Evaluation and monitoring mechanism to verify the application of the Schengen acquis

2010/0312(NLE) - 16/11/2010 - Initial legislative proposal

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

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: the Schengen area was developed within an intergovernmental framework in the late ’ 80s and early ’90s by Member States willing to abolish internal border controls. It is based on mutual trust between the Member States in their capacity fully to 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 1998. Its mandate consists of two separate tasks: (i) verification whether all preconditions for application of the Schengen *acquis* have been met by Member States wanting to join Schengen; (ii) verification that the Schengen *acquis* is being correctly applied by the Member States implementing the *acquis*.

Due to legal reasons related to the integration of the Schengen acquis in the framework of the European Union, it is necessary to revise the evaluation mechanism set up in 1998 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).

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.

It should be noted that this proposal replaces the proposals to establish a similar evaluation mechanism proposed in 2009 and which lapsed due to the entry into force of the Lisbon Treaty (see CNS/2009/0032 and CNS/2009/0033).

LEGAL BASIS: Article 77(2)(e) of the Treaty on the Functioning of the European Union (TFEU).

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

CONTENT: the main objective of the proposed Regulation is to establish an evaluation mechanism to verify application of the Schengen acquis in the Member States to which the Schengen acquis applies in

full. Experts from the Member States which, in accordance with the relevant Act of Accession, do not yet fully apply the acquis (Bulgaria, Romania and Cyprus) shall nevertheless participate in evaluation of all parts of the acquis.

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

Responsibilities: 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, such as Frontex. Member States shall cooperate with the Commission to allow it to carry out the tasks conferred on it by this Regulation. Member States shall also cooperate with the Commission during the preparatory, on-site visit, reporting and follow-up phases of evaluations.

Evaluations: evaluations may consist of **questionnaires and on-site visits**. Both may be supplemented by presentations by the evaluated Member State on the area covered by the evaluation. On-site visits and questionnaires may be used either independently or in combination in relation to specific Member States and/or specific areas. On-site visits may be announced or unannounced.

Multiannual programme: a multiannual evaluation programme covering a **period of five years** shall be established by the Commission which shall contain the list of Member States to be evaluated **each year**. Each Member State shall be evaluated at least once during each five-year period. The order in which the Member States are to be evaluated shall be based on a **risk analysis** taking into account the migratory pressure, internal security, the time which has elapsed since the previous evaluation and the balance between the different parts of the Schengen acquis to be evaluated. **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.

Taking into account the risk analysis provided by Frontex, 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 the (i) application of the acquis or parts of the acquis by one Member State, as specified in the multiannual programme; (ii) application of specific parts of the acquis across several Member States (thematic evaluations); (iii) application of the acquis by a group of Member States (regional evaluations).

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. Experts shall be able to communicate effectively in a common language.

Teams responsible for on-site visits: 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 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. 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. 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.

Provisions are laid down as regards the case of announced and unannounced visits. Under both circumstances, 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.

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.

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 and the European Parliament without delay.

Transitional provisions are also laid down as regards the starting dates for the programmes.

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 application: the legal basis for this proposal is in Title V, Part Three of the Treaty on the Functioning of the European Union. The ‘variable geometry’ system provided for in the protocols on the position of the United Kingdom, Ireland and Denmark and in the Schengen protocol therefore applies.

Consequently, the United Kingdom and Ireland shall not participate in the adoption of the Regulation and shall not be bound or subject to its application. Denmark may decided to apply the Regulation or not as the case may be. 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 IMPLICATION: the Commission has set out a financial statement annexed to the draft Regulation. This financial statement creates a new budget line allocating a financial envelope of between EUR 526 000 and EUR 730 000/year from 2012 to 2014. 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.