public policy or to internal security at the Union or national level, in particular following terrorist incidents or threats as well as threats posed by organised crime.
- (5) The situations can arise where a large numbers of third country nationals cross the external border of one or more Member States. This might result in an unexpected and significant increase in secondary movements of third country nationals found to be irregularly staying in the territory of another Member State or States. Taking into account the number of Member States affected by such an unexpected and significant increase in secondary movements, and the overall impact of this increase on the migratory situation in the Union or in an individual Member State, it may be considered necessary to temporarily reintroduce border control at internal borders where the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level. The crossing of the external border of a large number of third-country nationals might, in exceptional circumstances, justify the immediate reintroduction of some internal border controls, if such a measure is needed to safeguard public policy and internal security at the Union or national level from a serious and urgent threat.
- (6) The temporary reintroduction of certain controls at internal borders could also be a response to serious deficiencies identified by Schengen evaluations in accordance with Article 15 of the Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, where the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level.
- (7) Before any decision is taken on the temporary reintroduction of certain controls at internal borders, the possibility of resorting to measures aimed at addressing the underlying situation, including assistance by Union bodies such as Frontex or Europol, and technical or financial support measures at the national and/or Union level, should be fully explored. Moreover, any decision to reintroduce internal border control should be based on substantiated information, which may be provided by the Member State requesting the reintroduction, or come from other sources, including inspection visits.
- (8) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. These powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers³. Except in cases of urgency, and in view of the terms of Article 2(2)(b)(iii) of that Regulation, the examination procedure is applicable.

³ OJ L 55 of 28.2.2011, p. 13.

- (9) The Commission should adopt immediately applicable implementing acts where, in duly justified cases related to the imminence of the threat to public policy or internal security at the Union or national level, imperative grounds of urgency so require.
- (10) In accordance with Articles 1 and 2 of the Protocol 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 adoption of this Regulation and is therefore not bound by it or subject to application thereof. Given that this Regulation builds upon the Schengen *acquis*, under Title V of Part Three of the Treaty on the Functioning of the European Union, Denmark shall, in accordance with Article 4 of that Protocol, decide within six months after adoption of this Regulation whether it will implement it in its national law.
- (11) This Regulation constitutes a development of provisions of the Schengen *acquis*, in which the United Kingdom is not participating, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*⁴. The United Kingdom is therefore not taking part in adoption of this Regulation and is not bound by it or subject to application thereof.
- (12) This Regulation constitutes a development of provisions of the Schengen *acquis*, in which Ireland is not participating, in accordance with 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*⁵. Ireland is therefore not taking part in adoption of this Regulation and is not bound by it or subject to application thereof.
- (13) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen *acquis*, as provided for by 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*⁶.
- (14) As regards Switzerland, this Regulation constitutes a development of provisions of the Schengen *acquis*, as provided for by the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*⁷.
- (15) As regards Liechtenstein, this Regulation constitutes a development of provisions of the Schengen *acquis*, as provided for by 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*⁸.

⁴ OJ L 131, 1.6.2000, p. 43.

⁵ OJ L 64, 7.3.2002, p. 20.

⁶ OJ L 176, 10.7.1999, p. 36.

⁷ OJ L 53, 27.2.2008, p. 52.

⁸ OJ L 160 of 18.6.2011, p. 19.

- (16) As regards Cyprus, this Regulation constitutes an act building on the Schengen *acquis* or otherwise related to it, as provided for by Article 3(2) of the 2003 Act of Accession.
- (17) As regards Bulgaria and Romania, this Regulation constitutes an act building on the Schengen *acquis* or otherwise related to it, as provided for by Article 4(2) of the 2005 Act of Accession.
- (18) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the freedom of movement and of residence. This Regulation must be implemented according to those rights and principles.

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 562/2006 is amended as follows:

- (1) Articles 23 to 26 are replaced by the following:

"Article 23

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

1. Where in the area without border control at internal borders there is a serious threat to public policy or internal security at the Union or national level, border control at internal borders may exceptionally be reintroduced at all or specific parts of the internal borders of one or several Member States for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.
2. Border control at internal borders may only be reintroduced in accordance with the procedures foreseen in Articles 24, 25 and 26 of this Regulation. The criteria listed in Article 23a must be taken into account in each case where a decision on the reintroduction of border control at internal borders is contemplated.
3. If the serious threat to public policy or internal security at the Union or national level persists beyond the period provided for in paragraph 1, border control at internal borders may, taking account of the criteria listed in Article 23a, be prolonged on the same grounds as those referred to in paragraph 1 and, taking into account any new elements, for renewable periods of up to 30 days.
4. The total period during which border control is reintroduced at internal borders, on the basis of the initial period under paragraph 1 and prolongations under paragraph 3, shall not exceed six months. In cases of persistent serious deficiencies related to external border control or return procedures identified in accordance with Article 15 of the Regulation on the establishment of an

evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, the Commission can decide to extend this period.

Article 23a

Criteria for the temporary reintroduction of border control at internal borders

1. When deciding on the temporary reintroduction of border control at one or more internal borders or parts thereof, the Commission, or the Member State concerned in cases referred to in Article 25 paragraph 1, shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security at the Union or national level, and shall assess the proportionality of the measure to that threat. This assessment shall be based on the detailed information submitted by the Member State(s) concerned and any other relevant information, including any information obtained pursuant to paragraph 2. In making such an assessment, the following considerations shall in particular be taken into account:
 - (a) the likely impact of any threats to public policy or internal security at the Union or national level, including following terrorist incidents or threats as well as threats posed by organised crime;
 - (b) the availability of technical or financial support measures which could be or have been resorted to at the national and/or European level, including assistance by Union bodies such as Frontex, the EASO or Europol, and the extent to which such measures are likely to adequately remedy the threats to public policy or internal security at the Union or national level;
 - (c) the current and likely future impact of any serious deficiencies related to external border control or return procedures identified by Schengen evaluations in accordance with the Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*;
 - (d) the likely impact of such a measure on free movement within the area without internal border controls.
2. Before taking a decision, the Commission may
 - (a) request Member States, Frontex, Europol, Eurojust, the Fundamental Rights Agency or any other Union body to provide it with further information,
 - (b) carry out inspection visits, with the support of experts from Member States and of Frontex, Europol and any other relevant European body, in order to obtain or verify information relevant for a decision to temporarily reintroduce border control at internal borders.

Article 24

Procedure for the temporary reintroduction of border control at internal borders

1. Where a Member State considers that border control at internal borders should be reintroduced under Article 23(1), it shall submit a request to the Commission at the latest six weeks before the planned reintroduction, or within a shorter period where the circumstances giving rise to the need to reintroduce border control at internal borders do not become known until less than six weeks before the planned reintroduction, and shall supply the following information:
 - (a) the reasons for the proposed reintroduction, including all relevant data detailing the events that constitute a serious threat to public policy or internal security at the Union or national level;
 - (b) the scope of the proposed reintroduction, specifying at which part or parts of the internal borders border control is to be reintroduced;
 - (c) the names of the authorised crossing-points;
 - (d) the date and duration of the proposed reintroduction;
 - (e) where appropriate, the measures to be taken by the other Member States.

Such a request could also be submitted jointly by two or more Member States.

2. The information referred to in paragraph 1 shall also be submitted to the Member States and the European Parliament at the same time as the request is made.
3. Following a request by a Member State pursuant to paragraph 1, or on its own initiative based on the information specified in sections (a) to (e) of that paragraph, the Commission shall decide on the reintroduction of border control at internal borders. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33a (2).
4. The Commission shall decide on the prolongation of border control at internal borders. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33a(2).
5. On duly justified grounds of urgency, related to situations where the circumstances giving rise to the need to prolong border control at internal borders, in accordance with paragraph 4, do not become known until less than 10 days before the planned prolongation, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 33a (3).

Article 25

Specific procedure for cases requiring immediate action

1. Where a serious threat to public policy or internal security in a Member State demands immediate action to be taken, the Member State concerned may exceptionally and immediately reintroduce border control at internal borders, for a limited period of no more than five days.

2. The Member State reintroducing border control at internal borders shall at the same time notify the other Member States and the Commission accordingly, and shall supply the information referred to in Article 24 (1) and the reasons that justify the use of this procedure. The Commission may consult the other Member States immediately upon receipt of the notification.
3. If the serious threat to public policy or internal national security persists beyond the period provided for in paragraph 1, the Commission shall decide on the prolongation of the border control at internal borders. Given the need to take immediate action after the expiry of the period provided for in paragraph 1, which constitutes an imperative ground of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 33a (3).

Article 26

Specific procedure for cases of persistent serious deficiencies

1. In cases where the Commission finds that there are persistent serious deficiencies related to external border control or return procedures identified in accordance with Article 15 of the Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and insofar as these deficiencies constitute a serious threat to public policy or internal security at the Union or national level, border control at internal borders may be reintroduced for a period of no more than six months. This period can be prolonged by a further period of no more than six months if the serious deficiencies are not remedied. No more than three such prolongations will be possible.
2. The Commission shall decide on the reintroduction of border control at internal borders. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33a (2).
3. The Commission shall decide on the prolongation of border control at internal borders. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33a (2).
4. On duly justified grounds of urgency, related to situations where the circumstances giving rise to the need to prolong border control at internal borders, in accordance with paragraph 3, do not become known until less than 10 days before the planned prolongation, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 33a (3)."

- (2) Article 27 is replaced by the following:

"Article 27

Informing the legislators

The Commission and the Member State(s) concerned shall inform the European Parliament and the Council as soon as possible of any reasons which might trigger the application of Articles 23 to 26."

- (3) Article 29 and 30 are replaced by the following:

"Article 29

Report on the reintroduction of border control at internal borders

At the latest four weeks after the lifting of border control at internal borders, the Member State which has carried out border control at internal borders shall present a report to the European Parliament, the Council and the Commission on the reintroduction of border control at internal borders, outlining, in particular, the operation of the checks and the effectiveness of the reintroduction of border control at internal borders.

Article 30

Informing the public

The Commission shall inform the public on a decision to reintroduce border control at internal borders and indicate in particular the start and end date of such a measure, unless there are overriding security reasons for not doing so."

- (4) A new Article 33a is introduced:

"Article 33a

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply."

Article 2

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

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President