

## Draft Non-paper 14-11-2011

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from :	The Netherlands
to :	Working Party for Schengen Matters (Acquis)/Mixed Committee (EU-Iceland, Norway, Switzerland and Liechtenstein)

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The Treaty of Lisbon as well as the Schengen acquis underline the respect for fundamental principles and norms, fundamental freedoms, respect for human rights, as well as the rule of law. These principles are the foundation of European integration and Schengen cooperation and underpin the free movement of goods and persons - some of the major accomplishments of the EU and the essence of Schengen cooperation. The Netherlands perceives the preservation of the Schengen acquis and the free movement of persons of utmost importance for the interests of the EU and the Schengen area considering the important benefits it provides in economic, social and cultural terms. The Schengen acquis also includes a framework to secure the Schengen area, acknowledging the fact that freedom and security are interlinked, by constituting an area of freedom, security and justice. It encompasses not only the abolition of the border controls at the internal borders and common rules on the control of external borders but also visa policy, police and judicial cooperation, common rules on the return of illegal migrants and the establishment of common data-bases such as the Schengen Information System (SIS).

The Schengen zone continuously faces new challenges – e.g. ever changing migration flows, organised crime such as smuggling and trafficking of human beings, drugs and mobile (itinerant) criminal groups. To tackle these challenges and safeguard the benefits of the Schengen zone, cooperation between Member States is a prerequisite. Mutual trust between Member States and of EU / Schengen citizens in their authorities is essential. Every Member State and relevant authority has a responsibility to safeguard the achievements of the Schengen zone such as the protection of the EU external borders.

**Currently, the Schengen zone is under pressure. As concluded at the European Council of 24 June 2011, it is vital that Schengen partners respect the fundamental principles and norms of the EU, to be able to solve this problem.**

**The application of the Schengen acquis cannot be implemented properly if Schengen Member States cannot fulfil their Schengen obligations because they are vulnerable to elements which undermine the rule of law, such as corruption and influences of (organised) crime on society.**

In view of strengthening the effectiveness and reliability of the Schengen evaluation mechanism including the strengthening, adaptation and extension of the criteria based on the EU acquis - as requested by the European Council - the Netherlands would like to make several proposals. The proposals encompass additional elements to be included in the amended Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify the application of the Schengen acquis. These elements are:

- An assessment of the effects of all relevant legislation, the functioning of institutions executing the legislation and operational activities, contributing to the functioning of the Schengen zone in particular regarding corruption and those areas on which accompanying measures are needed to create and preserve a Schengen area as determined by the Schengen acquis. As mentioned before, the Schengen acquis will be jeopardised if the institutions responsible for the application of the acquis are under pressure. Therefore, the questionnaire used in the evaluation process (article 7) should be enlarged with questions which focus upon the functioning of the institutions executing the Schengen relevant legislation.
- The output of other evaluations on anti-corruption measures directly related to the application of the Schengen acquis e.g. the Group of States against Corruption (GRECO)<sup>1</sup> could be included. Besides upgrading of the questionnaire, the Schengen catalogues should be systematically supplemented with recommendations and best practices regarding corruption and conflict of interest.

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<sup>1</sup> The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

- Systematic involvement of Europol in the risk analysis exercise on which the multiannual and annual programmes are based. During the Justice and Home Affairs Council on 22 and 23 September 2011 the Council asked Frontex and Europol to provide the Council with an in-depth analysis on the situation and current challenges in the field of illegal migration and external border protection. This illustrates that the role of Europol is important in addressing problems in the Schengen system. This was also underlined in the non-paper submitted to the JHA Council by Austria, Hungary and The Netherlands on 25 October 2011.
- Recommendations made in other EU and non-EU mechanisms regarding these areas are fully taken into account when making the evaluations.
- Beside Frontex the participation of European Union agencies such as Europol in providing assistance for on site visits.

By integrating these elements in the evaluation mechanism, the required integrated and multidisciplinary approach for the effective application of the Schengen acquis and the evaluation and monitoring thereof will be developed. For such an approach existing as well as initiatives in the nearby future can be used. These are:

- Risk analysis provided by Frontex and Europol. In relation to this, the EU Internal Security Strategy paper and the EU policy cycle on organised and serious international crime are policy initiatives which need to be taken into account.
- The EU Anti-corruption reporting mechanism for periodic assessment,<sup>2</sup> as well as a proposal for an evaluation mechanism for criminal justice cooperation<sup>3</sup> - as announced in the Stockholm Action Plan.
- The joint action 97/827 of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.<sup>4</sup>
- Evaluations conducted by and recommendations given the Group of States against Corruption (GRECO).<sup>5</sup>

The proposed elements will increase the ability of the proposed evaluation mechanism to guarantee an effective application of the Schengen rules by Member States in accordance with fundamental principles and norms as requested by the European Council of 24 June 2011.

In Annex I the text proposals required to include the presented elements in the amended regulation are presented.

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<sup>2</sup> Doc 11580/11

<sup>3</sup> COM(2010)171 final

<sup>4</sup> 97/827/JHA: Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime *Official Journal L 344*, 15/12/1997 P. 0007 – 0009. These evaluations are undertaken within the framework of the EU Working Party on General Matters including Evaluations (GENVAL), previously the Multidisciplinary Working Party on Organized Crime.

<sup>5</sup> Example: First evaluation round (2000-2002) Questionnaire Adopted at the 3rd meeting of GRECO (Strasbourg, 3-5 May 2000)

## Annex I Text Proposals

The text proposals by The Netherlands are in bold, underlined and in italic and are the following:

- (12) The evaluation should guarantee that the Member States apply the Schengen rules effectively in accordance with fundamental principles and norms. Therefore the evaluation encompasses **an assessment of the effects of all relevant legislation, the functioning of institutions executing the legislation** and operational activities contributing to the functioning of an area without border control at internal borders; **in particular regarding corruption and the areas identified under consideration nr. 1. In this process, recommendations made in other mechanisms regarding these areas are fully taken into account.**
- (13) The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union<sup>6</sup> (hereinafter referred to as 'Frontex') **as well as The European Police Office (hereinafter referred to as Europol)** should support implementation of the mechanism, primarily in the area of risk analysis relating to external borders **and related illegal phenomena**. The mechanism should also be able to rely on the expertise of ~~the Agency~~ **Frontex** for carrying out on-site visits at the external borders on an *ad hoc* basis **as well as assistance from other relevant European Union agencies such as Europol.**

### Article 5

#### Multiannual programme

1. A multiannual evaluation programme covering a period of five years shall be established by the Commission **after consulting Frontex and Europol**<sup>7</sup>, ~~in accordance with the procedure referred to in Article 15 (2)~~, not later than six months before the start of the next five-year period. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17 (2).
2. The multiannual programme shall contain the list of Member States to be evaluated each year. Each Member State shall be evaluated at least once during each five-year period. The order in which the Member States are to be evaluated shall be based on a risk analysis taking into account the migratory pressure, internal security, 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 risk analysis will be based on Frontex and Europol risk analyses as well as other relevant sources.**
4. The multiannual programme may be adapted, if necessary, in accordance with the procedure referred to in paragraph 1.

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<sup>6</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 (OJ L 349, 25.11.2004, p. 1).

<sup>7</sup> This proposal corresponds to the French proposal as formulated in document 15853/11

## Article 6

### **Frontex Risk analysis**

1. By not later than 30 September each year, Frontex shall submit to the Commission a risk analysis taking into account migratory pressure 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. The Commission shall make this risk analysis available to the Member States.
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. 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.

## NEW Article 6a

### **Europol Risk analysis**

**By not later than (...) 30 September each year, Europol shall submit to the Commission and the Member States a risk analysis taking into account serious and organised crime and making recommendations for priorities for evaluations in the next year under the multiannual programme. This should be done in accordance with the EU policy cycle for organised and serious international crime.**

## Article 7

### Questionnaire

1. The Commission shall send a standard questionnaire to the Member States to be evaluated in the next year by not later than 15 August of the previous year. The standard questionnaires shall cover the relevant legislation, **the functioning of institutions executing the legislation** and the organisational and technical means available for implementation of the Schengen *acquis* and statistical data on each field of the evaluation.
2. Member States shall provide their replies to the questionnaire to the Commission within six weeks of communication of the questionnaire. The Commission shall make the replies available to the other Member States.

## Article 8

### Annual programme

1. Taking into account the risk analysis provided by Frontex **and Europol** in accordance with Article 6 **and new article 6a**, the replies to the questionnaire referred to in Article 7 and, where appropriate, ~~Europol or~~ other relevant sources, an annual evaluation programme shall be established by the Commission by not later

than 30 November of the previous year. The programme may provide for evaluation of:

- application of the *acquis* or parts of the *acquis* by one Member State **including the required functioning of institutions involved in the application**, as specified in the multiannual programme;

and, in addition, where relevant:

- application of specific parts of the *acquis*, **including the required functioning of institutions involved in the application**, across several Member States (thematic evaluations);
- application of the *acquis*, **including the required functioning of institutions involved in the application**, by a group of Member States (regional evaluations).

2. The first section of the programme, ~~adopted in accordance with the procedure referred to in Article 15 (2)~~, 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. This section shall be adopted by the Commission. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17 (2).
3. The Commission shall draw up 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 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.