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**SCHENGEN 39
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COMIX 326
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NOTE

from: Presidency
to: Council/Mixed Committee at Ministerial level

No. prev. doc. 5754/6/12 REV 6 SCHENGEN 7 SCH-EVAL 15 FRONT 8 COMIX 50 CODEC 202
6161/4/12 REV 4 SCHENGEN 9 FRONT 15 SCH-EVAL 17 COMIX 83
CODEC 292

Subject: – Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis
– Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances
- General approach

I. INTRODUCTION

1. On 23 and 24 June 2011, the European Council¹ called, on the one hand, for "*an effective and reliable monitoring and evaluation system*" which "*should be EU-based and involve experts from the Member States, the Commission and competent agencies*", the Commission being invited "*where necessary to propose measures to respond to any deficiencies which are identified*".

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

It also called for the introduction of a mechanism *"to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons [which] should comprise a series of measures to be applied in a gradual, differentiated and coordinated manner in order to assist a Member State facing heavy pressure at the external borders"* and which *"as a very last resort"* could include *"a safeguard clause (...) to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules"*. The Commission was invited to submit a proposal to this end in September 2011.

2. On 19 September 2011 the Commission submitted to the Council a legislative package² composed of:

- (a) 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 acquis³ (hereinafter "the Schengen evaluation mechanism proposal").

This text amends the proposal submitted to the Council in November 2010 for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify the application of the Schengen acquis (16664/10)⁴.

- (b) A proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances⁵ (hereinafter "the proposal on reintroduction of border control").

² See 14357/11.

³ 14358/11.

⁴ The previous proposal (16664/10) had already encountered substantial obstacles, e.g. the legal basis and the degree of involvement of the Commission and relevant EU agencies in the evaluation mechanism.

⁵ 14359/11.

II. STATE OF PLAY

3. After a preliminary debate in the Council (JHA) on 22 September 2011, the proposals were discussed at expert level at several meetings of the Working Party for Schengen Matters (Acquis) and the JHA Counsellors, as well as in COREPER (Mixed Committee) on 23 May 2012 and 30 May 2012.
4. As regards the Schengen evaluation mechanism proposal, the results of the discussions are reflected in a compromise text set out in 5754/6/12 REV 6. The approach represented by this text was broadly supported by a majority of delegations at the meeting of COREPER on 23 May 2012.
5. Throughout the discussions of the Schengen Evaluation proposal the question of legal basis has been a key question. A vast majority of the Member States, as well as the Council Legal Service⁶, consider that the correct legal basis for such a mechanism is Article 70 TFEU, which was specifically inserted in the Treaty for this very purpose. This Article enables the Council, on a proposal from the Commission, to adopt by qualified majority arrangements on mutual evaluations. Furthermore, Article 70 provides that mutual evaluations are to be conducted by the "*Member States, in collaboration with the Commission*" and for the European Parliament and the national parliaments to be "*informed of the content and results of the evaluation*".

At the meeting of COREPER on 30 May 2012 there was broad support for using Article 70 TFEU as the legal basis. However, one delegation could at this stage not agree to a change of legal basis.

6. The Presidency, in the event of agreement on a change of the legal basis, proposes that, in accordance with Article 19(7)(h) of the Council's Rules of Procedure, it is decided to consult the European Parliament on this instrument in order to take the opinion of the European Parliament into consideration, to ensure that the position of the European Parliament is reflected to the furthest extent possible.

⁶ See Opinion of the Council Legal Service of 13 May 2011 in 10148/11 already given in the context of the previous version of the proposal submitted by the Commission (16664/10) complemented by the Opinion of 29 May 2013 in 10463/12.

7. When preparing the compromise texts, the main views of the European Parliament have been taken into account, and the compromise text on the Schengen evaluation mechanism as set out in 5754/6/12 REV 6 is generally in line with the European Parliament as regards the substance.
8. As regards the proposal on reintroduction of border control the results of the discussions are reflected in a compromise text set out in 6161/4/12 REV 4. On 25 April 2012 the European Parliament held an Orientation Vote at the LIBE Committee on this proposal⁷.

III. CONCLUSION

9. **On this basis, and with a view to reaching a general approach on the whole package, the Council is invited to:**
- **agree on the substance of the text of the Schengen evaluation mechanism proposal as set out in the Presidency compromise set out in 5754/6/12 REV 6, and decide that the legal basis is changed from Article 77(2)(e) to Article 70 TFEU. Delegations are on that basis invited to lift their reservations on this proposal;**
 - **agree on the substance of the text of the proposal on reintroduction of border control as set out in the Presidency compromise set out in 6161/4/12 REV 4. Delegations are on that basis invited to lift their reservations on this proposal. The Presidency compromise text will then constitute the basis for the first informal trilogue with the European Parliament on this proposal;**
 - **agree that the European Parliament on a voluntary basis shall be consulted on the Schengen evaluation mechanism proposal, now with the legal basis of Article 70 TFEU, in accordance with Article 19(7)(h) of the Council's Rules of Procedure.**

⁷ See RR\2011_0242_COD_EN.doc PE Orientation vote of 25.04.2012v01-00.