



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Portuguese Assembleia da República for its reasoned opinion on the Commission proposal of 16 September 2011 for a Regulation of the European Parliament and the Council amending Regulation (EC) No 562/2006 (the Schengen Borders Code) in order to provide for common rules on the temporary reintroduction of border controls at internal borders in exceptional circumstances {COM(2011)560 final}. We would like to apologize for the late submission of this reply.

In its Communication on Migration adopted in May 2011, the Commission set out the reasons why it considers it to be necessary to review the way in which we oversee the management of our external borders as well as the way in which internal border controls are temporarily reintroduced. The basic starting point and objective of the Commission is that, since the Schengen area is a benefit shared by the whole EU, any decision affecting this benefit should be taken at EU level rather than by the Member States individually.

It should be noted that the proposal which is the subject of the Assembleia da República's reasoned opinion forms part of a package of two legislative proposals adopted by the Commission on 16 September 2011, building on the Conclusions of the European Council in June, whose purpose is to strengthen the governance of the area without internal border controls (the Schengen area), and enable it to respond effectively to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons.

At the centre of all this remains a consideration which is crucial and recognised as such by all institutional actors at EU level: free movement of people in the Schengen area is one of the most important and tangible results of the EU integration process. Therefore, this achievement must be preserved and strengthened in an effective and credible way.

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The proposed changes to the Schengen Borders Code set out in the Commission proposal in question provide that any decision to reintroduce internal border controls can only be reintroduced by a Commission decision taken via the 'comitology' procedure, except where urgency dictates that immediate action is required, in which case a Member State may unilaterally do so, but for no more than five days. The reintroduction of internal border controls would be temporary, limited in scope to what is necessary, and could only be resorted to if alternative measures have first been explored, and if the reintroduction of controls is necessary to mitigate a serious threat to public policy or internal security at the EU or national level.

The Commission has taken note of the views expressed in the Assembleia da República's reasoned opinion regarding the compatibility of this aspect of the Commission proposal with the principle of subsidiarity, as set out in Article 5 of the Treaty on the European Union (TEU), as well as regarding its compatibility with Articles 72 and 276 of the Treaty on the Functioning of the European Union (TFEU), which concern the competence of Member States for the maintenance of law and order, and the safeguarding of their internal security.

The Commission fully respects the sovereign responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security, and is convinced that these proposals are fully consistent with that sovereign competence. It should be pointed out that Article 3(2) of the TEU, as well as Articles 67 and 77 of the TFEU, make it clear that the development of an area without internal frontiers, which must ensure the free movement of persons, is an EU competence. The rules governing the creation and maintenance of such an area without internal frontiers are accordingly the subject of legislation adopted at Union level, and it is consistent with such a legislative scheme that any decisions allowing for exceptions to the general rule – namely that free movement within the area must be ensured – should be taken at European level. The procedure proposed, whereby the exercising of 'implementing powers' by the Commission can be controlled by Member States, should be seen in this light.

Decisions on the reintroduction of controls at internal borders have far-reaching human and economic consequences, the impact of which is felt beyond the territory of a specific Member State. Indeed, such decisions are never of purely national concern: internal borders are by their nature shared by at least two Member States, and reintroducing controls at such borders affects the freedom of movement of citizens of all Member States. It is therefore important for a mechanism to be put in place to ensure that any measure taken to restrict such freedom of movement within the area without internal borders is both necessary and proportionate. The mechanism should ensure that decisions on the reintroduction of internal border controls are taken in a consistent manner across the Union, on the basis of the same criteria, and that the possibility to resort to such exceptional measures is not abused. In view of the Union-wide consequences of internal border controls being reintroduced, such a mechanism can only be a Union-based one, with decisions taken at the European level.

The mechanism proposed by the Commission ensures moreover that exceptional measures can be taken very rapidly where necessary, while at the same time guaranteeing that they receive a collective endorsement at EU level. It is to be expected that requests by Member States for the reintroduction or prolongation of internal border controls which are based on legitimate security or public policy concerns will be satisfied, unless it is clear that those concerns are groundless, or that the requested measures are disproportionate to the concerns.

The Commission is therefore convinced that its proposal strikes the right balance between the need to have in place an efficient mechanism allowing for measures to be taken to effectively safeguard against serious threats to public policy and internal security, while at the same time ensuring that any such measures are not allowed to unnecessarily undermine the principle of the free movement of persons. As such, the Commission considers that its proposal is fully compatible with the principles of subsidiarity and proportionality, as set out in Article 5 of the TEU.

The Commission hopes that this reply addresses the concerns expressed in the reasoned opinion of the Assembleia da República.

Yours faithfully,

*Maroš Šefčovič
Vice-President*