



RESOLUTION No. 147/2011

**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 [COM(2011) 560]**

The Assembleia da República resolves, pursuant to the terms of Article 166(5) of the Constitution and of Law 43/2006 of 25 August, to send to the Presidents of the European Parliament, the Council and the European Commission the following reasoned opinion on the respect of the principle of subsidiarity by the 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 [COM(2011) 560]:

- 1- The draft act breaches the principle of subsidiarity in that the Treaty on the Functioning of the European Union reserves these matters to the sphere of national sovereignty of Member States and that the proposed objective will be more effectively achieved through action by individual Member States than by action at Union level.
- 2- The matter in question falls under the reserved legislative responsibility of the Assembleia da República.

Approved on 4 November 2011

THE PRESIDENT OF THE ASSEMBLEIA DA REPÚBLICA

Maria da Assunção A. Esteves



ANNEX

Reasoned opinion from the European Affairs Committee



Reasoned Opinion

COM (2011) 560

Proposal for REGULATION BY THE EUROPEAN PARLIAMENT AND THE COUNCIL amending Regulation (EC) No. 562/2006 to establish common rules regarding the temporary reintroduction of control of internal borders under unusual circumstances



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PART I - INTRODUCTORY NOTE

In accordance the terms of Articles 6 and 7 of Law No. 43/2006, of 25 August, on monitoring, assessment and pronouncement by the Assembleia da República in the context of the process of constructing the European Union, as well as the methodology of scrutinising European initiatives approved on 20 January 2010, the European Affairs Committee received the proposal of REGULATION BY THE EUROPEAN PARLIAMENT AND THE COUNCIL amending Regulation (EC) No. 562/2006 to establish common rules regarding the temporary reintroduction of controls on internal borders under unusual circumstances [COM (2011) 560].

The draft act identified above was sent to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, in view of its subject, which analysed this draft act and unanimously approved the Report which is attached to this Written Opinion, and is an integral part thereof.

PART II – RECITALS

1 – This European initiative proposes an alteration of the Schengen Borders Code (Regulation EC No. 562/2006 of the European Parliament, of 15 March 2006), in the sense of establishing common rules regarding the temporary reintroduction of control of internal borders under unusual circumstances.

2 – It is emphasised in this proposed Regulation that, in the interest of creating the regulatory framework needed to respond to the request of the European Council of 23 and 24 June in the sense of creating a mechanism to react to truly critical situations, it is necessary to alter the Schengen Borders Code, established by Regulation (EC) No. 562/2006 which defines, on the one hand, the rules applicable to external border controls and foresees, on the other hand, the suppression of controls on the internal borders, as well as the possibility of reintroducing them in some limited cases.

3 – The proposal of the Regulation proposes alterations in the procedures to be used for the temporary reintroduction of control of internal borders (Article 24).



4 – Thus, the Member State that considers that a control should be introduced to its internal borders should present a request to the European Commission, responsible for making the decision. The request should be presented within six weeks prior to the date projected for the establishment of control or within a shorter period if the circumstances that justify it are known in a period less than six months.

5 – It should also be noted that, in cases in which a serious threat to public order or to internal security of a Member State requires immediate action, there remains the possibility that the State in question could reintroduce, on an exceptional and immediate basis, control of internal borders and should communicate this decision to the Commission, to the other Member States to the European Parliament and to the Council.

6 – However, the draft act under study establishes that in these cases the control should have a limited period of not more than five days (Article 25) and that the Commission may consult the other Member States to ascertain the basis of that procedure (Article 25, part 2). If that situation lasts longer than five days, then it is up to the Commission to decide on an extension of the control period for internal borders (Article 25, part 3).

7 – The proposal of Regulation under analysis also foresees the possibility of reintroduction of certain controls on internal borders in the event serious deficiencies are identified through assessments of Schengen, made under the terms of Article 15 of the Regulation which create a mechanism for assessment and control to verify application of the Schengen *acquis*, if the circumstances constitute a serious threat to public order or internal security, at the level of the Union or at the national level (Article 26).

Mindful of the provisions of this proposal, the following issues should be raised:

a) Legal Basis

The European initiative under analysis indicates as a legal basis for the proposal, Article 77, parts 1 and 2 of the Treaty on the Functioning of the European Union.



This proposal alters Regulation (EC) No. 562/2006 of the European Parliament and the Council, of 15 March 2006, which establishes the Community Code regarding the regime of movement of persons at the borders (Schengen Borders Code), which was based on the equivalent provisions of the Treaty which founded the European Community, that is, respectively, Article 62, part 1 (internal borders) and part 2, paragraph a) (external borders).

a) The Principle of Subsidiarity

It is important to note the following:

- The proposal of the Regulation under study proposes transferring decision-making power for the temporary re-introduction of internal border controls of the Member States to the Commission.
- Under the terms of the current version of Article 23 of the Schengen Borders Control (Regulation No. 562/2006), "when there is a serious threat to public order or internal security, a Member State may exceptionally reintroduce control at its internal borders for a limited period of not more than 30 days...".
- It is thus proposed, in this European draft act, that this decision be up to the Commission at the request of a Member State.
- In addition, in cases where it is necessary to introduce immediate control of internal borders, the Member States shall retain this decision-making authority, but they have a maximum period of five days which may only be extended by a decision of the Commission.
- The Commission gave a legal basis for this decision based on Article 77 part 1 and part 2 of Treaty on the Functioning of the European Union (TFEU) which regulates the scope of activity of the Union regarding controls of borders.
- However, it is important to emphasise that we are in the domain of control of internal borders and that the criteria for their re-establishment is the existence of grave threats to public order or internal security.

Consequently, Article 72 of the TFEU states that "This title [The Area of Freedom, Security and Justice] does not prejudice the responsibilities incumbent upon the Member States in matters of public order and guaranteeing internal security."

- It should also be noted that Article 276 of the TFEU establishes that "In the exercise of its attributions regarding the provisions of Chapters 4 and 5 of Title V of Part 111,



relative to the area of freedom, security and justice, the Court of Justice of the European Union is not competent to inspect the validity or proportionality of operations conducted by the police services or other services responsible for application of law in a Member State, nor to decide on the exercise of responsibilities incumbent on Member States with regard to maintaining public order and guaranteeing internal security".

- Thus, these provisions safeguard the competency and sovereignty of the Member States with regard to maintaining public order and internal security.

- Therefore, and in agreement with that referenced in the report of the competent Committee, there are doubts regarding attribution of competence of decision-making power for the Commission of re-establishing controls over internal borders based on a grave threat to public order, when the very Treaty on the Functioning of the European Union reserved these matters to the sphere of the national sovereignty of the Member States.

Finally, and endorsing, on this issue, that referenced in the report of the competent Committee, it is important to note that "the Member States are better able to proceed with the evaluation and decision-making of control of internal borders, since they have their own procedures to consider whether there exist threats to public order and internal security.

Indeed, it is the authorities of each State that are in the field and recognise the typical circumstances (social, demographic, types of criminality) of the respective Member States".

c) The content of the draft act

1 – The proposal of the Regulation under study proposes an alteration of the Schengen Borders Code (Regulation EC No. 562/2006 of the European Parliament, of 15 March 2006), in the sense of establishing common rules regarding the temporary re-establishment of control of internal borders under unusual circumstances.

2 – That is, the Member State who feels a control should be introduced to its internal borders should present a request to the Commission who will then be responsible for making a decision.



3 – The request should be presented within six weeks prior to the date projected for the establishment of control or within a shorter period if the circumstances that justify it are known in a period less than six months.

4 – It should also be noted that in cases in which a serious threat to public order or to internal security of a Member State requires immediate action, there remains the possibility that the State in question could reintroduce, on an exceptional and immediate basis, control of internal borders and should communicate this decision to the European Commission, to the other Member States to the European Parliament and to the Council.

PART III – PERSONAL VIEW OF THE MP DRAWING UP THE WRITTEN OPINION

1 – As a result of the entry into effect of the Treaty of Lisbon, the power of the national Parliaments to intervene in consideration of community legislative proposals increased. This situation occurred from the Treaty having established control of the application of the principle of subsidiarity by national Parliaments as stated in Protocol No. 2 regarding application of the principle of subsidiarity attached to the Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU).

2 – Faced with a proposal from the European Commission and in cases where they consider that the principle of subsidiarity has not been respected, the national Parliaments may issue a substantiated opinion, forcing verification of the right to reanalysis which is achieved when one quarter of the votes of national Parliaments indicate lack of observance of the principle of subsidiarity.

3 – We are thus facing a project of the legislative act based on Article 67 section 1 of the TFEU, regarding Freedom of Space, Security and Justice.

4 – The proposal of the European Commission regarding the alteration of Regulation (EC) No. 562/2006 to establish common rights for the temporary reintroduction of control of internal borders in unusual circumstances establishes a framework of solutions which *a priori* seem to violate the referenced principle of subsidiarity.

5 – Indeed, the proposal of the European Commission broadens the power of intervention of the of the Commission in its ability to determine control of internal borders of Member States who have subscribed to the Schengen Agreement, which,



by conditioning the competencies of Member States, may limit respective sovereignty, by setting up a complex mechanism for the reintroduction of internal borders.

6 – Thus, it is important to study more deeply the issue at hand and which is part of the referenced Commission's Proposal now under analysis.

7 – This results in an inalienable concept: the existence of external borders does not preclude maintaining the existence of internal borders. This in itself establishes a limit for the reciprocal intervention between States and Community Institutions.

8 – Article 23 of the Schengen Borders Code already establishes the possibility that Member States may, under unusual circumstances, re-establish control of their internal borders if they are faced with a situation that could imply a serious threat to public order or internal security.

9 – The reintroduction of controls may only be made for a limited period not to exceed 30 days, or for the length of time the threat is expected to last if this exceeds the 30 day period, according to the provisions and procedures set forth in Articles 24 and 25 of the Schengen Borders Code.

10 – The proposal of the European Commission proposes a change in Articles 23, 24, 25 and 26 of the Schengen Borders Code (Regulation 562/2006).

11 – According to that established in this legislative initiative, the control of internal borders may only be reintroduced according to three types of procedures:

- The Member State shall present a documented petition to the Commission, generally six weeks prior to the date predicted, leaving the Commission to make the decision;
- The Member State may introduce immediately and under exceptional circumstances, if faced with a threat that requires immediate action, but only for a limited period of five days, leaving the Commission to make a decision regarding possible extension;
- The Commission may make this decision if there are serious and continuing defects in the control of external borders or in re-entry procedures identified in the scope of the mechanism for assessment and control designed to verify application of the quantity of the Schengen on a certain Member State.

12 – This set of changes translates into an effective and increased participation, or even control, by the European Commission, under justification of establishment of common rules regarding temporary reintroduction of borders in unusual circumstances.

13 – However, it is an honourable proposal to establish uniform behaviour in the protection of external borders; it can be shown from a legal perspective to violate the responsibility of the Member States transferring this responsibility to the European



Commission as regards control of their own territory. Consequently, these provisions imply removing competencies which are inherently sovereign to the States.

These render impossible full freedom to exercise the competences, even in the framework of competencies established by the Schengen Borders Code.

The principle of subsidiarity

1 – The principle of subsidiarity constitutes one of the basic principles in the construction of Community Law, setting forth the rules and forms defining limits of sharing competencies between the Union and the Member States, since from their exercise comes a greater proximity of decisions with the respective recipients and establishing the domain of the State the defence of their interests along with designation of the Union and thus ensuring a permanent search for a bisecting between European integration and respect for national sovereignty.

2 – Reserving these competencies to TFEU for the sphere of the sovereignty of the Member States, it is hard to understand the proposal to exchange these competencies - especially in unusual circumstances – to the control of the European Commission.

3 – The domains of public order and internal security constitute domains that are especially relevant to the manifestation of the sovereignty of the State. And is it proposed in the case under discussion that these competencies cease to remain under the free control of the State? This cannot be acceptable.

4 – It is our belief that the objective sought by the proposal of the European Commission contained in the final COM (2011) 560 amending Regulation (EC) No. 562/2006 does not respect the principle of subsidiarity.

5 – Or rather, the Member States are in the best position to review, consider and decide upon these decisions, in the most appropriate and practical manner in exceptional circumstances such as those resulting from possible threats to public order and internal security.

PART IV – WRITTEN OPINION

In view of these recitals, the European Affairs Committee is of the opinion that:



ASSEMBLEIA DA REPÚBLICA

1 – The present written opinion has been drawn up in accordance with the terms of Law 43/2006 of 25 August, which determines the powers of the Assembleia da República in monitoring, assessment and pronouncement in the context of the construction of the European Union.

2 – This draft act violates the principle of subsidiarity, insofar as the Treaty on the Functioning of the European Union reserved these issues for the sphere of national sovereignty of the Member States and that the objective to be achieved could be realised more effectively through each of the Member States rather than through an action by the community;

3 – The issue under discussion falls under the legislative competence reserved for the Assembleia da República;

4 – Thus, the European Affairs Committee is of the opinion that, under the terms of section 1 of Article 3, of Law No. 43/2006, of 25 August, the proposed resolution attached to this Written Opinion should be sent to the plenary.

São Bento Palace, 02 November 2011

Opinion drawn up by MP - António Rodrigues
Committee Chairman – Paulo Mota Pinto



ASSEMBLEIA DA REPÚBLICA

PART V – ATTACHMENT

Report and opinion of the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees



**COMMITTEE ON CONSTITUTIONAL AFFAIRS, RIGHTS, FREEDOMS AND
GUARANTEES**

REPORT

COM (2011) 560 final – Proposal for Regulation by the European Parliament and the Council amending Regulation (EC) No. 562/2006 to establish common rules regarding the temporary reintroduction of control of internal borders under unusual circumstances

1 – Introduction

In connection with the monitoring, assessment and pronouncement by the Assembleia da República in the context of the construction of the European Union, the European initiative COM (2011) 560 final – Proposal for Regulation by the European Parliament and the Council amending Regulation (EC) No. 562/2006 to establish common rules for the temporary re-establishment of control of internal borders under unusual circumstances, was distributed to the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees - for the purposes envisaged in Protocol No. 2 on the Principle of Subsidiarity annexed to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

2 – Background and objectives of the proposal

This initiative proposes an alteration of the Schengen Borders Code (Regulation EC No. 562/2006 of the European Parliament and the Council, of 15 March 2006), in the sense of establishing common rules regarding the temporary reintroduction of control of internal borders under unusual circumstances.

A set of criteria is listed for the temporary re-establishment of control of internal borders (Article 23-A). The Commission or the Member State (in cases which require mediate action - Article 25), should evaluate the need and proportionality of this measure based on the threat to public order or internal security at the Union or national level. During this assessment, the following aspects should be studied:



- *The probable impact of possible threats to public order or internal security at the Union or national level, including terrorist incidents and threats, as well as threats related to organised crime;*
- *The availability of methods of technical or financial support which may be or have been used at the national and/or European level, including assistance by bodies of the Union such as Frontex, EASO or Europol, and the extent to which these activities are able to adequately remedy the threats to public order or internal security at the Union or national level;*
- *The current and future impact of possible serious deficiencies related to the control of external borders or re-entry procedures identified in the scope of the Schengen assessments, according to the regulation which creates a method for evaluation and control to verify the Schengen acquis;*
- *The probable impact of this measure on free movement in the area without controls on internal borders;*

The proposal of the Regulation also proposes alterations in the procedures to be used for the temporary reintroduction of control of internal borders (Article 24). The Member State that considers that a control should be introduced to its internal borders should present a request to the Committee responsible for making the decision. The request should be presented within six weeks prior to the date projected for the establishment of control or within a shorter period if the circumstances that justify it are known in a period less than six months.

In cases in which a serious threat to public order or to the internal security of a Member State requires immediate action, there remains the possibility that the State in question could reintroduce, on an exceptional and immediate basis, control of internal borders and should communicate this decision to the Committee, to the other Member States to the European Parliament and to the Council. However, the draft act under study establishes that in these cases the control should have a limited period of not more than five days (Article 25) and that the Committee may consult the other Member States to ascertain the basis of that procedure (Article 25, part 2). If that situation lasts longer than five days, then it is up to the Committee to decide on an extension of the control period for internal borders (Article 25, part 3).



The draft act also foresees the possibility of reintroduction of certain controls on internal borders in the event serious deficiencies are identified through assessments of Schengen, made under the terms of Article 15 of the Regulation which create a mechanism for assessment and control to verify application of the Schengen *acquis*, if the circumstances constitute a serious threat to public order or internal security, at the level of the Union or national level (Article 26).

3 – Principle of subsidiarity

COM (2011) 560 final proposes transferring decision-making power for the temporary re-introduction of internal border controls of the Member States to the Committee. Under the terms of the current version of Article 23 of the Schengen Borders Control (Regulation No. 562/2006), "*when there is a serious threat to public order or internal security, a Member State may exceptionally reintroduce control at its internal borders for a limited period of not more than 30 days...*". It is thus proposed, with this proposal of Regulation, that this decision be up to the Commission at the request of a Member State. In addition, in cases where it is necessary to introduce immediate control of internal borders, the Member States shall retain this decision-making authority, but they have a maximum period of five days which may only be extended by a decision of the Commission.

The Commission gave a legal basis for this decision based on Article 77 part 1 and part 2 do Treaty on the Functioning of the European Union (TFEU) which regulates the scope of activity of the Union regarding controls of borders. However, it is important to emphasise that we are in the domain of control of internal borders and that the criteria for their re-establishment is the existence of grave threats to public order or internal security. Consequently, Article 72 of the TFEU states that "*This title [The Area of Freedom, Security and Justice] does not prejudice the responsibilities incumbent upon the Member States in matters of public order and guaranteeing internal security.*" It should also be noted that Article 276 of the TFEU establishes that "*In the exercise of its attributions regarding the provisions of Chapters 4 and 5 of Title V of Part III, relative to the area of freedom, security and justice, the Court of Justice of the European Union is not competent to inspect the validity or proportionality of operations conducted by the police services or other services responsible for application of law in a Member State, nor to decide on the exercise of responsibilities incumbent on Member States with*



regard to maintaining public order and guaranteeing internal security". Thus, these provisions safeguard the competency and sovereignty of the Member States with regard to maintaining public order and internal security. Therefore, there are doubts regarding attribution of competence of decision-making power for the Commission of re-establishing controls over internal borders based on a grave threat to public order, when the very Treaty on the Functioning of the European Union reserved these matters to the sphere of the national sovereignty of the Member States.

Finally, the Member States are better able to proceed with the evaluation and decision-making of re-establishing control of internal borders, since they have their own procedures to consider whether there exist threats to public order and internal security. Indeed, it is the authorities of each State that are in the field and recognise the typical circumstances (social, demographic, types of criminality) of the respective Member States. On the other hand, turning this decision over to the Commission renders the process more complex and time-consuming.

In view of the above, the final COM (2011) 560 - Proposal for Regulation by the European Parliament and the Council which alters Regulation (EC) No. 562/2006 to establish common rules regarding the temporary reintroduction of control of internal borders under unusual circumstances

4 – Opinion

In the light of the foregoing, the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees is of the opinion that COM (2011) 560 final – Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 562/2006 to establish common rules regarding the re-establishment of control of internal borders in unusual circumstances does not respect the principle of subsidiarity and that this Report should be sent to the European Affairs Committee.

São Bento Palace, 19 October 2011

Report drawn up by MP – Isabel Oneto
Committee Chairman – Fernando Negrão