



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 2 May 2012**

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**5754/2/12  
REV 2**

**LIMITE**

**SCHENGEN 7  
SCH-EVAL 15  
FRONT 8  
COMIX 50  
CODEC 202**

**NOTE**

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from: Presidency  
to: Working Party for Schengen Matters (Acquis) – Mixed Committee  
(EU-Iceland/Norway/Switzerland/Liechtenstein)

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No. prev. 5754/1/12 REV 1 SCHENGEN 7 SCH-EVAL 15 FRONT 8 COMIX 50 CODEC  
doc.: 202 ADD 1 + ADD 2 + ADD 3  
9375/12 SCHENGEN 30 SCH-EVAL 58 FRONT 64 COMIX 280 CODEC 1133

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Subject: Amended proposal for a regulation of the European Parliament and of the Council on  
the establishment of an evaluation and monitoring mechanism to verify the  
application of the Schengen acquis  
- Revised draft compromise text

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Delegations will find below, in light of the explanations given in 9375/12, a revised draft compromise text taking into account the discussions of the above mentioned issues at the Schengen Acquis Working Party during Polish Presidency as well as the opinions expressed by the delegations at working party meetings held on 17-18 January, 14-15 February and 2 April 2012.

General scrutiny reservations have been entered by AT, BE, CH, CZ, DE, EL, ES, FI, HU, IE, LT, LU, LV, MT, NL, PT, and SI. Parliamentary reservations are pending from FR, MT, NL, and UK.

Changes to the previous draft proposal (5754/1/12 REV 1) are indicated with **highlighting** (additions) and ~~striketrough~~ (deletions).

The recitals of the proposal will be dealt with at a later stage.

Please note, that following the opinions expressed by a number of delegations at the working party meeting on 2 April 2012, the term “*difficulties and deficiencies*” have been changed to “*deficiencies*” in this draft proposal. However, this issue still needs clarification and will be dealt with at a later stage. The change of wording in this draft should therefore be considered without prejudice to further discussion of this matter.

As the Presidency would like to focus the discussions on the question of procedure, scope and a review clause, the delegations are invited to focus on the relevant provisions, i.e. the Articles 1, 3, 4, 5, 6, 8, 11, 13, 13A, 16, 17, 21, and 22, and Article 22A.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article [77(2)(e)]<sup>1</sup> thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

[Acting in accordance with the ordinary legislative procedure]

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### *Article 1*<sup>3</sup>

#### Purpose and scope

This Regulation establishes an evaluation and monitoring<sup>4</sup> mechanism, which serves the following purposes:

- 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 Treaty on European Union and to the Treaty on the Functioning of the European Union, the Schengen *acquis* applies in part.
- To verify that the necessary conditions for the application of all parts of the Schengen *acquis* in a Schengen candidate Member State have been met.

Experts from the Member States which, in accordance with the relevant Act of Accession, do not yet fully apply the *acquis* shall nevertheless participate in evaluation and monitoring of all parts of the *acquis*.

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<sup>1</sup> Most delegations were in favour of or could accept changing the legal basis to Article 70 TFEU. However, there is a broad consensus among the Member States to closely involve the European Parliament.

<sup>2</sup> The recitals will be analyzed at a later stage.

<sup>3</sup> IE and UK entered a reservation on this Article.

<sup>4</sup> ES entered a reservation about “monitoring” in the whole text.

## *Article 2*

### Definitions

For the purpose of this Regulation, ‘Schengen *acquis*’ means the provisions of the Schengen *acquis*, as integrated into the European Union framework by the Protocol annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, together with the acts building upon it or otherwise related to it.

## *Article 3<sup>5</sup>*

### Responsibilities

1. The Member States and the Commission shall be jointly responsible for implementation of the evaluation and monitoring mechanism as specified in this Regulation, ~~and notably in Article 17 and~~ with the support of the EU bodies involved in the implementation of the Schengen *acquis*.
2. Member States and the Commission shall cooperate fully at all stages of evaluations in order to carry out the tasks entrusted to them by this Regulation.

## *Article 4*

### Evaluations

- 0a. 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, **and the required functioning of the institutions responsible for the execution of the Schengen *acquis***, as well as the absence of border control at internal borders.

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<sup>5</sup> DE, EL, ES, LV, MT, NL, SE and SI entered a reservation on this Article.

- 0b. Evaluations may consist of questionnaires and on-site visits which may be announced or unannounced. Announced on-site visits shall be preceded by a questionnaire. **On-site visits and questionnaires may, where appropriate, be used either independently or in combination in evaluating specific Member States and/or specific areas.**
- 0c. Both **questionnaires and on-site visits** may be supplemented by presentations by the evaluated Member State on the area covered by the evaluation. ~~On-site visits and questionnaires may, where appropriate, be used either independently or in combination to specific Member States and/or specific areas.~~

*Article 5<sup>6</sup>*

Multiannual programme

1. 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.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 17(2).

2. Each Member State shall be evaluated during each five-year period. The multiannual programme shall list the order of Member States to be evaluated each year. The order in which the Member States are to be evaluated shall take into account the time which has elapsed since the previous evaluation and the balance between the different parts of the Schengen *acquis* to be evaluated.
3. The multiannual programme may be adapted, if necessary, in accordance with the procedure referred to in paragraph 1.
- 3a. The multiannual programme may contain a reference to thematic evaluations as referred to in Article 8(1).

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<sup>6</sup> DE, ES, MT, NL, SE, and SI entered a reservation on this Article.

*Article 6 (ex-Article 8)*<sup>7</sup>

Annual programme

1. An annual evaluation programme shall be established by the Commission by not later than 31 of October of the previous year, taking into account notably the risk analysis provided by Frontex in accordance with Article 7 and where appropriate information provided by Europol or other relevant sources, notably in accordance with Article 7A.

The programme shall include proposals for evaluation of:

(a) application of the *acquis* or parts of the *acquis* by one Member State, as specified in the multiannual programme;

and, ~~in addition~~, where relevant:

(b) application of specific parts of the *acquis* across several Member States (thematic evaluations).<sup>8</sup>

2. The first section of the programme, including a provisional timeschedule of the on-site visits shall list the Member States to be evaluated in the next year in accordance with the multiannual programme. This section shall list the areas to be evaluated and the on-site visits.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 17(2).

3. The second section of the programme which shall list the unannounced on-site visits to be carried out in the next year. **This section shall be drafted and adopted by the Commission.** It shall be considered confidential and shall not be communicated to the Member States.
4. The annual programme may be adapted, if necessary, in accordance with paragraphs 2 and 3.

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<sup>7</sup> DE, EL, ES, MT, NL, SE, and SI entered a reservation on this Article.

<sup>8</sup> FI wants to make it possible to include regional evaluations in the annual programme.

## *Article 7 (ex-Article 6)*

### Frontex risk analysis

1. By not later than 31 August each year, Frontex shall submit to the Commission and the Member States a risk analysis taking into account illegal migration 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.
2. By the same deadline as stated in paragraph 1, 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 programme referred to in paragraph 1. 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 ten specific border crossing-points. The Commission may at any time request Frontex to submit to it a risk analysis making recommendations for evaluations to be implemented in the form of unannounced on-site visits.

## *Article 7A*

### Risk analysis by other EU bodies

The Commission may ask for risk analysis from other EU bodies, involved in the implementation of the Schengen acquis, which could be used for preparing an annual programme.

## *Article 8 (ex-Article 7)<sup>9</sup>*

### Questionnaire

1. The Commission shall send a standard questionnaire to the Member States to be evaluated in the next year by not later than 1 July of the previous year.

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<sup>9</sup> EL and ES entered a reservation on this Article.

The standard questionnaires shall be drafted and updated in close cooperation with the Member States and shall cover the relevant legislation and the organisational and technical means available for implementation of the Schengen *acquis* and available statistical data on each field of the evaluation. Frontex and Europol may be consulted on the draft questionnaire.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 17(2).

- 2.<sup>10</sup> Member States shall provide their replies to the questionnaire to the Commission within ten weeks of communication of the questionnaire. The Commission shall make the replies available to the other Member States.

*Article 9 (ex-Article 10)<sup>11</sup>*

Teams responsible for on-site visits

1. The teams responsible for on-site visits shall consist of experts designated by Member States and of Commission representatives.
2. The Commission shall invite Member States to designate experts who are available for participation in the respective on-site visits, indicating their area of expertise.

In the case of announced visits, the Commission shall invite Member States to designate experts not later than two months before the on-site visit is scheduled. Member States shall designate experts within two weeks.

In the case of unannounced visits, the Commission shall invite Member States to designate experts not later than two weeks before the on-site visit is scheduled. Member States shall designate the experts within 72 hours.

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<sup>10</sup> DE and NL entered a reservation on this provision.

<sup>11</sup> ES and NL entered a reservation on this Article.



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

The number of Commission representatives participating in the evaluation visits may not exceed two persons. If the number of experts designated by Member States exceeds the aforementioned maximum, the Commission, after consulting the Member States concerned, shall appoint the members of the team on the basis of the geographical balance and the competences of the experts.

4. Member States' experts may not participate in an evaluation mission that includes an on-site visit to the Member State where they are employed.
5. The Commission may invite Frontex, Europol, or other EU bodies involved in the implementation of the Schengen acquis to designate a representative to take part as an observer in a visit concerning an area covered by their mandate.
6. 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 the members of the team of experts as soon as possible after the team has been set up.

#### *Article 10 (ex-Article 9)*

##### Experts

The experts participating in on-site visits shall have appropriate qualifications, including a solid theoretical knowledge and practical experience in the areas covered by the evaluation mechanism, along with sound knowledge of evaluation principles, procedures and techniques, and shall be able to communicate effectively in a common language. To this end, Member States shall ensure that the experts receive relevant training.

*Article 11<sup>12</sup>*

Conduct of on-site visits

1. The on-site visit teams shall undertake all necessary preparatory activities in order to ensure the efficiency, accuracy and consistency of on-site visits.
2. **The programme for announced on-site visits shall be drafted by the Commission and shall be adopted in accordance with the examination procedure referred to in Article 17(2). The programme for unannounced on-site visits shall be established by the Commission.**  
The Member State concerned shall be consulted and notified of the timetable and detailed programme:
  - at least two months before an announced on-site visit is due to take place;
  - at least 48 hours before an unannounced on-site visit takes place<sup>13</sup>.
3. The members of the on-site visit team shall each carry identification authorising them to conduct on-site visits as members of the Schengen evaluation team in accordance with this regulation.
4. The evaluated Member State shall ensure that the team of experts can directly address relevant persons. It shall ensure that the team has access to all areas, premises and documents required for the evaluation. It shall ensure that the team is able to exercise its mandate to verify the activities in the areas to be evaluated.
5. The evaluated Member State shall, by any means within its legal powers, assist the team in performing its task.
6. In the case of announced on-site visits, the Commission shall provide the Member State to be evaluated with the names of the experts in the team in advance. The Member State to be evaluated shall designate a contact point for making the practical arrangements for the on-site visit.

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<sup>12</sup> ES and NL entered a reservation on this Article.

<sup>13</sup> A number of Member States considered the notification time for unannounced visits too short.

7. The Commission and the Member States shall be responsible for making the necessary travel arrangements to and from the evaluated Member State(s) for their respective experts participating in the evaluation team. The travel and accommodation costs for experts participating in the visits shall be reimbursed by the Commission.

The evaluated Member State(s) shall be responsible for making the necessary accommodation arrangements and for providing transport on the spot. For unannounced visits, the Commission shall facilitate the accommodation arrangements for experts.

*Article 12*  
(deleted – see Article 4)

*Article 13<sup>14</sup>*

Evaluation reports

1. A report shall be drawn up following each evaluation. The evaluation report shall be based on the findings of the on-site visit and the questionnaire, as appropriate. In case of on-site visits, the report shall be drawn up by the team during the visit.  
The Commission representative and the Member States' experts shall take overall responsibility for drafting the report and ensuring its integrity and quality. In case of disagreement, the team shall endeavour to reach a compromise.
2. The report shall analyse the qualitative, quantitative, operational, administrative and organisational aspects, as appropriate, and shall list any ~~difficulties~~ or deficiencies established during the evaluation. The report shall contain recommendations for remedial action and an indication of the priorities for implementing them, as well as examples of good practices where appropriate.

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<sup>14</sup> CH, DE, ES, MT, NL, PT, SE and SI entered a reservation on this Article.

3. One of the following assessments shall be given to each finding in the report:
- (a) compliant;
  - (b) compliant but improvement necessary;
  - (c) non-compliant.
4. The Commission shall communicate the draft report to the Member State concerned within six weeks of the on-site visit or of receipt of the replies to the questionnaire, as appropriate. The evaluated Member State shall provide its comments on the report within two weeks. The comments may be reflected in the report.
5. The draft report and the reply from the **evaluated** Member State shall be submitted by the Commission to ~~the committee established in accordance with Article 17~~ **the** Member States **who** shall be invited to comment on the replies to the questionnaire, the draft report and the comments by the **evaluated** Member State ~~evaluated~~.<sup>15</sup>
- On this basis, the Commission shall **submit to the Council a proposal for an** ~~adopt the~~ evaluation report ~~and,~~ **including** the recommendations aimed at addressing possible ~~difficulties or~~ deficiencies which have resulted in the assessment of the findings referred to in paragraph 3. **The Council shall adopt the said report.** ~~That implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17(2).~~

#### Article 13A<sup>16</sup>

##### Follow-up

1. Within three months after adoption of the report, the Member State concerned shall provide the Commission with an action plan to remedy any ~~difficulties or~~ deficiencies identified. If the evaluation report referred to in Article 13(5) concludes that the evaluated Member State is seriously neglecting its obligations, the evaluated Member State shall provide the action plan within one month.

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<sup>15</sup> FR suggested that in event of disagreement on the content of the report, decision should be taken by the majority of the team members.

<sup>16</sup> CH, DE, ES, MT, NL, SE, and SI entered a reservation on comitology in this Article.

2. After consulting the team of experts, the Commission shall present its assessment of the adequacy of the action plan to the **Council** ~~committee established in accordance with Article 17~~, within one month of receiving the action plan from the Member State. Member States shall be invited to comment on the action plan. Superfluous
3. The Member State concerned shall report to the Commission on implementation of the action plan within six months<sup>17</sup> of adoption of the evaluation report and shall thereafter continue to report every three months until the action plan is fully implemented.
4. Notwithstanding the six month period for reporting on the implementation of an action plan referred to in Article 13(6), if the evaluation report referred to in Article 13(5) concludes that the evaluated Member State is seriously neglecting its obligations, the evaluated Member State shall report on the implementation of the action plan within three months of receipt of the evaluation report.
5. Depending on the severity of the ~~difficulties or~~ deficiencies identified and the measures taken to remedy them, the Commission may **schedule** ~~decide on~~ announced visits to verify implementation of the action plan. **The Commission shall invite at least four experts who have participated in the on-site visit for participation in the revisit. Observers may participate on invitation by the Commission. The Commission shall establish the programme of the visit. The Member State concerned shall be notified of the programme at least one month before the revisit is due to take place.** ~~Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17(2).~~ The Commission may also foresee unannounced on-site visits.
6. The Commission shall inform the **Council** ~~committee established in accordance with Article 17~~, on a regular basis, about the implementation of the action plan.

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<sup>17</sup> CZ have suggested three months instead of six.

7. If an on-site visit reveals a serious ~~difficulty or~~ deficiency deemed to have a significant impact on the overall level of security<sup>18</sup> of one or more Member States, the Commission, on its own initiative or at the request of a Member State, shall inform the Council and the European Parliament as soon as possible.

7a. Where the Member State has been found to be compliant, but where the evaluation report contains recommendations for possible further improvements, the evaluated Member State shall provide to the Commission its assessment on a possible implementation of the recommendations within six months of adoption of the evaluation report.

*Article 14*

*(deleted)*

*Article 15*

*(deleted)*

*Article 16<sup>19</sup>*

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 EU RESTRICTED/RESTREINT UE. ~~The Commission shall transmit the reports to the Council in accordance with the applicable security rules on classified information.~~

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<sup>18</sup> SI expressed doubts about this concept.

<sup>19</sup> SI entered a reservation on this Article.

*Article 17*  
Committee<sup>20</sup>

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

*Article 18*  
Transitional provisions

1. The first multiannual programme in accordance with Article 5 and the first annual programme in accordance with Article 8 shall be established six months after this Regulation enters into force. The starting dates for both programmes shall be one year after this Regulation enters into force.
2. The first risk analysis to be provided by Frontex in accordance with Article 6 shall be provided to the Commission not later than three months after this Regulation enters into force.
3. Member States shall designate their experts in accordance with Article 9 not later than three months after this Regulation enters into force.

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<sup>20</sup> DE, EL, ES, FI, MT, NL, SE and SI entered a reservation on this Article.

## *Article 19<sup>21</sup>*

### Information of the European Parliament ~~and the Council~~

The **Council** ~~Commission~~ shall inform the European Parliament ~~and the Council~~ of the recommendations adopted ~~by the Commission~~ in accordance with Article 13(5).

## *Article 20*

### Reporting to the European Parliament and the Council

The Commission shall present a yearly summary report to the European Parliament and the Council on the evaluations carried out pursuant to this Regulation. This report shall be made public and 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.

## *Article 21*

### Transition and repeal

- 0a. ~~Part II of t~~**T**he Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def), entitled ‘Implementation committee for the States already applying the Convention’, shall be repealed with effect from one year after the entry into force of this Regulation.
- 0b. Notwithstanding paragraph 1, an evaluation scheme regarding a particular Member State which is ongoing on the date of entry into force of this Regulation shall be completed in accordance with the Decision referred to in paragraph 1.

## *Article 22*

~~The Council may decide to carry out the Schengen evaluations referred to in Acts of Accession concluded after the entry into force of this Regulation in accordance with this Regulation.~~

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<sup>21</sup> SI entered a reservation on this Article.



**Article 22A**

***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 programme mentioned in Article 18(1). Such review shall cover all the elements of this Regulation, including the functioning of the procedures for adopting acts under the mechanism.

*Article 23*

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

*[For the European Parliament  
The President]*

*For the Council  
The President*

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