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COMMISSION RECOMMENDATION

of 23.11.2023

on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls

{SWD(2023) 388 final}

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on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The area without controls at internal borders is underpinned by a legal framework of measures supporting operational cooperation and information exchange between police and judicial authorities in criminal matters as well as measures in the fields of visa and return policy. That framework has been developed to compensate for the absence of controls at the internal borders and must function smoothly together with the effective management of the external borders.
- (2) The obligation for Member States to assist each other and maintain constant and mutual cooperation is explicitly set out in Regulation (EU) 2016/399 of the European Parliament and of the Council¹. For the proper functioning of the Schengen area, it is equally important for Member States to assist each other with regard to the measures taken in the internal border area.
- (3) The Commission closely monitors the situation at internal borders. In the Communication 'A strategy towards a fully functioning and resilient Schengen area'², the Commission set out, among other actions, a number of key actions to strengthen and promote the mutual trust between the Member States. The 2022³ and 2023 State of Schengen reports⁴ include an overview of the actions taken by the Commission in that regard over the past few years, in addition to the priority areas for action to ensure a structured, coordinated and common European response to shared challenges.
- (4) Since 2022, the controls at internal borders have been the subject of an intensive dialogue between Member States and the Schengen Coordinator⁵. They are also at the

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).

² Communication from the Commission to the European Parliament and the Council "A strategy towards a fully functioning and resilient Schengen area", 2.6.2021, COM(2021) 277 final.

³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, State of Schengen report 2022, 24.5.2022, COM(2022) 301 final/2.

⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, State of Schengen report 2023, 16.5.2023, COM(2023) 274 final.

⁵ This function was established by the Commission in June 2022.

core of the Schengen Cycle⁶ and are a recurrent topic of discussions in the Schengen Council, as part of the Schengen Barometer. Furthermore, since May 2023, the Commission has been carrying out a consultation⁷ with the Member States having long-lasting internal border controls in place and the Member States which are affected by such controls⁸. The Schengen Coordinator intends to continue the ongoing dialogue with the Member States to support them in the implementation of this Recommendation, as well as regularly report in the Schengen Council on the state of play and progress made.

- (5) Recently, the situation at internal borders has also been the subject of two judgments of the Court of Justice of the European Union: first, in a judgment concerning the time-limits for the temporary reintroductions of internal border controls in response to a serious threat to internal security or public policy of the same character⁹ as set out in Regulation (EU) 2016/399 and, subsequently, in a judgment concerning the applicable rules with regard to irregular migrants who present themselves at border crossings point where reintroduced internal border controls are carried out¹⁰.
- (6) With the proposal for an amendment of Regulation (EU) 2016/399, adopted on 14 December 2021¹¹, the Commission proposed to broaden the types of measures that can be used as an alternative to internal border controls, including the measures which could address serious threats to internal security or public policy. Those proposed measures build on Commission Recommendation (EU) 2017/820¹² on police checks and cross-border police cooperation and as such demonstrate that there is a need for further actions to promote the use of alternative measures to internal borders controls, in response to threats to internal security or public policy.
- (7) Considering that the dialogue carried out between the Schengen Coordinator and the Member States revealed that the recommendations concerning proportionate police checks and cross-border police cooperation as set out by the Commission in Recommendation (EU) 2017/820 remain valid, that threats to internal security and public policy in the Schengen area are constantly evolving, and taking into account the judgments of the Court of Justice of the European Union in cases C-368/20, C-369/20 and C-143/22, the Commission considers it appropriate to re-examine Recommendation (EU) 2017/820 and complement it, based on lessons learnt since its adoption in 2017 and the dialogue carried out by the Schengen Coordinator. It is also

⁶ See Council Conclusions 6234/22 of 23 February 2023, Council document 9802/22 of 3 June 2022.

⁷ In the follow-up to the letter of 26 April 2023 from the Slovenian authorities with the opinion expressing concerns as to the necessity and proportionality of the Austrian decision renewing internal border controls at the border section with Slovenia, as of 12 May 2023.

⁸ Staff Working Document accompanying the Recommendation on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls adopted on [22 November 2023].

⁹ Judgment of the Court of Justice of 26 April 2022, Landespolizeidirektion Steiermark, joined cases C-368/20 and C-369/20, ECLI:EU:C:2022:298.

¹⁰ Judgment of the Court of Justice of 21 September 2023, ADDE and others, C-143/22, ECLI:EU:C:2023:689 which confirms to a large extent a judgment of the Court of Justice of 19 March 2019, Arib and Others, C-444/17, ECLI:EU:C:2019:220.

¹¹ 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, COM(2021) 891 final.

¹² Commission Recommendation (EU) 2017/820 of 12 May 2017 on proportionate police checks and police cooperation in the Schengen area (OJ L 122, 13.5.2017, p. 79, ELI: <http://data.europa.eu/eli/reco/2017/820/oj>).

appropriate to have an overview of other recommendations adopted since 2017 that are relevant for the type of threats identified by the Member States and put forward to justify reintroduced internal border controls.

- (8) The 2023 State of Schengen report sets out the priority to enhance internal security of the Schengen area to fight against organised crime and drugs trafficking. As explained in the 2023 State of Schengen report, the dialogue with Member States brought to light that Member States continue to be confronted with serious threats to their internal security and public policy, which require action. It also demonstrated the high variety of measures taken in the context of the notified reintroductions of the internal border controls. This concerns, in particular, the frequency and intensity of the reintroduced controls, and the relations with the other measures undertaken to address the identified threats.
- (9) The present Recommendation also builds on Council Recommendation (EU) 2022/915¹³ and should reinforce the effect that Member States give to that Recommendation. Recommendation (EU) 2022/915 sets out a number of solutions to remove identified obstacles in operational cooperation and to further strengthen it when law enforcement officers operate in other Member States to conduct cross-border hot pursuits, surveillances, joint patrols and other joint operations. As illustrated in the workshops organised by the successive Council Presidencies and the Commission in the context of Recommendation (EU) 2022/915, there is a wealth of good practices on operational law enforcement cooperation in some Member States, such as joint police stations, joint patrols on trains, joint permanent operational task forces, joint permanent police brigades ready for field deployment upon request, the use of Police and Customs Cooperation Centres to support operational law enforcement cooperation, technologies to perform police checks without impacting traffic, secured communication solutions working across borders, etc. and the Commission made dedicated funding available in 2023 to support their uptake across the Union. Other Member States should implement these good practices, whenever relevant to their situation. In addition, as set out in the 2023 State of Schengen report, the Commission intends to continue making funding available to step up the spreading of good practices in other Member States.
- (10) This Recommendation should take account of the major role that Police and Customs Cooperation Centres play in the fight against cross-border crime, notably in internal border areas. Recommendation (EU) 2022/915 fosters their role, and Directive (EU) 2023/977 of the European Parliament and of the Council¹⁴ provides for effective information sharing with and through Police and Customs Cooperation Centres.
- (11) Given that the European Multidisciplinary Platform Against Criminal Threats (EMPACT) has become the key instrument in the Union's fight against organised crime¹⁵, this Recommendation should take account of the framework that EMPACT provides to counter crime threats effectively.

¹³ Council Recommendation (EU) 2022/915 of 9 June 2022 on operational law enforcement cooperation (OJ L 158, 13.6.2022, p. 53, ELI: <http://data.europa.eu/eli/reco/2022/915/oj>).

¹⁴ Directive (EU) 2023/977 of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA (OJ L 134, 22.5.2023, p. 1, ELI: <http://data.europa.eu/eli/dir/2023/977/oj>).

¹⁵ Council conclusions 7100/23 on the permanent continuation of the EU Policy Cycle for organised and serious international crime: EMPACT 2022+, approved by the Council (Justice and Home Affairs) at its

- (12) Moreover, there is a need for reinforced joint actions to fight more effectively migrant smuggling and to counter irregular migration towards the Union and unauthorised movements between the Member States. The cooperation in those areas should be stepped up. The migratory pressure may lead to an intensification of controls in the internal border areas and, where appropriate, based on the rules set out in Regulation (EU) 2016/399, to the reintroduction of controls at internal borders. These controls should, however, be carried out only as long as they cannot be replaced by other less stringent measures, based on risk analysis.
- (13) It should be underlined that all the actions taken by law enforcement authorities are to be carried out in a proportionate and non-discriminatory manner.

HAS ADOPTED THIS RECOMMENDATION:

1. STRUCTURED COOPERATION AT ALL LEVELS

- (1) Member States should continue and further reinforce their close cooperation at all political, administrative and operational levels in combatting serious threats to public policy or internal security, within the Schengen area.
- (2) In particular, Member States should establish permanent contact points within the authorities responsible for the response to serious threats to public policy or internal security and inform each other as well as the Commission about such contact points, where appropriate.

Such permanent contact points should be established both at national and at local level.

The activity of the permanent contact points should be adjusted to the level of threats, with more frequent exchanges between them in the case of intensified police checks in the internal border areas, based on national law.

Such permanent contact points should:

- (a) monitor the evolution of the threats, in particular by exchanging between them risk analysis products and intelligence concerning for instance, the following:
- (i) terrorist threats;
 - (ii) trafficking of firearms and other small arms and light weapons in vehicles;
 - (iii) unauthorised movement routes;
 - (iv) drugs trafficking;
 - (v) the *modus operandi* of individuals or groups of individuals related *inter alia* to migrant smuggling or trafficking weapons and to providers of false documents considered by the Member States as posing a serious threat to public policy or internal security;
- (b) enhance law enforcement cooperation and information sharing on serious threats to public policy or internal security, with the support of the European

3936th meeting held on 9 March 2023 (ELI: <https://data.consilium.europa.eu/doc/document/ST-7100-2023-INIT/en/pdf>)

Union Agency for Law Enforcement Cooperation (Europol) as the Union criminal information hub and use joint analysis capabilities to facilitate the work of national investigators in cross-border criminal investigations.

- (3) If a Member State decides to reintroduce temporary internal border controls in accordance with Title III, Chapter II of Regulation (EU) 2016/399, the Member States concerned by such reintroductions should:
- (a) organise on a regular basis bilateral meetings of the contact points or of other services concerned, with a view to:
 - (i) monitoring the evolution of the identified serious threats, in particular by exchanging their risk analysis and intelligence concerning the identified serious threats;
 - (ii) examining the proportionality of the adopted measures in relation to the identified serious threats and adapting the measures applied at the internal border sections concerned and in the internal border areas, to those evolving identified serious threats, in particular as regards the location, frequency and intensity of the checks, with a view to preventing the closure of cross-border roads, which could impact the functioning of cross-border communities and the internal market;
 - (b) maintain a close cooperation with the Commission and, in particular:
 - (i) upon request, provide the Schengen Coordinator with all relevant information on time;
 - (ii) participate in the consultations organised by the Commission on the basis of Article 27(5) of Regulation (EU) 2016/399 with a view to enhancing mutual cooperation between the Member States and examining the proportionality between the measures taken and the events giving rise to the reintroduction of internal border controls, as well as the serious threat to public policy or internal security, while taking fully into account the case-law of the Court of Justice¹⁶.

2. REINFORCING CAPACITY FOR JOINT MEASURES

- (4) Member States should further develop their capacity to carry out joint and complementary measures, based on bilateral or multilateral cross-border cooperation.
- (5) In particular, Member States should:
- (a) review and adjust the bilateral agreements and arrangements providing grounds for cross-border law enforcement cooperation between the relevant authorities and contact points therein;
 - (b) develop joint risk analysis allowing to determine the most appropriate measures to respond to different types of serious threats to public policy or

¹⁶ In particular, judgment of the Court of Justice of 26 April 2022, Landespolizeidirektion Steiermark, joined cases C-368/20 and C-369/20, ECLI:EU:C:2022:298; judgment of the Court of Justice of 19 March 2019, Arib and Others, C-444/17, ECLI:EU:C:2019:220; and judgment of the Court of Justice of 21 September 2023, ADDE and others, C-143/22, ECLI:EU:C:2023:689.

internal security, as well as the intensity of such measures, while taking into account the specific local conditions. For instance, the Member States could consider developing, where appropriate, together with their neighbouring Member States a tailored approach to each internal border section, providing an overview of the specific measures, depending on the characteristics of the identified serious threats. Such tailored approach could, for example, serve to address large-scale unauthorised movements of irregular migrants, terrorism and drugs trafficking threats and to prevent and reduce the trafficking of firearms and other small arms and light weapons, which require specific joint risk analysis;

- (c) ensure the necessary resources, equipment and competences for joint patrols and mixed brigades. Such joint patrols and mixed brigades should, in particular, have powers to take actions related to the detection and seizure of concealed firearms and other small arms and light weapons in vehicles, identification of the individuals or the groups of individuals who are considered by Member States to be posing a serious threat to internal security and/or public policy. While taking into account the conditions set out in the relevant case-law of the Court of Justice, such joint patrols and mixed brigades should be allowed to operate in an area defined as wide as necessary, given the local conditions, determined on the basis of the risk analysis, without excluding internal border areas, as long as they are not equivalent to border controls.

3. MAKING MAXIMUM USE OF THE POSSIBILITIES OFFERED BY RECOMMENDATION (EU) 2022/915

(6) Member States should:

- (a) take all the necessary measures to give effect to Recommendation (EU) 2022/915 in the context of combatting serious threats to public policy or internal security, within the Schengen area, by:
 - (i) making available or adopting the necessary technical, legal and operational means and tools to allow the performance of joint patrols and mixed brigades, hot pursuits and cross-border surveillances in internal border areas;
 - (ii) setting up or reinforcing Police and Customs Cooperation Centres to enhance the cooperation in internal border areas;
- (b) make use of good practices in operational police cooperation that exist in other Member States, as set out in the implementation roadmap in the Council's Law Enforcement Working Party;
- (c) make use of available Union funding to:
 - (i) develop transnational projects on operational law enforcement cooperation with Union added value;
 - (ii) step up the deployment of good practices.

4. STEPPING UP JOINT ACTIONS TO FIGHT MIGRANT SMUGGLING

(7) Member States should take the necessary steps to:

- (a) increase joint investigations of identified high-value targets and high-risk criminal networks;
 - (b) establish and use targeted joint patrols and other joint operations in specific internal border areas;
 - (c) systematically share information on trends regarding unauthorised movements with other Member States concerned as well as with the European Border and Coast Guard Agency and Europol, and report events and display analysis in the situational pictures of EUROSUR¹⁷, where available.
- (8) Europol and the European Union Agency for Criminal Justice Cooperation should support the joint investigations referred to in point (7)(a) of this Recommendation through dedicated Operational Task Forces in the framework of the European Multidisciplinary Platform Against Organised Crime ('EMPACT').
- (9) Europol should provide support to investigations in smuggling-related crimes resulting from the operations referred to in point (7)(b) of this Recommendation.

5. MAKING USE OF THE EXISTING POSSIBILITIES IN THE AREA OF RETURN TO ADDRESS UNAUTHORISED MOVEMENTS

- (10) Member States should effectively address and discourage the identified large-scale unauthorised movements which can pose a serious threat to public policy or internal security.

Member States should make use of relevant tools in the area of return in accordance with Directive 2008/115/EC of the European Parliament and of the Council¹⁸, notably by implementing Recommendation (EU) 2017/820, Commission Recommendation (EU) 2017/432¹⁹ and Commission Recommendation (EU) 2023/682²⁰.

- (11) In particular, Member States should:
- (a) take back third-country nationals who transited through their territory before being apprehended in another Member State by:
 - (i) applying the provisions of bilateral agreements or arrangements existing on 13 January 2009, referred to in Article 6(3) of Directive 2008/115/EC, in particular among neighbouring Member States;

¹⁷ In accordance with Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR) (OJ L 124, 12.4.2021, p. 3, ELI: http://data.europa.eu/eli/reg_impl/2021/581/oj).

¹⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98, ELI: <http://data.europa.eu/eli/dir/2008/115/oj>).

¹⁹ Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council (OJ L 66, 11.3.2017, p. 15, ELI: <http://data.europa.eu/eli/reco/2017/432/oj>).

²⁰ Commission Recommendation (EU) 2023/682 of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council (OJ L 86, 24.3.2023, p. 58, ELI: <http://data.europa.eu/eli/reco/2023/682/oj>).

- (ii) taking all necessary measures, including establishing operational practices between competent national authorities, to ensure that return procedures are finalised swiftly;
 - (iii) assessing the need for a renegotiation or renewal of the bilateral agreements and arrangements existing on 13 January 2009, referred to in Article 6(3) of Directive 2008/115/EC, in view of the judgments of the Court of Justice in cases C-444/17 and C-143/22;
- (b) provide the necessary training including on fundamental rights, to the services involved in internal border controls, in order to ensure that the obligations resulting from Directive 2008/115/EC are complied with at all times.
- (12) Where a third country national is not taken back by another Member State in line with Article 6(3) of Directive 2008/115/EC and where a verification in the Schengen Information System during police checks or reintroduced internal border controls, shows that a third-country national is already subject to a return decision previously issued by another Member State, Member States should take steps to:
- (a) mutually recognise the return decision previously issued by another Member State in accordance with Recommendation (EU) 2023/682 and remove the person in line with Directive 2008/115/EC.
 - (b) Where it is not possible to mutually recognise a return decision in accordance with Recommendation (EU) 2023/682, Member States should contact the Member State who previously issued a return decision to that same third-country national to obtain any relevant information that it could take into account in the context of the return procedure in accordance with Directive 2008/115/EC and in particular for the purpose of assessing the risk of absconding.

6. MEASURES TO ADDRESS UNAUTHORISED MOVEMENTS

- (13) Member States confronted with the unauthorised movements of third-country nationals between Member States should, in the first place, intensify police controls in the internal border areas. Any decision on a temporary reintroduction of internal border controls on the grounds of unauthorised movements, which in exceptional situations may amount to a serious threat to internal security or public policy, taken in accordance with Title III, Chapter II of Regulation (EU) 2016/399, should be accompanied by appropriate mitigating measures and be subject to constant review, allowing to replace such controls, based on risk analysis, by intensified police checks and cross-border police cooperation measures as early as possible.

7. STEPPING UP JOINT ACTIONS TO FIGHT TERRORISM AND CROSS-BORDER ORGANISED CRIME

- (14) Member States should review and increase their engagement in EMPACT and its various operational action plans dedicated to tackling the Union's priorities for the fight against serious and organised crime, in line with the Council Conclusions of 9 March 2023 on setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025²¹.

²¹ Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025 (document 7101/23).

- (15) Member States should make use of the possibilities that Directive (EU) 2023/977²² provides for effective information exchange with and through Police and Customs Cooperation Centres, while keeping the Single Points of Contact and Europol fully informed.

8. APPLYING MITIGATING MEASURES

- (16) Member States should limit the impact of any measures adopted to address the serious threats to public policy or internal security.
- (17) Member States should:
- (a) limit the use of systematic checks as the last resort measure for exceptional situations only;
 - (b) give preference to mobile checks in the territory of the Member States over static checks at fixed locations;
 - (c) enhance the use of modern technologies and passenger information for a risk-based data-driven approach on better targeting the checks.
- (18) In the exceptional case of deciding to resort to the use of systematic checks and checks in fixed locations, in accordance with Regulation (EU) 2016/399, such a decision should be discussed in advance with the neighbouring Member State and be based on joint risk analysis.
- (19) The Member State carrying out systematic checks and checks in fixed locations during the reintroduced temporary internal border controls, should provide sufficient resources in terms of staff and equipment to limit the impact of the checks on the fluidity of the traffic and the availability of all cross-border connections.
- (20) The organisation of the traffic and resources during the systematic checks and checks in fixed locations should be adjusted accordingly (for instance, separate lanes at the margins of the roads should be organised).
- (21) In case of difficulties with the necessary resources, the Member State concerned should reach out to the relevant neighbouring Member State to agree on the use of complementary measures.

²² Directive (EU) 2023/977 of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA (OJ L 134, 22.5.2023, p. 1–24).

9. FOLLOW UP

- (22) Member States should continue to closely cooperate with and be supported in the implementation of this Recommendation by the Schengen Coordinator who will continue the ongoing dialogue with them as well as regularly report in the Schengen Council on the state of play and progress made.

Done at Brussels, 23.11.2023

For the Commission
Ylva JOHANSSON
Member of the Commission

