



## ASSEMBLEIA DA REPÚBLICA

### European Affairs Committee

## WRITTEN OPINION

**Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis***

**[COM(2010) 624 final]**

### **I – Introductory Note**

In accordance with Article 7 of Law 43/2006 of 25 August (Law on Monitoring, Assessment and Pronouncement by the *Assembleia da República* in the context of the construction of the European Union) and the terms of the Protocol on the role of national Parliaments annexed to the EU Treaty on the Functioning of the European Union, the European Affairs Committee referred legislative initiative COM(2010) 624 Final to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees.

At its meeting on 20 December 2010, the 1st Parliamentary Committee scrutinised the above initiative and approved the Report attached hereto.

In compliance with the terms of the above cited Law on monitoring by the *Assembleia da República* in the context of the construction of the European Union, it falls to this Parliamentary Committee to assess the **Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis***, having regard to the legal basis of the Proposal.



## ASSEMBLEIA DA REPÚBLICA

### European Affairs Committee

#### II – Recitals

##### A) Legal basis

The proposal for a regulation under consideration here proposes to create an evaluation mechanism to verify application of the Schengen *acquis*, a mechanism designed, according to the Commission, to maintain a high level of mutual trust between Member States as to their ability to apply efficiently and effectively the accompanying measures necessary to maintain an area without internal border controls. In 1998, the Member States established a Standing Committee with two well defined tasks: first, to establish whether candidate States fulfil all the preconditions for joining the Schengen area and, second, to ensure that the Schengen *acquis* is properly applied. Fulfilling these conditions would, in the Commission's view, reinforce mutual trust between Member States.

The proposal for a regulation under consideration here arises from the wide-ranging discussions that have taken place between the Commission and Member States since 1999 on how to make the Schengen mechanism more efficient. With the current evaluation having revealed certain weaknesses and problems, it has become necessary to prepare a new text that addresses these shortcomings. A more detailed explanation can be found in the full text of the proposal for a regulation.

The legal support for this proposal is provided in Article 4(2)(j) of the Treaty of Lisbon, which establishes that competence for the Area of Freedom, Security and Justice is shared between the Member States and the European Union.

Moreover, under the terms of Article 67(1) of the Treaty on the Functioning of the European Union, the Union constitutes an area of freedom, security and justice, respecting the fundamental rights and different legal systems and traditions of the Member States and, according to Article 77 of the TFEU, one of the aims of the European Union is the lifting of internal border controls with the ultimate objective of creating an area of free movement of



## ASSEMBLEIA DA REPÚBLICA

### European Affairs Committee

persons within the European Union. It is in this legal context that the proposal for a regulation under consideration here arises, in compliance with the terms of the Treaty.

#### **B) Principle of Subsidiarity**

The Principle of Subsidiarity requires that the European Union should not adopt measures in areas of shared competence unless “the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”, pursuant to Article 5(3) of the Treaty on the European Union (TEU).

Under the terms of Article 4(2)(j) in conjunction with Article 77(2 e)) of the Treaty on the Functioning of the European Union (TFEU), the Union has shared competence as regards the area of freedom, security and justice, within which it shall develop a common judicial cooperation policy based on the absence of any controls on the movement of persons, whatever their nationality, when crossing internal borders, and the European Parliament and the Council, in accordance with ordinary legislative procedure, shall adopt rules to achieve this objective.

From the conjugation of the provisions cited above, it is clear that this proposal for a regulation complies with the Principle of Subsidiarity, since the European Union has shared competence in these areas with the Member States, but the objectives which this measure addresses are better pursued and achieved through action at Union level.

Notwithstanding the verification of compliance in general with the principle of subsidiarity, it is appropriate to consider some of the provisions of the proposed regulation that could challenge or encroach on the structure and fundamental aspects of individual Member States’ criminal justice systems.



## ASSEMBLEIA DA REPÚBLICA

### European Affairs Committee

As the Report of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees states, this raises three issues:

*Firstly, Article 9 establishes that the Commission shall compile a list of national experts designated by Member States for participation in on-site visits which will be communicated to them. The Commission will designate the teams that will carry out the on-site visits from this list. Although Article 10 provides that the Commission must ensure a geographical balance and balance of competences among the experts who make up the teams, Member States should have a more active role in the designation of their national experts. Therefore, in order to avoid an arbitrary choice by the Commission, criteria of opportunity, fairness and transparency should be established in order to ensure the effective participation of experts from different Member States.*

*Secondly, Article 12 provides that the teams responsible for unannounced on-site visits with the objective of verifying the absence of controls at internal borders shall consist solely of Commission officials. It is not clear what is the material and legal justification for excluding national experts of the Member States from this type of evaluation. In this respect, it is not possible to invoke the argument of independence and impartiality because Article 10 provides that Member States' experts may not participate in on-site visits in the Member State in which they are employed. Moreover, as the policy with regard to border controls is a matter of shared competence between the Member States and the Union, it is not obvious why those visits should only be composed of Commission officials.*

*Finally, we would comment that the notice stipulated in Article 11 for informing Member States of on-site visits, in particular in the case of unannounced visits (48 hours), may be too short. Notice of four or five days would be more reasonable, especially considering the tasks that are required of Member State for such visits.*



## ASSEMBLEIA DA REPÚBLICA

### European Affairs Committee

#### II – Opinion

In the light of the foregoing, and there being nothing further to add, the Parliamentary European Affairs Committee is of the opinion that this initiative does not violate the principle of subsidiarity, in that the proposed objective will be more effectively achieved through action at Union level and considers that the legislative process is complete.

*Assembleia da República, 4 January 2011*

Opinion drawn up by MP – *Ana Catarina Mendes*

Chairman of the Committee - *Vitalino Canas*



# ASSEMBLEIA DA REPÚBLICA

## COMMITTEE ON CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND GUARANTEES

### REPORT

**COM(2010) 624 final** – Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*

#### 1 – Introductory Note

In connection with the monitoring, assessment and pronouncement by the Assembleia da República in the context of the construction of the European Union, European initiative COM(2010) 624 final – Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis* – was distributed to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees for the purposes envisaged in Protocol No. 2 on the Principle of Subsidiarity annexed to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

#### 2 – Framework and objectives of the proposal

This European initiative proposes to amend certain conditions of the evaluation mechanism for verifying the application of the Schengen *acquis* in Member States in order to make it more efficient.

The area without internal borders created by the Schengen *acquis* is based on mutual trust between Member States as to their ability to apply fully the accompanying measures that permit the abolition of internal border controls.

In 1998, the Schengen Member States established a Standing Committee to reinforce and maintain this mutual trust, whose mandate is defined in a decision of the Schengen Executive Committee and consists of two separate tasks: verifying whether all preconditions for application of the Schengen *acquis*, i.e. lifting of border controls, have been met by Member States wanting to join Schengen ('putting into effect'); and verifying that the Schengen *acquis* is being correctly applied by the Member States implementing the *acquis* ('implementation').



## ASSEMBLEIA DA REPÚBLICA

The evaluation of the application of Schengen has been the subject of discussions between Member States and the Commission since 1999. The following weaknesses have been identified as a result:

- the inadequacy of the current evaluation mechanism (lack of clarity of the rules on consistency and frequency of evaluations);
- a need to develop a method for priority-setting based on risk analysis;
- a need to consistently ensure high-quality expertise and specialisation in the evaluation exercise;
- a need to improve the post-evaluation mechanism for assessing the follow-up to recommendations made after on-site visits, as the measures taken to remedy deficiencies and the timeframe within which they are to be remedied vary from one Member State to another;
- the institutional responsibility of the Commission as guardian of the Treaties is not reflected in the current evaluation system.

In March 2009 the Commission presented two proposals for legal instruments on the revision of the Schengen evaluation mechanism in order to embrace the whole area of Schengen cooperation in a coherent framework. In October 2009 these proposals were rejected by the European Parliament, which argued that the co-decision procedure should have been followed.

In the light of the difficulties described above, the proposal for a regulation under consideration proposes the following:

- transfer of the entity responsible for evaluating the application of the Schengen *acquis* from the Council to the Commission, which previously had an observer role in this context, with the Member States retaining a key role in cooperation with the Commission through a management committee in which they may have voting rights with regard to the annual and five-year planning of evaluation missions and on the related reports and proposed measures (Articles 3 and 15);
- introduction of announced and unannounced multiannual and annual on-site visits (Articles 5 and 8);
- determination by the Commission of the specific need for on-site visits following consultation with Member States (Articles 5 and 8);
- inclusion in the annual programme, should the need arise, of thematic or regional evaluations (Article 8);



## ASSEMBLEIA DA REPÚBLICA

- organisation of unannounced on-site visits on the basis of risk analysis conducted by Frontex or any other source suggesting the need for a visit of this kind, such as Europol (Articles 4 and 6);
- limiting the number of experts to 8 in announced visits, and 6 in the case of unannounced visits (Article 10);

### 3 – Principle of subsidiarity

Under the terms of Article 77 of the Treaty on the Functioning of the European Union, one of the aims of the Union is the lifting of internal border controls with the ultimate objective of creating an area of free movement of persons within the European Union. This proposal for a regulation was prepared pursuant to Article 77(2)(e) of the Treaty on the Functioning of the European Union which provides that the European Parliament and the Council may adopt measures on *“the absence of any controls on persons, whatever their nationality, when crossing internal borders”*. Considering that the objective of this initiative is to increase the effectiveness of the Schengen evaluation mechanism, this can only be achieved at Union level and not through isolated action by individual Member States.

Notwithstanding the verification of compliance with the principle of subsidiarity, there are some issues regarding certain of the provisions which call for further consideration. Firstly, Article 9 establishes that the Commission shall compile a list of national experts designated by Member States for participation in on-site visits which will be communicated to them. The Commission will designate the teams that will carry out the on-site visits from this list. Although Article 10 provides that the Commission must ensure a geographical balance and balance of competences among the experts who make up the teams, Member States should have a more active role in the designation of their national experts. Therefore, in order to avoid an arbitrary choice by the Commission, criteria of opportunity, fairness and transparency should be established in order to ensure the effective participation of experts from different Member States.

Secondly, Article 12 provides that the teams responsible for unannounced on-site visits with the objective of verifying the absence of controls at internal borders shall consist solely of Commission officials. It is not clear what is the material and legal justification for excluding national experts of the Member States from this type of evaluation. In this respect, it is not possible to invoke the argument of independence and impartiality because Article 10 provides that Member States' experts may not participate in on-site visits in the Member State in which they are employed. Moreover, as the policy with regard to border controls is a matter of shared competence between the Member States and the Union, it is not obvious why those visits should only be composed of Commission officials.





## ASSEMBLEIA DA REPÚBLICA

Finally, we would comment that the notice stipulated in Article 11 for informing Member States of on-site visits, in particular in the case of unannounced visits (48 hours), may be too short. Notice of four or five days would be more reasonable, especially considering the tasks that are required of Member State for such visits.

### **4 – Opinion**

In the light of the foregoing, the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees is of the opinion that COM(2010) 624 final – Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis* respects the principle of subsidiarity and that this Report should be referred to the European Affairs Committee.

São Bento Palace, 20 December 2010

**MP acting as Rapporteur –** *Celeste Correia*

**Chairman of the Committee –** *Osvaldo de Castro*