



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 December 2011

Interinstitutional Files:
2010/0312 (COD)
2011/0242 (COD)

18196/1/11
REV 1

SCHENGEN 61
SCH-EVAL 217
FRONT 195
COMIX 810
CODEC 2331

NOTE

from: Presidency
to: Council / Mixed Committee at ministerial level
(EU-Iceland/Norway and Switzerland/Liechtenstein)

No. prev. doc.: 17280/1/11 REV 1 SCHENGEN 56 SCH-EVAL 202 FRONT 174 COMIX 744
CODEC 2131

Subject: – Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis
– 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
- State of play

I. INTRODUCTION

1. On 23 and 24 June 2011, the European Council¹ called, on the one hand, for "*an effective and reliable monitoring and evaluation system*" which "*should be EU-based and involve experts from the Member States, the Commission and competent agencies*", the Commission being invited "*where necessary to propose measures to respond to any deficiencies which are identified*". It called, on the other hand, for the introduction of a mechanism "*to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons [which] should comprise a series of measures to be applied in a gradual, differentiated and coordinated*

¹ EUCO 23/1/11 REV 1, paragraphs 21 and 22.

manner in order to assist a Member State facing heavy pressure at the external borders" and which "as a very last resort" could include "a safeguard clause (...) to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules". The Commission was invited to submit a proposal to this end in September 2011.

II. STATE OF PLAY

2. On 16 September 2011 the Commission submitted to the Council a legislative package² composed of an amended proposal for the Schengen evaluation mechanism³ and a proposal for amending the Schengen Borders Code (SBC)⁴ as regards the temporary reintroduction of border control at internal borders in exceptional circumstances⁵.
3. It should be noted that in accordance with Protocol (No 1) on the role of national Parliaments⁶, a considerable number of national Parliaments have transmitted a negative opinion on the question of whether the proposal on reintroduction of border control complies with the principle of subsidiarity (FR⁷, NL⁸, PT⁹, SE¹⁰, SK¹¹, RO¹²). Some national parliaments have not finished their proceedings yet, and further opinions may be transmitted.

² See 14357/11.

³ Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, as set out in 14358/11.

⁴ Regulation (EC) No 562/2006 of 15 March 2006, OJ L 105, 13.4.2006, p. 1.

⁵ 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, as set out in 14359/11.

⁶ OJ C 83, 30.3.2010, p. 203.

⁷ 17094/11.

⁸ Document to be issued.

⁹ 16679/1/11 REV 1.

¹⁰ 17095/11.

¹¹ 17063/11.

¹² 17056/11 and 17096/11 (both chambers).

4. After a preliminary debate in the Council (JHA) on 22 September 2011, the proposals were discussed at the Working Party for Schengen Matters (Acquis) on 30 September 2011, 28 October 2011, 8 November 2011 and 18 November 2011.
5. On 2 December 2011, the Presidency submitted to COREPER (Mixed Committee) three questions¹³ with a view to facilitating further discussions on the legislative package:
 - (a) *whether the legal basis for the Schengen evaluation mechanism proposal should be Article 70 or Article 77(2) TFEU.*
 - (b) *whether the text amending the existing provisions of the SBC relating to the temporary reintroduction of controls at the internal borders should confer a decision-making power on the Commission by way of a comitology procedure.*
 - (c) *whether there was general agreement on the need for a provision on the introduction of internal border control in the case of persistent serious deficiencies related to border control measures where such deficiencies constitute a serious threat to public policy or internal security, and whether a decision-making power should be conferred on the Commission by way of a comitology procedure.*
6. From the discussions it appeared that:
 - (a) A considerable number of delegations considered Article 70 as the appropriate legal basis. A minority of delegations preferred Article 77(2) or were open to the use of that provision as the legal basis.
 - (b) Almost all the delegations were opposed to confer the power to decide on the temporary reintroduction of controls at the internal borders on the Commission (by way of comitology). However, a number of delegations indicated openness to reinforcing the existing monitoring and exchange of information arrangements.
 - (c) A majority of delegations were in favour of having an EU-level safeguard mechanism to deal with cases of serious deficiencies causing a threat to public policy or internal security, in which Member States would remain responsible for taking the relevant decisions.

¹³ See 17280/1/11 REV 1 + COR 1.

7. It should also be noted that the Council Legal Service gave an opinion on the legal basis for the Schengen evaluation mechanism proposal¹⁴, arguing that the correct legal basis for such a mechanism should be Article 70 TFEU, which was specifically inserted in the Treaty for this very purpose. Furthermore, the Council Legal Service gave also an opinion¹⁵ stating that Article 26 of the proposed provisions in the SBC and Article 15 of the proposal for the Schengen evaluation mechanism, allowing for reintroduction of internal border controls in cases where a Member State fails to comply with its obligations under the Schengen acquis, are incompatible with the system of Treaties.

III. CONCLUSION

8. In this context, the Council/Mixed Committee is invited to take note of the outcome of discussions in Coreper/Mixed Committee as set out in point 6 above, which will now provide the basis for further work at Coreper and working party level as appropriate.

¹⁴ See Opinion of the Council Legal Service of 13 May 2011 in 10148/11, which was given already in the context of the previous version of the proposal submitted by the Commission.

¹⁵ 18392/11.