

24 October 2011
D(2011) 1239888

Morgan Johansson
Chair
The Committee on Justice
The Swedish Parliament
SE 100 12 Stockholm

I am writing in connection with the proposals for strengthening the Schengen area adopted by the Commission on 16 September 2011 following a request from the European Council in June. The proposals include efforts to strengthen the Schengen area and to enable effective reactions to such special circumstances that may have a negative effect on the overall functioning of Schengen cooperation, but without jeopardising free movement of people. I understand that the Committee is hesitant about whether these proposals, especially the proposal to amend the Schengen Borders Code, are compliant with the principle of subsidiarity in Article 5 of the Treaty on European Union.

In the proposed amendment to the Schengen Borders Code¹ there is a provision that internal border controls can only be reintroduced by means of a decision by the Commission with the help of comitology, except in cases where the circumstances dictate that measures should be taken immediately. In the latter case, a member state may decide unilaterally to reintroduce border controls, but only for a maximum of five days. This would imply a change compared to today, when border controls can be reintroduced following a unilateral decision at national level. In all circumstances, the reintroduction of internal border controls are to be temporary, limited in scope to what is actually necessary, and may only be imposed after alternative measures have been looked into. Reintroducing border controls can be necessary in order to remove or alleviate a serious threat to public order or internal security, either at EU level or at national level.

I know that some member states have expressed their doubts about whether this part of the Commission's proposals is compliant with Article 5 (the principle of subsidiarity) and Article 4.2 of the Treaty on European Union, and with Article 72 of the Treaty on the Functioning of the European Union, which applies to the member states' responsibility for maintaining law and order and protecting internal security.

The Commission respects completely the member states' unrestricted responsibility concerning the maintenance of law and order and protection of internal security. The proposals presented are completely compatible with this. It should be pointed out that in Article 3.2 of the Treaty on European Union, and Article 67 and 77 of the Treaty on the Functioning of the European Union it is made very clear that the European Union has the authority to develop an area without internal borders, in which free movement for people is guaranteed. The legislation to establish and maintain such an area without internal borders is therefore to be adopted at EU level and, in compliance with such legislation, all decisions concerning exceptions to the general rule - that freedom of movement within this area must be ensured - are also to be adopted at EU level. The Commission's proposal must

¹ COM (2011) 560

be seen in view of this; in other words, decisions concerning exceptions are to be taken according to the comitology procedure, which makes it possible for member states to examine the Commission's implementing powers.

A decision to reintroduce internal border controls has far-reaching humanitarian and economic consequences that stretch beyond a specific member state's territory. The fact is that such decisions are never solely of national interest; internal borders are something that, per definition, affect at least two member states, and reintroducing controls at such borders affects freedom of movement for citizens in all member states. It is therefore important that there is a mechanism that ensures that all measures that limit freedom of movement are both necessary and proportionate. The proposed mechanism will ensure that decisions to reintroduce border controls are taken in a consistent manner throughout the EU, that the decisions are based on the same criteria and that the possibility of taking exceptional measures is not misused. Since reintroduction of internal border controls would have consequences throughout the EU, such a mechanism must also be applicable throughout the EU, and decisions concerning such a mechanism must be taken at EU level.

The procedure proposed by the Commission, i.e. that decisions concerning the reintroduction of internal border controls shall take place according to the comitology procedure, also guarantees that exceptional measures can be taken in an efficient manner and, if necessary, very rapidly, at the same time as ensuring that the decisions have the legitimacy that follows when they have the support of a qualified majority of the member states. A request from a member state to reintroduce or extend internal border controls can be expected to be approved if the reasons are valid and have to do with general order or internal security, while a request on unclear grounds or without grounds, or a request for measures that are not proportionate cannot be expected to be approved.

In my opinion, our proposals present a good balance between the need for an efficient mechanism that makes it possible to take measures in order to effectively protect a member state from threats to general order or internal security, and the need to ensure that such measures are not permitted to undermine the area without internal borders that the Schengen area represents.

Yours sincerely,