Schengen: evaluation mechanism to verify the application of the Schengen acquis

2009/0033(NLE) - 04/03/2009 - Legislative proposal

PURPOSE: to establish an evaluation mechanism to verify the application of the Schengen acquis.

PROPOSED ACT: Council Regulation.

BACKGROUND: the Schengen area was developed within an intergovernmental framework in the late 80s and beginning of the 90s by Member States willing to abolish internal border controls. This area is based on full mutual trust between the Member States in their capacity to fully implement the accompanying measures allowing the lifting of internal border controls. In order to gain and maintain this mutual trust, the Schengen Member States set up a Standing Committee in with a mandate to: (i) verify whether all preconditions for application of the Schengen acquis (i.e. lifting of border controls) have been met by Member States wanting to join Schengen ('putting into effect/application'); (ii) verify that the Schengen acquis is being correctly applied by the Member States implementing the acquis (implementation').

Once the Schengen acquis became part of the European Union framework (following the entry into force of the Amsterdam Treaty), modifications to this mechanism proved necessary. While, for legal reasons, the "putting into effect/application" part must continue to be managed on an exclusively intergovernmental basis, the same cannot be said for the "implementation" part, particularly for first pillar matters (establishing an Area of freedom, security and justice covered by the Treaty).

In this context, the Commission proposes a new evaluation mechanism for the second part (implementation) of the Schengen acquis, under the terms set out in this proposal.

Moreover, the proposal responds to the need to overcome a number of weaknesses identified by the Member States and the Commission with regard to the current evaluation framework, notably the fact that:

- the current methodology for the evaluation mechanism is inadequate as the rules on consistency and frequency of evaluations are not clear;
- there is no practice of conducting unannounced on-site visits;
- there is a need to develop a methodology for priority-setting based on risk analysis;
- a consistently high quality of expertise during the evaluation exercise needs to be ensured (experts participating in the evaluation should possess an adequate level of legal knowledge and practical experience and the number of experts should be limited);
- the post-evaluation mechanism for assessing the follow-up given to recommendations made after the on-site visits needs improving;
- the institutional responsibility of the Commission as guardian of the Treaty concerning first pillar matters is not reflected in the current evaluation system.

Note that the proposed Regulation goes together with the proposal for a Decision on the establishment of an evaluation mechanism to monitor the application of those elements of the Schengen acquis that are part of Community law (see CNS/2009/0032).

IMPACT ASSESSMENT: the proposal was not subject to an impact assessment.

CONTENT: the main objective of the proposed Regulation is to establish a legal framework for evaluating the correct application of those elements of the Schengen acquis that form part of EU law. It goes together with the proposal for a Decision on the establishment of an evaluation mechanism to monitor the application of those elements of the Schengen acquis that are part of Community law. This double evaluation mechanism is designed to maintain mutual trust between Member States in their capacity to effectively and efficiently apply the accompanying measures allowing the creation of an area without internal borders.

The main elements of the proposal can be summarised as follows:

Methodology for evaluations: this proposal for a Regulation establishes an evaluation mechanism to verify the application of the Schengen acquis **in the Member States to which the Schengen acquis applies in full and in the Member States which have been authorised by the Council to take part in some of the provisions of the Schengen acquis**. Member States which have been authorised to take part in some of the provisions of the Schengen acquis shall only participate in the evaluation of the provisions that are covered by the authorisation and which they already apply.

The Commission is responsible for the implementation of this evaluation mechanism with the help of a coordination group consisting of representatives of the Member States.

The proposal introduces a clear programming, providing for **multiannual and annual programmes** of on-site visits. Member States will continue to be evaluated on a regular basis in order to ensure the overall correct application of the acquis. All parts of the Schengen acquis which have their legal basis in the Treaty establishing the European Community can be the subject of evaluation. A non-exhaustive annex specifies the areas that may be the subject of evaluation.

This evaluation can be based on:

d) replies to questionnaires;

e) on-site visits; or

f) a combination of both. In the latter case, the visits can take place shortly after the replies to the questionnaires are received.

On-site visits may be **announced** or **unannounced** (unlike the proposal for a Decision where only announced on-site visits can be carried out). The concrete need for such visits will be determined by the Commission after seeking the advice of the Member States, taking into account changes in the legislation, procedures or organisation of the Member State concerned as well as the risk analysis provided by Frontex regarding external borders and visas (see below).

Thematic or regional evaluations can also be included in the annual programme.

Both multiannual and annual programmes can always be adapted if need be.

Risk analysis: a risk analysis shall be provided by Frontex before an on-site visit programme is carried out. This risk analysis shall take into account migratory pressure with recommendations for priorities for evaluations in the coming year. The recommendations shall refer to specific sections of the external borders and to specific border crossing points to be evaluated in the coming year. Frontex shall submit to the Commission a separate risk analysis with recommendations for priorities for evaluations to be implemented **through unannounced on-site visits** in the coming year.

Expertise of the Member States: the Commission shall establish a list of experts designated by Member States, Europol and Eurojust for participation in on-site visits. Those national experts shall be selected by the Member States on the basis of their competences. In order to guarantee a high quality of expertise, Member States must ensure that the experts have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation, as well as a sound knowledge of on-site visit principles, procedures and techniques.

On-site visits shall be carried out by teams appointed by the Commission. Only a proportion of the experts shall be responsible for unannounced on-site visits. The number of experts participating in the announced on-site visits may not exceed eight persons and six persons for unannounced visits.

The Commission shall ensure the geographical balance and competence of the experts taking part in each team. Member State experts may not participate in an on-site visit to the Member State where they are employed. The members of the team shall also agree jointly on the appointment of a coordinating expert, who shall be responsible for conducting the on-site visits.

Experts of Frontex may also participate in the evaluation as observers.

The proposal also contains provisions on the conduct of on-site visits.

Follow-up of the evaluation: a report shall be drawn up following each evaluation. The report shall be based on the findings of the on-site visit and the questionnaire as relevant. It shall analyse the qualitative, quantitative, operational, administrative and organisational aspects as relevant and shall list any shortcomings or weaknesses established during the evaluation. It shall also contain recommendations for remedial action as well as respective deadlines for their implementation.

Within two weeks, the Member State concerned should provide its comments on the report and within six weeks an action plan on how to remedy the weaknesses. The Member State will be obliged to report within six months on the implementation of its action plan. Depending on the weaknesses identified, the Commission may schedule and carry out announced on-site visits in order to verify the correct implementation of the action plan. In the event of serious deficiencies, the Commission has to inform the Council without delay. This does not affect the Commission's power to initiate an infringement procedure at any stage of the evaluation.

Sensitive information: 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 and the Member State concerned shall decide which part of the report can be made public.

Report: the Commission shall present a yearly report to the Council and the European Parliament on the evaluations carried out pursuant to this Decision. The report shall be made public and shall include information on the conclusions in relation to each evaluation and the state-of-play with regard to remedial actions as well as any infringement procedures initiated by the Commission as a result of the evaluations.

Territorial provisions: for legal reasons established in the Treaty, the United Kingdom and Ireland shall take part in the implementation and application of this text. The same is true for Denmark, but Denmark shall have a period of six months to adopt this text. The participation of these three countries shall, however, be limited to certain defined areas. For specific legal reasons, Cyprus, Bulgaria and Romania shall also take part in this mechanism but only regarding those parts of the acquis which they already apply. Lastly, Norway, Iceland, Switzerland and Lichtenstein shall take part in the implementation of this text in accordance with the bilateral agreements concluded with the EU on the Schengen acquis.

BUDGETARY IMPLICATIONS: the Commission has prepared a common financial statement annexed to the draft Regulation the parallel draft Decision on the establishment of an evaluation mechanism to monitor the correct application of the Schengen acquis under Title IV of the EC Treaty. This statement provides for a financial envelope of between EUR 560 000 and EUR 730 000 per year for the implementation of this mechanism, in terms of operational expenses only, until 2013). Adequate human and financial resources will have to be allocated to the Commission, which will be responsible for the new Schengen evaluation mechanism. Costs incurred by the Member State experts will also be reimbursed.