



EUROPEAN COMMISSION

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Dear Marshal,

The Commission would like to thank the Polish Senate for its two Opinions, respectively on the Commission proposals for an 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 {COM(2011) 559 final} and for a Regulation of the European Parliament and the Council amending Regulation (EC) No 562/2006 (the Schengen Borders Code) in order to provide for common rules on the temporary reintroduction of border controls at internal borders in exceptional circumstances {COM(2011) 560 final}. The Commission apologises for the delay in replying.

In its Communication on Migration adopted in May 2011, the Commission set out the reasons why it is necessary to review the way we oversee the management of our external borders as well as the way in which internal border controls can be temporarily reintroduced.

The basic starting point and objective of the Commission is that, since the Schengen area is a benefit shared by the whole EU, any decision affecting this benefit must be taken at EU level and not individually.

It should be noted that the two legislative proposals which are the subject of the Senate's opinions form a package, building on the conclusions of the European Council in June 2011, whose purpose is to strengthen the governance of the area without internal border controls (the Schengen area), and enable it to respond effectively to exceptional circumstances that put the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons.

At the centre of all this remains a consideration which is crucial and recognised as such by all the institutional actors at EU level: free movement of people in the Schengen area is one of the most important and tangible results of the EU integration process. Therefore, this achievement must be preserved and strengthened in an effective and credible way.

As regards the proposal for the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, the Senate's opinion considers that the role of Member States in the Schengen evaluation process should be enhanced. The Commission agrees that Member States should be closely involved so that mutual trust in the Schengen area can be maintained. To that end, the proposal foresees that all important decisions throughout the monitoring and evaluation should be taken by 'comitology' that is by the Commission with the support of a qualified majority of the Member State experts represented in the Committee. Member States' experts will

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moreover play a key role in the monitoring and evaluation process, including via their participation in announced and unannounced visits.

The Commission has taken note of the Senate's concerns regarding the compatibility of the Commission proposal with the principle of proportionality, as set out in Article 5 of the Treaty on European Union (TEU), namely concerning the proposed support measures in the event of serious deficiencies in the carrying out of external border control or return procedures being identified (Article 14) and the measures proposed in case those deficiencies persist (Article 15). The Senate is of the view that the proposals should enable deficiencies to be rectified in a gradual fashion.

The Commission would like to emphasise that the proposals are intended to allow for deficiencies to be resolved over a period of time that would be considered reasonable, bearing in mind the extent of the problems involved and the measures required to rectify them. The Member State concerned would first be required to draw up an Action Plan mapping out how it intends to resolve the problems identified, and it would be expected to then request whatever support and assistance might be necessary, as proposed in Article 14. It would only be as a last resort in the exceptional circumstances where the deficiencies persist despite support measures being sought and/or deployed, and where the situation risks to pose a serious threat to public policy or internal security at the Union or national level that the reintroduction of internal border controls might be contemplated. For these reasons, the Commission believes that both Articles are consistent with the principle of proportionality.

The proposed changes to the Schengen Borders Code set out in the Commission proposal in question provide that any decision to reintroduce internal border controls can only be made by a Commission decision taken via the 'comitology' procedure, except where urgency dictates that immediate action is required, in which case a Member State may unilaterally do so, but for no more than five days. The reintroduction of internal border controls would be temporary, limited in scope to what is necessary, and could only be resorted to if alternative measures have first been explored, and if the reintroduction of controls is necessary to mitigate a serious threat to public policy or internal security at the EU or national level.

The Commission has taken note of the views expressed in the Senate's opinion regarding the compatibility of this aspect of the Commission proposal with the principles of subsidiarity and proportionality, as set out in Article 5 of the TEU, as well as regarding its compatibility with Article 4(2) of the TEU and Article 72 of the Treaty on the Functioning of the European Union (TFEU), which concern the competence of Member States for the maintenance of law and order, and the safeguarding of national or internal security.

The Commission fully respects the sovereign responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security, and considers that these proposals are fully consistent with that sovereign competence. It should be pointed out that Article 3(2) of the TEU, as well as Articles 67 and 77 of the TFEU, make it clear that the development of an area without internal borders, whereby the free movement of persons must be ensured, is a Union competence. The rules governing the creation and maintenance of such an area without internal borders are accordingly the subject of legislation adopted at the Union level, and it is consistent with such a legislative scheme that any decisions allowing for exceptions to the general rule – namely that free movement within the area must be ensured – should be taken at Union level. The Commission's procedure proposed, whereby the exercising of 'implementing powers' by the Commission can be controlled by Member States, should be seen in this light.

Decisions on the reintroduction of controls at internal borders have far-reaching human and economic consequences, the impact of which is felt beyond the territory of a specific Member State. Indeed, such decisions are never of purely national concern: internal borders are by their nature shared by at least two Member States, and reintroducing controls at such borders affects the freedom of movement of citizens of all Member States. It is therefore important for a mechanism to be put in place to ensure that any measure taken to restrict such freedom of movement within the area without internal borders is both necessary and proportionate. The mechanism should ensure that decisions on the reintroduction of internal border control are taken in a consistent manner across the Union, on the basis of the same criteria, and that the possibility to resort to such exceptional measures is not abused. In view of the Union-wide consequences of internal border controls being reintroduced, such a mechanism can only be a Union-based one, with decisions taken at the Union level.

The mechanism proposed by the Commission moreover ensures that exceptional measures can be taken very rapidly where necessary, while at the same time ensuring that they receive a collective endorsement at EU level. It is to be expected that requests by Member States for the reintroduction or prolongation of internal border controls which are based on legitimate security or public policy concerns will be acceded to, unless it is clear that those concerns are groundless, or that the requested measures are disproportionate to the concerns.

The Commission is therefore convinced that its proposal strikes the right balance between the need to have in place an efficient mechanism allowing for measures to be taken to effectively safeguard against serious threats to public policy and internal security, while at the same time ensuring that any such measures are not allowed to unnecessarily undermine the area without internal border controls. As such, the Commission considers that its proposal is fully compatible with the principles of subsidiarity and proportionality, as set out in Article 5 of the TEU.

I hope that this reply addresses the concerns expressed in the two opinions of the Senate, and look forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*