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*****I**
REPORT

on 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*
(COM(2010)0624 – C7-0370/2010 – 2010/0312(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Carlos Coelho

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on 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* (COM(2010)0624 – C7-0370/2010 – 2010/0312(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2010)0624), and the amended proposal (COM(2011)0559),
 - having regard to Article 294(2) and Article 77(2)(e) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0370/2010),
 - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rules 55 and 37 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0226/2012),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Citation 1

Text proposed by the Commission

Having regard to the Treaty on the Functioning of the European Union and in particular Article 77(2)(e) thereof,

Amendment

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2) **and Article 74** thereof,

Amendment 2

Proposal for a regulation

Recital 1

Text proposed by the Commission

(1) The Schengen area without **internal** border controls relies on effective and efficient application by the Member States of accompanying measures in the areas of external borders, visa policy, the Schengen Information System, including data protection, police cooperation, **judicial cooperation** in criminal matters **and** drugs policies.

Amendment

(1) The Schengen area without border control **at internal borders is founded, at its core, on mutual trust between Member States and** relies on effective and efficient application by the Member States of accompanying measures in the areas of external borders, visa policy, the Schengen Information System, including data protection, police cooperation in criminal matters, drug policies **and the fight against corruption and organised crime, in so far as corruption and organised crime could undermine the application of the Schengen acquis.**

Amendment 3

Proposal for a regulation

Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) The Schengen area is one of the main achievements of the Union and is the one most appreciated by citizens, since it ensures freedom of movement. Therefore, the absence of control and checks at internal borders should be safeguarded.

Amendment 4

Proposal for a regulation

Recital 2

Text proposed by the Commission

Amendment

(2) By decision of the Executive Committee of 16 September 1998 , a

(2) By decision of the Executive Committee of 16 September 1998, a

Standing Committee on the evaluation and implementation of Schengen was set up. The Standing Committee was given the mandate, first, to establish whether all the preconditions for lifting internal **border controls** with a candidate State have been fulfilled and, second, to ensure that the Schengen *acquis* is properly applied by the States already implementing the *acquis* in full.

Standing Committee on the evaluation and implementation of Schengen was set up. The Standing Committee was given the mandate, first, to establish whether all the preconditions for lifting **border control at internal borders** with a candidate State have been fulfilled and, second, to ensure that the Schengen *acquis* is properly applied by the States already implementing the *acquis* in full.

Amendment 5

Proposal for a regulation

Recital 3

Text proposed by the Commission

(3) A specific evaluation mechanism to verify application of the Schengen *acquis* **is necessary given the need to** ensure high uniform standards in application of the Schengen *acquis* in practice and **to maintain** a high level of mutual trust between those Member States that form part of an area without internal **border controls**. Such a mechanism should build upon close cooperation between the Commission and those Member States.

Amendment

(3) A specific **and uniform** evaluation **and monitoring** mechanism **is necessary in order** to verify application of the Schengen *acquis* **both in the candidate States and in those Member States to which the Schengen acquis applies in whole or in part, in accordance with the relevant protocol annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. That mechanism should** ensure high uniform standards in application of the Schengen *acquis* in practice and **maintenance of** a high level of mutual trust between those Member States that form part of an area without **border control at internal borders**. Such a mechanism should build upon close cooperation between the Commission and those Member States.

Amendment 6

Proposal for a regulation

Recital 6

Text proposed by the Commission

(6) The evaluation mechanism set up in

Amendment

(6) The evaluation mechanism set up in

1998 should therefore be revised as regards the second part of the mandate given to the Standing Committee. ***The first part of the mandate given to the Standing Committee should continue to apply, as laid down in Part I of the Decision of 16 September 1998.***

1998 should therefore be revised as regards ***both the first and*** the second part of the mandate given to the Standing Committee, ***in order to ensure that there is one single uniform mechanism based on the same criteria for candidate States and Member States already applying the Schengen acquis.***

Justification

The aim is a uniform mechanism for both candidate and member states to the Schengen area in order to avoid double standards.

Amendment 7

**Proposal for a regulation
Recital 6 a (new)**

Text proposed by the Commission

Amendment

(6a) A candidate State meeting all the requirements provided for under the Schengen acquis should be able to join without significant delay.

Amendment 8

**Proposal for a regulation
Recital 7**

Text proposed by the Commission

Amendment

(7) The experience gathered during previous evaluations demonstrates the need to maintain a coherent evaluation mechanism covering all areas of the Schengen *acquis* except those where a specific evaluation mechanism already exists within EU law.

(7) The experience gathered during previous evaluations demonstrates the need to maintain a coherent, ***transparent and uniform*** evaluation ***and monitoring*** mechanism covering all areas of the Schengen *acquis* except those where a specific evaluation mechanism already exists within EU law.

Justification

The experience gathered during previous evaluations also demonstrates the need for greater transparency and predictability, which will ensure that evaluation of the application of the Schengen acquis is conducted on the basis of clear and uniform criteria.

Amendment 9

Proposal for a regulation Recital 8

Text proposed by the Commission

(8) Member States should be closely involved in the evaluation process. *Measures* for implementation of this Regulation *should be* adopted by *the management procedure, as provided for in Article 4 of Council Decision 1999/468/EC of 28 June 1999* laying down *the procedures for the* exercise of implementing powers *conferred on the Commission.*

Amendment

(8) Member States should be closely involved in the evaluation *and monitoring* process. *In order to ensure uniform conditions* for *the* implementation of this Regulation, *in particular for the adoption and adaptation of the multiannual evaluation programme and of the first section of the annual evaluation programme, for drafting the evaluation reports and making recommendations on the classification of the findings in those reports, and for scheduling announced and unannounced visits during the evaluation process, and to verify the implementation of the action plan* adopted by a Member State to remedy the weaknesses identified, *implementing powers should be conferred on the Commission. Those 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 powers¹. *In view of the terms of point (b)(iii) of Article 2(2) of that Regulation, the examination procedure is applicable.*

¹ OJ L 55, 28.2.2011, p. 13.

Amendment 10

Proposal for a regulation Recital 9

Text proposed by the Commission

(9) The evaluation mechanism should set up transparent, efficient and clear rules on the method to be applied for the evaluations, the use of highly qualified experts for on-site visits and the follow-up to the findings of the evaluations. In particular, the method should provide for unannounced on-site visits to supplement the announced on-site visits, notably with regard to border controls and visas.

Amendment

(9) The evaluation **and monitoring** mechanism **should be based on a Union approach and** should set up transparent, efficient and clear rules on the method to be applied for the evaluations, the use of highly qualified experts for on-site visits and the follow-up to the findings of the evaluations. In particular, the method should provide for unannounced on-site visits to supplement the announced on-site visits, notably with regard to border controls and visas.

Amendment 11

Proposal for a regulation Recital 10

Text proposed by the Commission

(10) The evaluation mechanism should also include verification of the relevant legislation on the abolition of controls at internal borders and checks within national territory. ***In view of the specific nature of these provisions, which do not affect the internal security of the Member States, the*** relevant on-site visits should be entrusted ***exclusively to the*** Commission.

Amendment

(10) The evaluation **and monitoring** mechanism should also include verification of the relevant legislation on the abolition of controls at internal borders and checks within national territory. ***The*** relevant on-site visits should be entrusted to Commission ***representatives in cooperation with Member States' experts and representatives of the European Parliament.***

Amendment 12

Proposal for a regulation Recital 10 a (new)

Text proposed by the Commission

Amendment

(10a) The Commission's role is particularly relevant for the purposes of ensuring the monitoring and coordination of the evaluation programmes and of the

follow-up procedure. Furthermore, during the evaluation process, the Commission should ensure independence, transparency and accountability, and should promote mutual trust among the parties involved.

Amendment 13

Proposal for a regulation Recital 11

Text proposed by the Commission

(11) The evaluation should pay particular attention to respect of fundamental rights when applying the Schengen *acquis*.

Amendment

(11) The evaluation ***and monitoring*** should pay particular attention to respect of fundamental rights ***and data protection*** when applying the Schengen *acquis*.

Amendment 14

Proposal for a regulation Recital 11 a (new)

Text proposed by the Commission

Amendment

(11a) The European Data Protection Supervisor and the national supervisory authorities, each acting within the scope of their respective competences, should participate in on-site visits concerning data protection.

Amendment 15

Proposal for a regulation Recital 11 b (new)

Text proposed by the Commission

Amendment

(11b) The evaluation should ensure that the Member States apply the Schengen rules effectively in accordance with fundamental principles and norms. Therefore, the evaluation should

encompass all relevant legislation and operational activities contributing to the functioning of an area without border control at internal borders and which apply to all those Member States applying the Schengen acquis in full or in part.

Amendment 16

Proposal for a regulation Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) The evaluation and monitoring mechanism should provide for a support mechanism in the event of a serious deficiency being detected in the application of the acquis. Steps should be taken to ensure that the Member State concerned, applying the Schengen acquis in full or in part, receives appropriate support for a period of six months, provided by the Commission with the technical assistance of Frontex and other relevant Union agencies. As a measure of last resort, and in so far as the circumstances may be such as to constitute a serious threat to public policy or to internal security, there should be a possibility of reintroducing border control at internal borders to the extent and for the duration necessary to remedy those deficiencies. Upon the introduction of border controls, the Commission should set up financial compensatory measures in order to support the Member States concerned.

Amendment 17

Proposal for a regulation Recital 16 a (new)

Text proposed by the Commission

Amendment

(16a) Those Member States to which, according to Decision 2000/365/EC and Decision 2002/192/EC, the Schengen acquis applies only in part, should be subject to evaluations relating to the application of those parts of the acquis in which they are taking part, and their experts should be able to participate in those evaluations.

Amendment 18

Proposal for a regulation Article 1 – paragraph 1

Text proposed by the Commission

Amendment

This Regulation establishes an evaluation mechanism to verify application of the Schengen *acquis* in the Member States to which the Schengen *acquis* applies in full.

This Regulation establishes an evaluation ***and monitoring*** mechanism ***-serving the following purposes:***

– to ascertain whether all the preconditions for bringing the Schengen acquis into force in a candidate State are fulfilled;

– to verify application of the Schengen acquis in the Member States to which the Schengen acquis applies in full; and

– to verify the application of the provisions of the Schengen acquis by those Member States which, according to Decision 2000/365/EC and Decision 2002/192/EC, apply the Schengen acquis only in part, limited to the extent of their participation in the Schengen acquis.

Amendment 19

Proposal for a regulation Article 1 – paragraph 2

Text proposed by the Commission

Experts from the Member States which, in accordance with the relevant Act of Accession, do not yet fully apply the *acquis* shall nevertheless participate in evaluation of all parts of the *acquis*.

Amendment

Experts from the Member States which, in accordance with the relevant Act of Accession, do not yet fully apply the *acquis* shall nevertheless participate in evaluation **and monitoring** of all parts of the *acquis*.

Experts from the Member States which, according to Decision 2000/365/EC and Decision 2002/192/EC, apply the Schengen acquis only in part, shall participate only in the evaluation of those parts of the acquis that are applicable to those Member States.

Amendment 20

Proposal for a regulation Article 3 – paragraph 1

Text proposed by the Commission

1. The Commission shall be responsible for implementation of this evaluation mechanism in close cooperation with the Member States and with the support of European bodies, as specified in this Regulation.

Amendment

1. The Commission shall be responsible for implementation of this evaluation **and monitoring** mechanism in close cooperation with the Member States and with the support of European bodies, as specified in this Regulation, **including Frontex, Europol and Eurojust.**

Amendment 21

Proposal for a regulation Article 5 – paragraph 1

Text proposed by the Commission

1. A multiannual evaluation programme covering a period of five years shall be established by the Commission, **in**

Amendment

1. A multiannual evaluation programme covering a period of five years shall be established by the Commission, not later

accordance with the procedure referred to in Article 15(2), not later than six months before the start of the next five-year period.

than six months before the start of the next five-year period. ***The implementing acts establishing that programme shall be adopted in accordance with the examination procedure referred to in Article 15(2).***

Amendment 22

Proposal for a regulation Article 5 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. The multiannual programme may contain references to thematic and/or regional evaluations as referred to in Article 8(1).

Amendment 23

Proposal for a regulation Article 6 – paragraph 1

Text proposed by the Commission

Amendment

1. By not later than 30 September each year, Frontex shall submit to the Commission a risk analysis taking into account migratory pressure and making recommendations for priorities for evaluations in the next year. The recommendations shall refer to specific sections of the external borders and to specific border crossing-points to be evaluated in the next year under the multiannual programme. The Commission shall make this risk analysis available to the Member States.

1. By not later than 30 September each year, Frontex shall submit to the Commission a risk analysis taking into account migratory pressure and making recommendations for priorities for evaluations in the next year. The recommendations shall refer to specific sections of the external borders and to specific border crossing-points to be evaluated in the next year under the multiannual programme. The Commission shall make this risk analysis available to the Member States ***and to the European Parliament without delay.***

Amendment 24

Proposal for a regulation Article 6 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. By the same deadline as stated in paragraph 1, Europol shall submit to the Commission a risk analysis regarding corruption and organised crime, in so far as corruption and organised crime may undermine the application of the Schengen acquis by the Member States, together with recommendations for priorities for evaluations in the next year. The recommendations shall refer to specific sections of the external borders and to specific border crossing points to be evaluated in the following year under the multiannual programme. The Commission shall make that risk analysis available to the Member States and to the European Parliament without delay.

Amendment 25

Proposal for a regulation Article 6 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. By the same deadline as stated in paragraph 1, the Fundamental Rights Agency shall submit to the Commission a risk analysis regarding the fundamental rights situation at external and internal borders, paying special attention to compliance with the abolition of checks at internal borders, and making recommendations for priorities for evaluations in the following year. The Commission shall make that risk analysis available to the Member States and the European Parliament without delay.

Amendment 26

Proposal for a regulation Article 6 – paragraph 2

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Text proposed by the Commission

2. By the same deadline as stated in paragraph 1, Frontex shall submit to the Commission a separate risk analysis making recommendations for priorities for evaluations to be implemented in the form of unannounced on-site visits in the next year. These recommendations may concern any region or specific area and shall contain a list of at least ten specific sections of the external borders and ten specific border crossing-points.

Amendment

2. By the same deadline as stated in paragraph 1, Frontex shall submit to the Commission a separate risk analysis making recommendations for priorities for evaluations to be implemented in the form of unannounced on-site visits in the next year. These recommendations ***may take into consideration the annual report of Frontex and*** may concern any region or specific area and shall contain a list of at least ten specific sections of the external borders and ten specific border crossing-points. ***The Commission may at any time request Frontex or Europol to submit to it a risk analysis, based on effective risks for the functioning of the Schengen area, making recommendations for evaluations to be implemented in the form of unannounced on-site visits.***

Amendment 27

**Proposal for a regulation
Article 7 – paragraph 1**

Text proposed by the Commission

1. The Commission shall send a standard questionnaire to the Member States to be evaluated in the next year by not later than 15 August of the previous year. The standard questionnaires shall cover the relevant legislation and the organisational and technical means available for implementation of the Schengen *acquis* and statistical data on each field of the evaluation.

Amendment

1. The Commission shall send a standard questionnaire to the Member States to be evaluated in the next year by not later than 15 August of the previous year. The standard questionnaires ***shall be drawn up in close cooperation with the Member States and*** shall cover the relevant legislation and the organisational and technical means available for implementation of the Schengen *acquis* and statistical data on each field of the evaluation.

Amendment 28

Proposal for a regulation
Article 7 – paragraph 2

Text proposed by the Commission

2. Member States shall provide their replies to the questionnaire to the Commission within six weeks of communication of the questionnaire. The Commission shall make the replies available to the other Member States.

Amendment

2. Member States shall provide their replies to the questionnaire to the Commission within six weeks of communication of the questionnaire. The Commission shall make the replies available to the other Member States **and the European Parliament**.

Amendment 29

Proposal for a regulation
Article 8 – paragraph 1 – introductory wording

Text proposed by the Commission

1. Taking into account the risk analysis provided by Frontex in accordance with Article 6, the replies to the questionnaire referred to in Article 7 and, where appropriate, other relevant sources, an annual evaluation programme shall be established by the Commission by not later than 30 November of the previous year. The programme may provide for evaluation of:

Amendment

1. Taking into account the risk analysis provided by Frontex in accordance with Article 6, the replies to the questionnaire referred to in Article 7 and, where appropriate, **the risk analysis provided by Europol, the Fundamental Rights Agency or** other relevant sources, an annual evaluation programme shall be established by the Commission by not later than 30 November of the previous year. The programme may provide for evaluation of:

Amendment 30

Proposal for a regulation
Article 8 – paragraph 2

Text proposed by the Commission

2. The first section of the programme, **adopted in accordance with the procedure referred to in Article 15(2)**, shall list the Member States to be evaluated in the next year in accordance with the multiannual programme. This section shall list the areas to be evaluated and the on-site visits.

Amendment

2. The first section of the programme shall list the Member States to be evaluated in the next year in accordance with the multiannual programme. This section shall list the areas to be evaluated and the on-site visits **and shall be adopted by the Commission. The implementing acts in that regard shall be adopted in**

accordance with the examination procedure referred to in Article 15(2).

Amendment 31

Proposal for a regulation Article 9

Text proposed by the Commission

Amendment

1. The Commission shall compile a list of experts designated by Member States for participation in on-site visits. The list shall be communicated to the Member States.

2. Member States shall indicate the areas of expertise of each expert with reference to the areas listed in the Annex to this Regulation. Member States shall notify the Commission of any changes as soon as possible.

3. Member States shall indicate which experts can be made available for unannounced on-site visits in accordance with the requirements set out in Article 10(5).

4. The experts shall have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation mechanism, along with sound knowledge of evaluation principles, procedures and techniques, and shall be able to communicate effectively in a common language.

5. Member States shall ensure that **their designated experts meet the requirements specified in the previous paragraph, including by indicating the training the experts have received. In addition, Member States shall ensure that the**

The experts ***participating in on-site visits*** shall have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation mechanism, ***including respect for fundamental rights***, along with sound knowledge of evaluation principles, procedures and techniques, and shall be able to communicate effectively in a common language. ***To that end***, Member States, ***in cooperation with Frontex***, shall ensure that the experts receive ***relevant*** training.

experts receive *continuous* training *in order to continue to comply with these requirements*.

Amendment 32

Proposal for a regulation Article 10 – paragraph 1

Text proposed by the Commission

1. *On-site visits shall be carried out by teams appointed by the Commission. The teams shall consist of experts drawn from the list of experts referred to in Article 9 and Commission officials. The Commission shall ensure the geographical balance and competence of the experts in each team.* Member States' experts may not participate in an on-site visit to the Member State where they are employed.

Amendment

1. The teams *responsible for on-site visits* shall consist of experts *designated by Member States* and *of* Commission *representatives*. Member States' experts may not participate in an on-site visit to the Member State where they are employed.

Amendment 33

Proposal for a regulation Article 10 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The Commission shall invite Member States to designate experts who are available for participation in the respective on-site visits, indicating their area of expertise. In the case of announced visits, the Commission shall invite Member States to designate experts not later than six weeks before the planned date of the on-site visit. Member States shall designate the experts within one week of receiving that invitation. In the case of unannounced visits, the Commission shall invite Member States to designate experts not later than two weeks before the planned date of the on-site visit. Member States shall designate the

experts within 72 hours of receiving that invitation. The Member States and the designated experts shall commit themselves to the obligation to respect confidentiality regarding the unannounced on-site visits.

Amendment 34

Proposal for a regulation Article 10 – paragraph 2

Text proposed by the Commission

2. The Commission *may* invite Frontex, Europol, Eurojust or other relevant European bodies to designate a representative to take part as an observer in a visit concerning an area covered by their mandate.

Amendment

2. The Commission *shall* invite *the European Parliament*, Frontex, *and where appropriate*, Europol, Eurojust or other relevant European bodies to designate a representative to take part as an observer in a visit concerning an area covered by their mandate. *The Commission shall define a clear mandate for the participating representatives including duration, responsibilities and functions.*

Amendment 35

Proposal for a regulation Article 10 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. The European Data Protection Supervisor and the national supervisory authorities, each acting within the scope of their respective competences, shall be invited to participate in on-site visits concerning data protection.

Amendment 36

Proposal for a regulation Article 10 – paragraph 3

Text proposed by the Commission

Amendment

3. The number of experts (***including observers***) participating in evaluation visits may not exceed eight persons for announced on-site visits and six persons for unannounced on-site visits.

3. The number of ***Member States'*** experts participating in evaluation visits may not exceed eight persons for announced on-site visits and six persons for unannounced on-site visits. ***If the number of experts designated by Member States exceeds the maximum number, the Commission, after consulting the Member States concerned, shall appoint the members of the team on the basis of the geographical balance and the competences of the experts.***

Amendment 37

Proposal for a regulation Article 10 – paragraph 4

Text proposed by the Commission

Amendment

4. In the case of announced visits, the Member States whose experts have been appointed in accordance with paragraph 1 shall be notified by the Commission not later than four weeks before the on-site visit is scheduled. Member States shall confirm the availability of the experts within one week.

deleted

Justification

This is now taken up in paragraph 1.

Amendment 38

Proposal for a regulation Article 10 – paragraph 5

Text proposed by the Commission

Amendment

5. In the case of unannounced visits, the Member States whose experts have been appointed in accordance with paragraph 1 shall be notified by the Commission not

deleted

later than one week before the on-site visit is scheduled. Member States shall confirm the availability of the experts within 48 hours.

Justification

This is now taken up in paragraph 1.

Amendment 39

**Proposal for a regulation
Article 10 – paragraph 6**

Text proposed by the Commission

6. The leading experts for on-site visits shall be a Commission ***official*** and an expert from a Member State, who shall be appointed prior to the on-site visit jointly by the members of the team of experts.

Amendment

6. The leading experts for on-site visits shall be a Commission ***representative*** and an expert from a Member State, who shall be appointed prior to the on-site visit jointly by the members of the team of experts.

Amendment 40

**Proposal for a regulation
Article 11 – paragraph 2**

Text proposed by the Commission

2. The Member State concerned shall be notified:

– at least two months before an announced on-site visit is due to take place;

– ***at least 48 hours before an unannounced on-site visit takes place.***

Amendment

2. The Member State concerned shall be notified at least two months before an announced on-site visit is due to take place.

Amendment 41

Proposal for a regulation

Article 11 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. The Member State concerned shall not be notified before an unannounced on-site visit takes place.

Amendment 42

Proposal for a regulation

Article 11 – paragraph 4

Text proposed by the Commission

Amendment

4. The Member State concerned shall ensure that the team of experts can directly address relevant persons. It shall ensure that the team has access to all areas, premises and documents required for the evaluation. It shall ensure that the team is able to exercise its mandate to verify the activities in the areas to be evaluated.

4. The Member State concerned shall ensure that the team of experts can directly address relevant persons. It shall ensure that the team has access to all areas, premises and documents required for the evaluation. It shall ensure that the team is able to exercise its mandate to verify the activities in the areas to be evaluated, ***in particular by making available ad hoc translation and interpretation from the language of the Member State concerned into the common language, as referred to in Article 9(4).***

Amendment 43

Proposal for a regulation

Article 11 – paragraph 7

Text proposed by the Commission

Amendment

7. The Member States shall be responsible for making the necessary travel and accommodation arrangements for their experts. The travel and accommodation costs for experts participating in the visits shall be reimbursed by the Commission.

7. The Member States shall be responsible for making the necessary travel and accommodation arrangements for their experts. The travel and accommodation costs for experts participating in the visits shall be reimbursed by the Commission. ***In the case of unannounced on-site visits, the***

Commission shall designate a contact point for making the practical arrangements for the on-site visit.

Justification

In the case of unannounced on-site visits there is strict time restriction and therefore it is necessary that the Commission is held responsible for designating a contact point regarding the practical arrangements of the visit.

Amendment 44

**Proposal for a regulation
Article 12**

Text proposed by the Commission

Notwithstanding Article 10, teams for unannounced on-site visits to verify the absence of controls at internal borders shall consist of Commission ***officials only***.

Amendment

Notwithstanding Article 10, teams for unannounced on-site visits to verify the absence of controls at internal borders shall consist of ***three*** Commission ***representatives and three experts from the Member States***.

Justification

In order to underline the fact that the evaluation mechanism is based on the principle of close cooperation of the Commission and Member States, experts from the Member States should also participate in on-site visits concerning the abolition of controls at internal borders. See amendment concerning recital 10.

Amendment 45

**Proposal for a regulation
Article 13 – paragraph 1 – point b**

Text proposed by the Commission

(b) In the case of announced on-site visits, the report shall be drawn up by the team during the visit. The Commission ***official*** shall take overall responsibility for drafting the report and ensuring its integrity and quality. In case of disagreement, the team shall endeavour to reach a compromise. Dissenting opinions ***may*** be included in the

Amendment

(b) In the case of announced on-site visits, the report shall be drawn up by the team during the visit. The Commission ***representative*** shall take overall responsibility for drafting the report and ensuring its integrity and quality. In case of disagreement, the team shall endeavour to reach a compromise. Dissenting opinions

report.

shall be included in the report.

Amendment 46

Proposal for a regulation Article 13 – paragraph 2

Text proposed by the Commission

2. The report shall analyse the qualitative, quantitative, operational, administrative and organisational aspects, as appropriate, and shall list any shortcomings or weaknesses established during the evaluation. The report shall contain recommendations for remedial action and deadlines for implementing them.

Amendment

2. The report shall analyse the qualitative, quantitative, operational, administrative and organisational aspects, as appropriate, and shall list any shortcomings or weaknesses ***within and beyond the control of the relevant Member States which are*** established during the evaluation. The report shall contain recommendations for remedial ***or supplementary*** action and deadlines for implementing them.

Amendment 47

Proposal for a regulation Article 13 – paragraph 4

Text proposed by the Commission

4. The Commission shall communicate the report to the Member State concerned within ***six*** weeks of the on-site visit or of receipt of the replies to the questionnaire, as appropriate. The Member State concerned shall provide its comments on the report within two weeks.

Amendment

4. The Commission shall communicate the ***draft*** report to the Member State concerned within ***four*** weeks of the on-site visit or of receipt of the replies to the questionnaire, as appropriate. The Member State concerned shall provide its comments on the report within two weeks.

Justification

In case of serious deficiencies in the system a rapid reaction is needed in order to maintain confidence in the Schengen system.

Amendment 48

Proposal for a regulation Article 13 – paragraph 5 – subparagraph 1

Text proposed by the Commission

The Commission expert shall present the report and the reply from the Member State to the committee established in accordance with Article 15. Member States shall be invited to comment on the replies to the questionnaire, the report and the comments by the Member State concerned.

Amendment

The Commission expert shall present the **draft** report and the reply from the Member State to the committee established in accordance with Article 15. Member States shall be invited to comment on the replies to the questionnaire, the **draft** report and the comments by the Member State concerned.

Amendment 49

Proposal for a regulation

Article 13 – paragraph 5 – subparagraph 2

Text proposed by the Commission

The recommendations addressing the classification of the findings referred to in paragraph 3 shall be adopted **by the Commission** in accordance with the procedure referred to in Article 15(2).

Amendment

On that basis, the Commission shall decide on the evaluation report and recommendations addressing the classification of the findings referred to in paragraph 3. **The implementing acts relating thereto** shall be adopted in accordance with the **examination** procedure referred to in Article 15(2).

Amendment 50

Proposal for a regulation

Article 13 – paragraph 5 – subparagraph 3

Text proposed by the Commission

Within one month after adoption of the report, the Member State concerned shall provide the Commission with an action plan to remedy any weaknesses identified.

Amendment

Within one month after adoption of the report, the Member State concerned shall provide the Commission with an action plan to remedy any weaknesses identified. **If the report is based on thematic or regional evaluations and concerns more than one Member State, the action plans of the Member States concerned shall be coordinated.**

Amendment 51

Proposal for a regulation

Article 13 – paragraph 5 – subparagraph 4

Text proposed by the Commission

After consulting the team of experts, the Commission shall present its assessment of the adequacy of the action plan to the committee established in accordance with Article 15. Member States shall be invited to comment on the action plan.

Amendment

After consulting the team of experts, **and within one month of receiving the action plan from the Member State concerned**, the Commission shall present its assessment of the adequacy of the action plan to the committee established in accordance with Article 15. Member States shall be invited to comment on the action plan. **The European Parliament shall also, upon request, be informed of the assessment of adequacy of the action plan by the Commission.**

Amendment 52

Proposal for a regulation

Article 13 – paragraph 6 – subparagraph 1

Text proposed by the Commission

The Member State concerned shall report to the Commission on implementation of the action plan within **six** months of receipt of the report and shall thereafter continue to report every three months until the action plan is fully implemented. Depending on the severity of the weaknesses identified and the measures taken to remedy them, the Commission **may schedule** announced visits in accordance with the procedure referred to in Article 15(2) **to verify implementation of the action plan**. The Commission may also schedule unannounced on-site visits.

Amendment

The Member State concerned shall report to the Commission on implementation of the action plan within **four** months of receipt of the report and shall thereafter continue to report every three months until the action plan is fully implemented. Depending on the severity of the weaknesses identified and the measures taken to remedy them, the Commission **shall decide on** announced visits **to verify implementation of the action plan. The implementing acts in that regard shall be adopted** in accordance with the **examination** procedure referred to in Article 15(2). The Commission may also schedule unannounced on-site visits.

Amendment 53

Proposal for a regulation
Article 13 – paragraph 6 – subparagraph 2

Text proposed by the Commission

The Commission shall inform the committee established in accordance with Article 15, on a regular basis, about implementation of the action plan.

Amendment

The Commission shall inform the committee established in accordance with Article 15, on a regular basis, about implementation of the action plan. ***The European Parliament may also request the Commission to report without delay on the stage reached in the implementation of the action plan.***

Justification

The European Parliament must be able to ask the Commission for information on the progress made in the implementation of the action plans established by Member States in response to deficiencies in the application of the Schengen acquis.

Amendment 54

Proposal for a regulation
Article 13 – paragraph 7

Text proposed by the Commission

7. If an on-site visit reveals a serious deficiency deemed to have a significant impact on the overall level of security of one or more Member States, the Commission, on its own initiative or at the request of a Member State, shall inform the Council and the European Parliament as soon as possible.

Amendment

7. If an on-site visit reveals a serious deficiency deemed to have a significant impact on the overall level of security of one or more Member States, the Commission, on its own initiative or at the request ***of the European Parliament or*** of a Member State, shall inform the Council and the European Parliament as soon as possible ***and keep them regularly informed during the six-month support period in accordance with Article 13a and after taking any decision on a possible follow-up in accordance with Article 13b.***

Amendment 55

Proposal for a regulation
Article 13 a (new)

Text proposed by the Commission

Amendment

Article 13a

Support measures at the external borders
In the event of a serious deficiency within the meaning of Article 13(7) being detected, Frontex shall set up a team of experts which, for a period of six months following the detection of the serious deficiency, shall support the Member State concerned in remedying the deficiency. Member States' experts may participate in the team. The Commission may also establish financial support measures to help the Member State concerned.

Justification

Serious deficiencies which may have a significant impact on the overall level of security of one or more Member States must be remedied as a matter of urgency in order to restore mutual trust. Frontex as the specialised EU agency can play a vital part in supporting the Member State concerned in addressing the deficiency.

Amendment 56

Proposal for a regulation
Article 13 b (new)

Text proposed by the Commission

Amendment

Article 13b

Measures at the external borders and Frontex support

1. Where serious deficiencies in the carrying-out of external border control are identified in the evaluation report, and with a view to ensuring compliance with the recommendations referred to in Article 13(5), the Commission may decide to request the evaluated Member State to take certain specific measures, which may include one or more of the following:
— initiation of the deployment of

European Border Guard Teams, in accordance with Regulation No 2007/2004;

– submission of its strategic decisions on risk assessment and plans for the deployment of technical equipment for approval to Frontex;

– closing of a specific border crossing-point for a limited period of time until the weaknesses are remedied.

The implementing acts in that regard shall be adopted in accordance with the examination procedure referred to in Article 15(2).

2. The Commission shall inform the committee established in accordance with Article 15 on a regular basis on the progress in the implementation of the measures referred to in paragraph 1 and on its impact on the deficiencies identified. The European Parliament shall also be informed by the Commission, without delay.

Justification

If a Member State, after a six-month period and despite support from Frontex, has not remedied the serious deficiency, there should be a possibility for the Commission, in cooperation the committee composed of Member States' representatives, to decide on follow-up measures including sanctions.

Amendment 57

Proposal for a regulation

Article 13 c (new)

Text proposed by the Commission

Amendment

Article 13c

Serious deficiencies relating to external border controls

1. Notwithstanding the four-month period for reporting on the implementation of an action plan referred to in Article 13(6), if

the evaluation report referred to in Article 13(5) concludes that the evaluated Member State is seriously neglecting its obligation to carry out external border control, the evaluated Member State shall report on the implementation of the action plan within three months of receipt of the evaluation report.

2. If, following expiry of the three-month period referred to in paragraph 1, the Commission finds that the situation persists, Articles 23a and 26 of 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 movement of persons across borders (Schengen Borders Code)¹ shall apply.

¹ OJ L 105, 13.4.2006, p. 1.

Amendment 58

Proposal for a regulation Article 14

Text proposed by the Commission

The teams shall regard as confidential any information they acquire in the course of performing their duties. The reports drawn up following on-site visits shall be classified as restricted. The Commission, after consulting the Member State concerned, shall decide which part of the report can be made public.

Amendment

The teams shall regard as confidential any information they acquire in the course of performing their duties. The reports drawn up following on-site visits shall be classified as restricted. ***That classification shall not preclude the report from being made available in full to the European Parliament.*** The Commission, after consulting the Member State concerned, shall decide which part of the report can be made public.

Amendment 59

Proposal for a regulation Article 15 – paragraph 1

Text proposed by the Commission

1. The Commission shall be assisted by a committee ***made up of representatives of the Member States and chaired by the representative of the Commission.***

Amendment

1. The Commission shall be assisted by a committee. ***That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.***

Justification

The amendment aims to ensure that the new comitology rules under the Treaty of Lisbon apply.

Amendment 60

Proposal for a regulation Article 15 – paragraph 2

Text proposed by the Commission

2. Where reference is made to this paragraph, ***Articles 4, 7 and 8 of Decision 1999/468/EC shall apply.***

Amendment

2. Where reference is made to this paragraph, ***Article 5 of Regulation (EU) No 182/2011 shall apply. Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.***

Justification

The amendment aims to ensure that the new comitology rules under the Treaty of Lisbon apply. In order to ensure adequate participation of Member States' representatives the examination procedure provided for in Article 5 of Regulation (EU) No 182/2011 should be chosen. This procedure makes sure that the Commission's proposals are supported by a qualified majority of the committee of experts. By contrast, under the advisory procedure provided for in Article 4 the Commission may adopt an implementing act even if a majority of Member States' representatives opposes it.

Amendment 61

Proposal for a regulation Article 16 – paragraph 2

Text proposed by the Commission

2. The first risk analysis to be provided **by Frontex** in accordance with Article 6 shall be provided to the Commission not later than three months after this Regulation enters into force.

Amendment 62

**Proposal for a regulation
Article 17**

Text proposed by the Commission

Article 17

Information of the European Parliament

The Commission shall inform the European Parliament of the recommendations adopted by the Commission in accordance with Article 13(5).

Amendment 63

**Proposal for a regulation
Article 18 – introductory wording**

Text proposed by the Commission

The Commission shall present a yearly report to the European Parliament and the Council on the evaluations carried out pursuant to this Regulation. The report shall be made public and shall include information on:

Amendment

2. The first risk analysis to be provided in accordance with Article 6 shall be provided to the Commission not later than three months after this Regulation enters into force.

Amendment

Article 17

**Information of the European Parliament
and the Council**

The Commission shall inform the European Parliament **and the Council** of the recommendations adopted by the Commission in accordance with Article 13(5).

Amendment

The Commission shall present a **comprehensive** yearly report to the European Parliament and the Council on the evaluations carried out pursuant to this Regulation. The report shall be made public and shall include information on:

Amendment 64

Proposal for a regulation Article 19

Text proposed by the Commission

Part II of the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def), entitled ‘Implementation committee for the States already applying the Convention’, shall be repealed with effect from one year after the entry into force of this Regulation.

Amendment

The Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def), entitled ‘Implementation committee for the States already applying the Convention’, shall be repealed with effect from one year after the entry into force of this Regulation.

Justification

In the rapporteur's view there should be a uniform evaluation mechanism based on the present Regulation. Therefore the Decision of the Executive Committee should be repealed not only as regards part I but also as regards part II.

Amendment 65

Proposal for a regulation Article 20

Text proposed by the Commission

The Council may decide to carry out the Schengen evaluations referred to in Acts of Accession concluded after the entry into force of this Regulation in accordance with this Regulation.

Amendment

deleted

Justification

As the amendment to Article 1 paragraph 1 already aims at including candidate countries in the new Schengen evaluation mechanism from the outset, Article 20 becomes obsolete.

Amendment 66

Proposal for a regulation Article 21 – paragraph 2

Text proposed by the Commission

This Regulation shall be binding in its entirety and directly applicable in the Member States, in accordance with the *Treaty on the Functioning of the European Union*.

Amendment

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

EXPLANATORY STATEMENT

Background

The creation of the Schengen area in the late 1980s and early 1990s was one of European history's greatest successes, characterised by the absence of controls at shared borders between participating countries and the introduction of freedom of movement within this area. In parallel, various compensatory measures were implemented, in particular the strengthening of controls at external borders and of police, customs and judicial cooperation, the creation of the Schengen Information System, etc.

The abolition of internal border controls requires full mutual trust between the Member States in their capacity to fully implement the accompanying measures allowing those controls to be lifted. Indeed, the security of the Schengen area depends on the rigour and effectiveness with which a Member State carries out controls at its external borders, as well as on the quality and speed with which information is exchanged through the SIS. The fragility or inadequate functioning of any of these elements poses a risk to the security of the European Union and to the efficiency of the Schengen area.

In 1998 a Standing Committee was created with the task of assessing the Member States at two separate stages:

- putting into effect: the committee was to verify whether all the preconditions for application of the Schengen *acquis* had been met so that border controls could be lifted;
- implementation: the mutual trust established when internal controls were lifted was to be maintained and strengthened through assessments of the way in which the Schengen *acquis* was being applied by the Member States.

Following the entry into force of the Amsterdam Treaty in 1999 and the integration of the Schengen *acquis* into the EU, the name of the Standing Committee was changed to Schengen Evaluation Working Group (SCH-EVAL). Its mandate was, however, unchanged and its intergovernmental character was preserved.

Under the Hague Programme, the Commission was invited to submit a proposal to supplement and remedy the weaknesses identified in the existing Schengen evaluation mechanism. In March 2009, the Commission presented two proposals for a Council regulation and a Council decision to establish the legal framework for a single evaluation mechanism to verify and monitor the correct application of the Schengen *acquis*. The Council regulation covered activities relating to the free movement and border control elements of the Schengen *acquis*. The Council decision covered policing measures which compensated for the removal of internal border controls.

The proposals further aimed to respond to the changes in the legal situation following the integration of the Schengen *acquis* into the EU framework, when each provision of the *acquis*

received a legal basis under the first or the third pillar.

The European Parliament was consulted about these two proposals and, proceeding from the opinion given by its the Legal Service regarding the verification whether the legal basis chosen by the Commission was the most appropriate one, concluded that codecision should have been the procedure chosen for the proposal for a regulation. Given that both proposals showed the same shortcomings and, in legal terms, represented two sides of the same coin, i.e. the creation of a single Schengen evaluation system, they should have been treated as a package. In October 2009, the European Parliament rejected the two proposals and invited the Commission to withdraw them and to submit new substantially improved proposals respecting the codecision procedure and taking into account the entry into force of the Treaty of Lisbon.

With the entry into force of the Lisbon Treaty, the third pillar proposal became obsolete and was withdrawn in the 'Omnibus Communication' of December 2009. At the same time, the remaining proposal (the first pillar regulation) was also withdrawn.

Scope of the new proposal

A single new proposal was put forward in November 2010, with the objective of establishing a legal framework for evaluating the correct application of the Schengen *acquis*. This evaluation mechanism is designed to maintain mutual trust between Member States in their capacity to apply, effectively and efficiently, the accompanying measures making it possible to maintain an area without internal borders.

Codecision is proposed as the legislative procedure, the European Parliament being a full participant in the area of justice and home affairs. To enhance transparency, regular reporting to the Council and to the European Parliament is proposed on evaluations carried out, conclusions drawn from evaluations and follow-up measures taken by the Member States concerned.

The proposal further aims at making the Schengen evaluation mechanism more efficient, ensuring the transparent, effective and consistent implementation of the Schengen *acquis*.

This new evaluation mechanism should be based on questionnaires and visits *in situ*, announced or not, and is organised in phases. There should be a multiannual programme of five years (each Member State should be evaluated at least once in the five-year period) with the list of countries that should be evaluated (preparatory phase). The draft programme should be adopted by a comitology procedure.

The same should happen in relation to the annual programme, which should be based on the risk analysis assessment made by Frontex. This programme should establish the evaluations that should take place per country, with or without previous warning (in this case, the list of Member States should be confidential).

Rapporteur's position

The rapporteur applauds the Commission for submitting this new proposal, which not only takes into account some of Parliament's earlier criticisms, but also provides – quite rightly – for a legal basis (Article 77(2)(e) TFEU) entailing the use of the codecision procedure (the ordinary legislative procedure).

A new Schengen evaluation mechanism needs to be established along the following lines:

- it should be more Community oriented (and based on a European approach and the involvement of the Community institutions as opposed to a purely intergovernmental approach);
- it should be more transparent (and hence impose an obligation to inform the Council and Parliament about the outcome of on-site visits and about Commission recommendations and their implementation);
- it should make for greater cooperation (striking a balance between the Commission and Member States in terms of their participation by allowing European and national experts to participate to the full);
- it should utilise resources more effectively (by involving Frontex and drawing on its experience and risk analyses);
- it should be more effective (teams should be less ‘cumbersome’);
- it should make for greater rigour (enabling accurate assessment to be brought to bear on the degree of compliance with Schengen rules and providing for prompt corrective action to dispel any feelings of impunity).

The rapporteur is opposed to a system based on ‘double standards’ that would be very severe to candidate countries and very lenient with countries already in the Schengen area. He therefore believes that the rules must invariably be the same and that the evaluation system must proceed from the premiss that they will continue to be complied with over time and not just at the moment of accession. It thus makes no sense to have different criteria and assessment systems for members and candidates.

The rapporteur wishes to draw attention once again to the importance of mutual trust, the bedrock on which the entire Schengen system is built.

Finally, he has sought to secure the partial participation of the United Kingdom and Ireland so as to enable them to be evaluated as regards police cooperation, SIS/SIRENE operations, and data protection.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

20.6.2012

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the 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(2010)0624 - C7-0370/2010 - 2010/0312 (COD))

Dear Mr Chair,

By letter of 31 May 2012 you informed the Committee on Legal Affairs that your rapporteur, Carlos Coelho, proposes to change the legal basis to Article 77(2) TFEU in combination with Article 74, and asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to consider the issue and indicate whether such an amendment is appropriate. In the meantime, the Committee on Civil Liberties, Justice and Home Affairs voted on the proposal in its meeting on 11 June 2012, changing the legal basis as proposed by the rapporteur.

The Commission presented its proposal for a regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis on the basis of Article 77(2)(e) TFEU. The proposal was accordingly submitted to Parliament under the ordinary legislative procedure.

Parliament's Legal Service had provided, by letter of 12 July 2011, upon request from LIBE, a legal opinion on the proposal, in which it comes to the conclusion as regards the legal basis that the proposal should be based on Article 77(2) TFEU, in combination with Article 74 TFEU. By letter of 14 June 2012, the Legal Service confirmed this analysis, taking into account the new elements introduced by LIBE in its report.

Background

I. The proposal

The first Commission proposals of March 2009 on a revised mechanism for Schengen

evaluation (a "first pillar" Regulation¹, and a "third pillar" decision²) were rejected by Parliament on 20 October 2009, on the grounds that the consultation procedure was not appropriate. The Commission indicated in its Omnibus communication following the adoption of the Lisbon Treaty³, that the proposal on the third pillar part was withdrawn⁴ and that the legal basis of the proposal for the first pillar part was changed to Article 74 TFEU⁵.

With its proposal for a regulation on the establishment of an evaluation mechanism to verify application of the Schengen acquis of 16 November 2010⁶, the Commission withdrew also the "first pillar" part. The proposal of 16 November 2010 was based on Article 77(2)(e) TFEU. The Commission presented a modified proposal on 16 September 2011⁷, while leaving the legal basis unchanged.

The initial proposal suggests an evaluation based on questionnaires and announced or unannounced on-site visits (Article 4), a five-year multiannual evaluation programme (Article 5) and a risk analysis by Frontex (Article 6). It contains details of the questionnaire (Article 7), an annual evaluation programme (Article 8), and rules on how to identify Member States experts (Article 9), how to establish teams for on-site visits (Article 10) and the conduct of those visits (Article 11), as well as provisions as to how the evaluation reports are drawn up (Article 13), including an obligation for the Member State concerned to set up an action plan to remedy weaknesses, and to report to the Commission on the implementation of that plan. Comitology procedures are foreseen for the setting up of the multiannual programme (Article 5(1)), the annual programme (Article 8(2)) and the recommendations in the evaluation report (Article 13(5), 2nd subparagraph). Council and Parliament are informed if "an on-site visit reveals a serious deficiency deemed to have a significant impact on the overall level of security on one or more Member States" (Article 13(7)). Yearly reporting by the Commission to Parliament and Council is prescribed (Article 18).

The modified proposal adds a "monitoring" element (cf. Article 1 and 3). The comitology provisions are replaced by implementing acts. The important new element is the possibility for specific measures in case an evaluation report identifies serious deficiencies in a Member State (Article 14): the Commission may decide to request that Member State to deploy European Border Guard teams in accordance with the Frontex regulation, to submit its strategic plans to remedy the situation to Frontex for approval, or to close a specific border point for a limited period of time until the weaknesses are remedied. Where an evaluation report concludes that a Member State was seriously neglecting its obligation to carry out external border control or return procedures, the proposal (Article 15) requires the evaluated Member State to report on the implementation of the action plan within three months; if the Commission finds that the situation persists, the provisions of the Schengen Borders Code⁸ on

¹ Commission proposal of 4 March 2009 for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis (COM(2009)0102).

² Commission proposal of 4 March 2009 for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen acquis (COM(2009)0105).

³ Communication from the Commission of 2 December 2009 "Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures" (COM(2009)0665).

⁴ Annex 2 to COM(2009)0665.

⁵ Annex 4 to COM(2009)0665.

⁶ COM(2010)0624.

⁷ COM(2011)0559.

⁸ Regulation EC No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a

temporary reintroduction of border control at external borders apply.

Together with this modified proposal for the amendment of the Schengen evaluation mechanism, the Commission submitted a proposal to amend the Schengen Borders Code¹. That proposal provides, under certain conditions, for reintroduction of controls at internal borders through a Commission implementing act adopted using the examination procedure, with a possibility for Member States unilaterally to reintroduce internal border controls, if immediate action is needed. The modified proposal on the Schengen evaluation mechanism refers to these newly proposed provisions of the Schengen Borders Code.

2. Report adopted in LIBE on 11 June 2012

The report adopted in LIBE takes up a number of modifications contained in the modified Commission proposal, but also exhibits some differences. Some main features are the following:

- The LIBE report contains provisions taking up the content of the new Articles 14 and 15 of the modified Commission proposal, i.e. providing for measures at external borders in case of serious deficiencies (Frontex involvement, closing of a border crossing point), by Commission implementing acts, and, as a measure of last resort and in case of a serious threat to public policy or to internal security, for the possibility of reintroducing border control at internal borders (AM 16, 56, 57). LIBE adds a rule on support by Frontex experts for the Member State concerned (AM 55).
- Implementing powers are conferred on the Commission as regards the adoption and adaptation of the multiannual programme and of the first section of the annual evaluation programme, for drafting the evaluation reports and making recommendations on the classification of the findings in the evaluation reports, and for scheduling announced and unannounced visits during the evaluation process and to verify the implementation of the action plan adopted by a Member State to remedy the identified weaknesses (AM 9, 21, 49, 52), as well as in the case of serious deficiencies (see above).
- The monitoring element introduced by the modified proposal is mirrored (AM 10, 11, 13, 20), and this function is explicitly attributed to the Commission (AM 12).
- Requirements to inform the European Parliament are added, i.e. on the risk analysis (AM 23), the replies to the questionnaire (AM 28), the assessment of adequacy of a Member States' action plan by the Commission (AM 51) as well as the implementation of the action plan by the Member States (AM 53), serious deficiencies revealed in the course of on-site visits (AM 54) and classified on-site visit reports (AM 58).
- Specific risk analyses to be provided by Eurojust and the Fundamental Rights Agency are foreseen (AM 24, 25, 29, 61).
- The role of Member States in the evaluation process is strengthened – as compared to the Commission proposals –, e. g. when drawing up the questionnaire (AM 27), and for on-site visits on the experts participating and the reporting (AM 28, 36, 44, 45)
- Participation of other players in the on-site visits is foreseen, including the European Parliament (AM 34) and the European Data Protection Supervisor (AM 35).

Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).

¹ Commission proposal of 16 September 2011 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 border in exceptional circumstances.

II. The legal bases in question

1. Legal basis of the proposal

Both Commission proposals, the initial and the modified proposal, are based on Article 77(2)(e), which reads as follows:

"2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

[...]

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders".

Article 77(1) TFEU – which is referred to in this provision – reads as follows:

"1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders."

2. Proposed change of the legal basis

LIBE, in its request to JURI for an opinion, refers to Article 77(2) TFEU in combination with Article 74 TFEU as legal basis for the proposal and points to the Legal Service opinion of 2011. Article 74 TFEU reads as follows.

"The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament

The full text of Article 77(2) TFEU reads as follows:

"2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders."

III. Analysis

Certain principles emerge from the case law of the Court as regards the choice of legal basis. First, in view of the consequences of the legal basis in terms of substantive competence and procedure, the choice of the correct legal basis is of constitutional importance¹. Secondly, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred upon it by the Treaty². Thirdly, according to the case-law of the Court of Justice, "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure"³. Finally, as regards multiple legal bases, if examination of a EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component⁴. On the other hand, where a measure has several contemporaneous objectives or components which are indissolubly linked with each other without one being secondary and indirect in respect of the others, the measure must be based on the various relevant Treaty provisions⁵.

The legal bases under discussion are Article 77(2)(e) TFEU or Article 77(2) in combination with Article 74 TFEU.

As regards the aim and content of the measure in question, recital 3 as adopted by LIBE (AM 5) explains that the "specific and uniform evaluation and monitoring mechanism" to be established "should ensure high uniform standards in application of the Schengen acquis in practice and maintenance of a high level of mutual trust between those Member States that form part of an area without border control at internal borders." Furthermore, Article 1(1) as adopted by LIBE (AM 18) identifies as purposes of the evaluation and monitoring mechanism: "to ascertain whether all the preconditions for bringing the Schengen acquis into force in a candidate State thereto are fulfilled and to verify application of the Schengen acquis in the Member States to which the Schengen acquis applies in full, to verify the application of the provisions of the Schengen acquis on the Member States to which [...] the Schengen acquis applies in part [...]".

The Commission, in its proposal, argues that the measures proposed should be based on Article 77(2)(e) TFEU as legal basis on the grounds that correct application of the Schengen acquis makes it possible to maintain an area without border control at internal borders, thus

¹ Opinion 2/00 *Carthagna Protocol* [2001] E.C.R. I-9713, para. 5; Case C-370/07 *Commission v. Council* [2009] E.C.R. I-8917, paras 46-49; Opinion 1/08, *General Agreement on Trade in Services* [2009] ECR I-11129, para. 110.

² Case C-403/05 *Parliament v. Commission* [2007] E.C.R. I-9045, para. 49, and the case-law cited therein.

³ See most recently Case C-411/06 *Commission v Parliament and Council* [2009] E.C.R. I-7585.

⁴ Case C-42/97 *Parliament v Council* [1999] E.C.R. I-868, paras. 39-40; Case-C 36/98 *Spain v Council* [2001] E.C.R. I-779, para. 59; Case C-211/01 *Commission v Council* [2003] E.C.R. I-8913, para. 39.

⁵ Case C-165/87 *Commission v. Council* [1988] E.C.R. 5545, para. 11; Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-107, paras. 43-56.

the evaluation and monitoring of the correct application of the Schengen acquis serve the ultimate policy objective of maintaining the area of free movement of persons within the European Union free of border controls at internal borders¹.

However, Article 77(2)(e) TFEU only concerns the measures concerning the absence of controls at internal borders as such, whereas points (a) to (d) of paragraph 2 refer to other related measures concerning visas, checks on the external borders, freedom of movement for third country nationals and measures related to the establishment of an integrated management system for external borders, "for the purposes of [Article 77] paragraph 1", i.e. ensuring the absence of internal border control, carrying out checks on persons and monitoring external borders and the gradual introduction of an integrated management system.

As the text adopted in LIBE refers to the evaluation of the application of the entire Schengen acquis (cf. also AM 15 introducing a new recital 11b, referring to "all relevant legislation and operational activities contributing to the functioning of an area without border control"), it should be based on the whole of paragraph 2 of Article 77 TFEU.

Article 74, the other provision which is to form the legal basis according to the amendment adopted in LIBE, provides for the adoption of measures to ensure administrative cooperation between the authorities of the Member States, as well as between those and the Commission, in the areas covered by Title V of the TFEU. Title V of the TFEU covers "Policies on border checks, asylum and immigration" (Chapter 2), "Judicial cooperation in criminal matters" (Chapter 4) and "Police cooperation" (Chapter 5). Those belong to the Schengen acquis the application of which is being evaluated under the regulation in question.

The question is, now, whether Article 74 TFEU would be necessary as a legal basis alongside Article 77(2) TFEU. Firstly, the application of the Schengen acquis goes beyond the abolition of internal border control, and beyond measures in the field of external borders and visa policy, and also relates to measures, for instance, on police cooperation and judicial cooperation in criminal matters. It therefore appears to be necessary to have recourse to a legal basis that would have a broader coverage, as is the case with Article 74 TFEU.

Furthermore, it needs to be assessed whether the measures foreseen in the text adopted by LIBE would correspond to the ones Article 74 TFEU allows for. The evaluation mechanism underlying the text adopted by LIBE presents itself as a mechanism carried out in cooperation between Member States and the Commission, with the Member States' role slightly stronger than was proposed in the Commission proposal, by at the same time attributing to the Commission a monitoring role (see above point II. 2.). It need not be analysed whether the mechanism is indeed limited to genuine cooperation only. Should any element of this mechanism go beyond the cooperation intended under Article 74 TFEU, it could, by all means, be based on Article 77(2) TFEU.

It should be noted that, in this case, recourse to a dual legal basis would not be excluded from the outset on the ground that the procedures laid down for each legal basis are incompatible

¹ Explanatory memorandum COM (2010)0624, p. 8, COM(2011)0559, p. 4.

with one another¹. The use of a dual legal basis has been held valid where it did not lead to an encroachment upon the European Parliament's rights. In this case, Article 77(2) TFEU provides for the ordinary legislative procedure, whereas Article 74 TFEU foresees consultation of the Parliament only. The Court has held that, in such a case, the ordinary legislative procedure would prevail, as it involves greater participation of Parliament².

The committee considered the above question at its meeting of 19 June 2012. At this meeting, it accordingly decided, by unanimity³, to recommend that the appropriate legal basis for the 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 adopted in LIBE is Article 77(2) in combination with Article 74 TFEU, and thus concluded that the change in the legal basis effected in LIBE is appropriate.

Yours sincerely,

Klaus-Heiner Lehne

¹ Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-107, para. 57; Case C-300/89 *Commission v Council ("Titanium dioxide")* [1991] E.C.R. I-2867, paras 17-25.

² Case C-155/07 *European Parliament v Council* [2008] E.C.R. I-8103, paras. 75-79.

³ The following were present for the final vote: Raffaele Baldassarre (Vice-Chair), Luigi Berlinguer, Sebastian Valentin Bodu (Vice-Chair), Piotr Borys, Cristian Silviu Buşoi, Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne (Chair), Eva Lichtenberger, Antonio Masip Hidalgo, Alajos Mészáros, Evelyn Regner (Vice-Chair), Dagmar Roth-Behrendt, Francesco Enrico Speroni, Keith Taylor, Alexandra Thein, Patrice Tirolien (pursuant to Rule 187(2)), Axel Voss (rapporteur), Cecilia Wikström, Tadeusz Zwiefka.

PROCEDURE

Title	Establishment of an evaluation mechanism to verify application of the Schengen acquis
References	COM(2011)0559 – C7-0370/2010 – COM(2010)0624 – 2010/0312(COD)
Date submitted to Parliament	16.9.2011
Committee responsible Date announced in plenary	LIBE 23.11.2010
Committee(s) asked for opinion(s) Date announced in plenary	BUDG 23.11.2010
Not delivering opinions Date of decision	BUDG 24.11.2010
Rapporteur(s) Date appointed	Carlos Coelho 9.12.2010
Legal basis disputed Date of JURI opinion	JURI 19.6.2012
Date adopted	11.6.2012
Result of final vote	+: 48 –: 0 0: 3
Members present for the final vote	Jan Philipp Albrecht, Roberta Angelilli, Edit Bauer, Mario Borghezio, Rita Borsellino, Emine Bozkurt, Arkadiusz Tomasz Bratkowski, Simon Busuttil, Carlos Coelho, Agustín Díaz de Mera García Consuegra, Ioan Enciu, Frank Engel, Cornelia Ernst, Tanja Fajon, H�el�ene Flautre, Kinga G�al, Nathalie Griesbeck, Sylvie Guillaume, Anna Hedh, Salvatore Iacolino, Sophia in 't Veld, Teresa Jim�enez-Becerril Barrio, Juan Fernando L�opez Aguilar, Clemente Mastella, V�eronique Mathieu, Anthea McIntyre, Louis Michel, Claude Moraes, Jan Mulder, Antigoni Papadopoulou, Georgios Papanikolaou, Carmen Romero L�opez, Judith Sargentini, Birgit Sippel, Renate Sommer, Kyriacos Triantaphyllides, Axel Voss, Renate Weber, Josef Weidenholzer, Cecilia Wikstr�om, Tatjana �Zdanoka
Substitute(s) present for the final vote	Alexander Alvaro, Anna Maria Corazza Bildt, Silvia Costa, Mariya Gabriel, Evelyne Gebhardt, Franziska Keller, �Adam K�osa, Hubert Pirker, Jens Rohde
Substitute(s) under Rule 187(2) present for the final vote	Marina Yannakoudakis
Date tabled	12.7.2012