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

2010/0312(NLE) - 07/10/2013 - Final act

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

NON-LEGISLATIVE ACT : Council Regulation (EU) No 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

BACKGROUND : the Schengen area without border control at internal borders relies on the effective and efficient application by the Member States of accompanying measures in the areas of external borders, visa policy, the Schengen Information System (SIS), data protection, police cooperation, judicial cooperation in criminal matters and drugs policies.

By the Decision of the Executive Committee of 16 September 1998 (SCH/Com-ex (98) 26 def), a Standing Committee on the evaluation and implementation of Schengen was set up and asked to establish **whether all the preconditions for lifting border control at internal borders with a candidate State have been fulfilled** and then, to **ensure that the Schengen acquis is properly applied by the States already implementing it in full.**

However, it seems necessary to set up a new evaluation and monitoring mechanism to verify application of the Schengen acquis given the need to:

- ensure high uniform standards in the application of the Schengen acquis in practice;
- to maintain 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.

The objective of this Regulation is to revise the evaluation mechanism set up in 1998 to cover all areas of the Schengen acquis except those where a specific evaluation mechanism already exists under Union law.

It should be noted that the Regulation was adopted at the end of some Interinstitutional disagreement between the European Parliament and the Council, which revolved around the **appropriate legal basis** for the Regulation.

The text which was adopted in the end is based on **Article 70 of the Treaty on the Functioning of the European Union** which provides that the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies concerned by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

The Council's choice of this legal basis meant, however, that:

- the Regulation was **not adopted in accordance with the ordinary legislative procedure**;

- the **implementing power to adopt the recommendations** for remedial action are conferred on the Council, mirroring the specific powers conferred by the TFEU, in the field of mutual evaluation of the implementation of Union policies within the area of freedom, security and justice.

After intense negotiations, Parliament finally succeeded in guaranteeing its involvement both in the current procedure and in future initiatives in this field.

CONTENT : the Regulation aims to establish an evaluation mechanism to verify the application of the Schengen acquis in Member States.

Scope: in particular, the Regulation aims to:

- verify application of the Schengen acquis in the Member States to which the Schengen acquis applies in full as well as in Member States to which, in accordance with the relevant Protocols annexed to the TEU and to the TFEU, the Schengen acquis applies in part;

- verify that the necessary conditions for the application of all relevant parts of the Schengen acquis have been met in those Member States in respect of which a Council decision stating that the provisions of the Schengen acquis shall apply in full or in part has not been taken, with the exception of those Member States whose evaluation had already been completed at the time of entry into force of this Regulation. Experts from the Member States, which, in accordance with the relevant Act of Accession, do not yet fully apply the Schengen acquis, shall nevertheless participate in evaluation of all parts of the Schengen acquis.

Responsibilities: Member States and the Commission shall be jointly responsible for implementation of the evaluation and monitoring mechanism, with the support of the EU bodies, offices and agencies involved in the implementation of the Schengen acquis.

The Commission shall have an overall coordination role in relation to the annual and multiannual programming, the drafting of the questionnaire and the schedules of the visits, the conduct of the visits and the drafting of the evaluation reports and recommendations. It shall also ensure the follow-up and monitoring of the evaluation reports and recommendations.

Member States and the Commission shall **cooperate fully at all stages of evaluations**.

Evaluations: evaluations may cover all aspects of the Schengen acquis, including the effective and efficient application by the Member States of accompanying measures in the areas of:

- external borders,

- visa policy,

- the Schengen Information System,

- data protection,

- police cooperation,

- judicial cooperation in criminal matters,

- the absence of border control at internal borders.

Evaluations may **consist of questionnaires and of on-site visits which may be announced or unannounced.**

Multiannual evaluation programme: a multiannual evaluation programme **covering a period of five years** shall be established by the Commission where appropriate after consulting Frontex and Europol, not later than six months before the start of the next five-year period. The Commission shall transmit the multiannual evaluation programme to the European Parliament and the Council.

Each Member State shall be evaluated during each five-year period covered by a multiannual evaluation programme. The multiannual evaluation programme shall list the order of Member States to be evaluated each year.

The first multiannual evaluation programme shall be established by **27 May 2014**. The starting date of that programme shall be 27 November 2014 and the end date shall be 31 December 2019.

Annual evaluation programme: the Commission shall establish an annual evaluation programme, taking into account notably the **risk analysis provided by Frontex** and where appropriate information provided by Europol or other Union bodies.

- The first section of the annual evaluation programme, including a provisional time-schedule of the on-site visits shall list the Member States to be evaluated in the next year in accordance with the multiannual evaluation programme. That section shall list the areas to be evaluated and the on-site visits – this will be sent to the European Parliament and Council.

- The second section of programme which shall list the unannounced on-site visits to be carried out in the next year. It shall be considered **confidential**.

The first annual evaluation programme shall be established by **27 May 2014**. The starting date of that programme shall be 27 November 2014 and the end date shall be 31 December 2014.

Frontex risk analysis: by 31 August each year, Frontex shall submit to the Commission and the Member States **a risk analysis** in accordance with its mandate and taking into account, inter alia, illegal immigration and significant changes in the operational environment at the external borders, 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 evaluation programme. The Commission shall transmit the risk analysis without delay to the European Parliament and the Council.

At the same time, 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, independently of the Member States to be evaluated in accordance with the multiannual evaluation programme. 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 at least ten specific border crossing points.

The Commission may also, where appropriate, **request Union bodies, offices and agencies, other than Frontex,** to carry out risk analyses, including regarding corruption and organised crime.

Questionnaire: by 1 July of the previous year, the Commission shall send a standard questionnaire to the Member States to be evaluated in the next year. Member States shall provide their replies to the questionnaire to the Commission within eight weeks of communication of the questionnaire. The Commission shall make the replies available to the other Member States and shall inform the European Parliament of the replies. **If so requested by the European Parliament, notably due to the seriousness of the matter,** on a case-by-case basis and in accordance with the applicable rules on relations between the European Parliament and the Commission, the Commission shall also inform the European Parliament of the content of a specific reply.

Teams responsible for on-site visits: the teams responsible for on-site visits shall consist of experts designated by Member States and of Commission representatives. Measures are set out as regards the mobilisation of experts, delays, competences, etc. as well as specific measures in case of unannounced visits.

The number of Member States' experts participating in evaluation on-site visits may not exceed **eight persons** for announced on-site visits and **six persons** for unannounced on-site visits. The Commission may have **two representatives**.

Member States' experts may not participate in an evaluation mission that includes an on-site visit to the Member State where they are employed.

The Commission may invite Frontex, Europol, or other EU bodies to designate a representative to take part as an observer in an on-site visit concerning an area covered by their mandate.

The leading experts for on-site visits shall be a Commission representative and an expert from a Member State, who shall be appointed jointly by mutual agreement.

There are also provisions on:

- the conduct of on-site inspections (whether announced or unannounced);

- the establishment of evaluation reports following evaluations (so to identify the compliance of each Member State and possible improvements if necessary). The evaluation report shall analyse the qualitative, quantitative, operational, administrative and organisational aspects, as appropriate, and shall list any deficiencies identified during the evaluation.

- the procedure to be followed by the Commission to inform Member States, through a draft report to which the latter must respond within 2 weeks. The final evaluation report must be sent to Parliament.

Recommendations: when drafting the evaluation report and in the light of the findings and the assessments contained in that evaluation report, Member States' experts and the Commission representatives shall draft **recommendations for remedial actions aimed at addressing any deficiencies** and an indication of the priorities for implementing them, as well as examples of good practices where appropriate.

The Council shall adopt the recommendations and shall transmit them to the European Parliament and the national parliaments.

Follow-up and monitoring: within three months after adoption of the recommendations, the Member State concerned shall provide the Commission and the Council with an **action plan to remedy any**

deficiencies identified. If the recommendations conclude that the evaluated Member State is seriously neglecting its obligations, the evaluated Member State shall provide the action plan within one month. The Commission shall transmit the action plan to the European Parliament.

Depending on the seriousness of the deficiencies identified and the measures taken to remedy them, the Commission may schedule announced on-site revisits to verify implementation of the action plan. The Commission may also foresee unannounced on-site revisits.

The Commission shall inform the European Parliament and the Council on a regular basis about the implementation of the action plans or improvements measures.

The Regulation sets out provisions regarding a time-table for reacting to the acting plan proposed by the Member State concerned in terms of whether the plan is judged appropriate or not. Depending on the seriousness of the deficiencies and the remedial measures taken, the Commission may schedule **announced on-site revisits to verify implementation of the action plan.** It may also schedule unannounced on-site revisits. It shall inform the European Parliament and the Council on a regular basis about the implementation of the action plans or improvement measures.

If an on-site visit reveals **a serious deficiency deemed to constitute a serious threat to public policy or internal security** within the area without internal border controls, the Commission, on its own initiative or at the request of the European Parliament or a Member State, shall inform the European Parliament and the Council as soon as possible thereof.

Sensitive information: the teams shall regard as confidential any information they acquire in the course of performing their duties. The evaluation reports drawn up following on-site visits shall be classified as EU RESTRICTED/ RESTREINT UE in accordance with applicable security rules. Classification shall not preclude information from being made available to the European Parliament.

Committee and implementing powers: some implementing powers should be conferred on the Commission and some **on the Council**. The powers to prepare and plan the evaluations and the power to adopt the evaluation report should be conferred on the Commission. These powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council on the Commission's exercise of implementing powers. The examination procedure should be applicable for the adoption of such acts.

Reporting to the European Parliament and the Council: the Commission shall present a **yearly comprehensive report** to the European Parliament and the Council on the evaluations carried out in the Member States. This report shall include information on:

- the evaluations carried out during the previous year, and
- the conclusions drawn from each evaluation and the state of play with regard to remedial action.

Review: the Commission shall undertake a review of the operation of this Regulation and submit a report to the Council within 6 months after the adoption of all reports regarding the evaluations covered by the first multiannual evaluation programme. Such review shall cover all the elements of this Regulation, including the functioning of the procedures for adopting acts under the mechanism. The report shall be transmitted to the European Parliament.

Transition: the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen shall continue to apply **until 1 January 2016** for evaluation procedures which had already begun before 26 November 2013.

Participation of the United Kingdom and Ireland: specific provision is made for the participation of the UK and Ireland in the evaluation mechanism.

Declaration: in a joint statement, the European Parliament, the Council and the Commission indicate that the adoption of the Regulation on the temporary reintroduction of internal border controls in exceptional circumstances and of this Regulation on the establishment of an evaluation mechanism for the Schengen acquis **address adequately** the call of the European Council in its Conclusions of 24 June 2011 for an enhancement of the cooperation and the mutual trust between the Member States in the Schengen area.

The three institutions state that this new evaluation system is an EU-based mechanism and that it will cover all aspects of the Schengen acquis and that **any future proposal from the Commission for amending this evaluation system would be submitted to the consultation of the European Parliament in order to take into consideration its opinion**, to the fullest extent possible, before the adoption of a final text.

ENTRY INTO FORCE : 26.11.2013.