



To Mr José Manuel Barroso
Chairman of the European Commission
B – 1049 Brussels
Belgium

Place and date The Hague 8 November 2011

Re: Reasoned opinion (subsidiarity) on the Decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances – COM(2011)560

Our reference 2011Z22361 / 2011D54598 / 149443.01U

Dear Mr Barroso,

The Senate and the House of Representatives of the States General have, in accordance with the prescribed procedure, tested the above proposal to the principles of subsidiarity. Application was thus given to Article 5 of the EU Treaty and Protocol 2 of the Treaty of Lisbon concerning the application of the subsidiarity and the proportionality principle.

This letter serves to inform you of the opinion of the Senate and the House of Representatives of the States General. Similar letters have been sent to the European Parliament, the Council and the Dutch government.

The proposed Decree recommends a shift of power from Member States to the European Commission with regard to the reintroduction of border controls at the internal borders in exceptional situations.

In the present situation, a Member State, according to article 23 of the Schengen Borders Code (decree 562/2006), may, by way of exception in the event of a serious threat to the public order or internal security in accordance with the procedure of Article 24, or, in urgent cases in accordance with the procedure of Article 25, again introduce border controls at the internal borders for a period of at most 30 days or for the foreseeable duration of the threat if this continues for more than 30 days.

The new Decree proposes that this decision shall be taken by the European Commission following a request by a Member State. In those cases in which the circumstances require the direct closure of the internal borders, the Member State retains the option to decide for itself for a maximum period of five days. Thereafter, only the European Commission may decide to prolong the border controls.

Re: Reasoned opinion (subsidiarity) on the Decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances – COM(2011)560
Reference 2011Z22361 / 2011D54598 / 149443.01U

The European Commission chooses Article 77, paragraphs 1 and 2, of the Treaty on the Functioning of the European Union as the legal basis for the proposal for the Decree. However, this proposal concerns control of the internal borders where the existence of a serious threat to public security or internal security forms the criterion for the reintroduction of border controls. Both the Senate and the House of Representatives of the States General are of the opinion that Article 72 of the Treaty on the Functioning of the European Union is applicable in which it is stated that *this title [THE AREA OF FREEDOM, SECURITY AND JUSTICE] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*

The Treaty on the European Union (Article 4, paragraph 2) also indicates that: *The Union [...] [respects] the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*

Moreover, Article 276 of the Treaty on the Functioning of the European Union states that *in exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice [...] the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State, nor to express an opinion on the execution of the responsibilities incumbent on the Member States in respect to maintaining public order and the safeguarding of the internal security.*

In view of the above Articles, the Senate and the House of Representatives have objections in respect of subsidiarity concerning the shift of the power of decision to the European Commission. According to the Treaty on the Functioning of the European Union, this competence clearly lies with the Member States. Moreover, the Member States have existing procedures to carry out these controls and are better able to assess and to decide on the reintroduction of such controls. The national authorities are, after all, in the best position to assess the specific local circumstances.

Re: Reasoned opinion (subsidiarity) on the Decree for the purpose of providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances – COM(2011)560
Reference 2011Z22361 / 2011D54598 / 149443.01U

Hence, this Decree (COM (2011)560) is not, according to both Chambers, in conformity with the principle of subsidiarity.

Yours sincerely,

G.J. de Graaf
President of the Senate
of the States General

Gerdi A. Verbeet
President of the House of Representatives
of the States General