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## The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock

*Yves Pascouau*

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One of the immediate effects of the Arab Spring was the launch of intense discussions about 'Schengen governance'. While the package of proposals presented by the European Commission has opened a new debate regarding the possibility of reintroducing internal border checks, it has revived an 'old' proposal to make evaluating the implementation of Schengen rules more efficient. But discussions on the latter are blocked due to a problem related to the legal basis, which has a significant impact on the European Parliament's (EP) participation - or lack of participation - in the process.

### BACKGROUND

#### Two types of evaluation mechanism

Evaluation is an integral part of the Schengen system and is based on two driving mechanisms. The first evaluates the ability of Member States to join the Schengen area. It aims to verify whether an applicant country is correctly implementing the rules in order to lift internal border checks. This mechanism is commonly described as the 'putting-into-effect' mechanism.

The second mechanism is applied once a Member State has been admitted to the Schengen area. It assesses whether the Schengen *acquis* is being implemented correctly. This 'implementation mechanism' seeks to reinforce mutual trust, which is the basis of the cooperation that ensures free movement of people in the Schengen area.

Both types of evaluation were initially carried out on an intergovernmental basis. At the outset, evaluations were managed by a standing committee composed of Member-State representatives. After the entry into force of the Treaty of Amsterdam, these tasks were transferred to the Schengen Evaluation Working Group within the Council.

#### Proposals to modify the Schengen evaluation mechanism

In March 2009, the Commission presented a proposal to modify the Schengen evaluation mechanism. It

sought to move away from the intergovernmental approach by entrusting the Commission with the tasks carried out by the Schengen Evaluation Working Group regarding the implementation mechanism.

This was justified, on the one hand, by the integration of the Schengen *acquis* into the EU framework, especially with regard to areas falling within the first pillar and, on the other, by the need to make the evaluation mechanism more efficient, in particular regarding the implementation phase. This proposal was rejected by the EP, since the procedure was not based on co-decision and *de facto* excluded the Parliament from the decision-making process.

With the entry into force of the Lisbon Treaty at the end of 2009 and the establishment of a new legal framework, the proposal became obsolete. A new proposal was issued in November 2010 in order to comply with new rules and procedures. The proposal was further modified in September 2011 according to orientations deriving from the 'Schengen Governance' package.

The new proposals seek to boost the efficiency of the Schengen evaluation mechanism. The main modifications concern: (i) entrusting the Commission to lead the evaluation process with regard to the implementation of the Schengen *acquis*; (ii) establishing annual and multiannual programmes of both announced and unannounced on-site visits,

and the conditions under which these visits are carried out; (iii) improving the involvement of Member-State experts and EU agencies in the evaluation mechanism, as well as the rules for following up on evaluation findings. Finally, the revised 2011 proposal introduces the possibility of a Union-based mechanism for reintroducing border checks at internal borders should a Member State show serious deficiencies in

carrying out external border checks or seriously neglect its obligation to control its section of the external border.

While these proposals seek to improve the Schengen evaluation mechanism, the negotiation process is currently frozen due to problems regarding the legal basis.

## STATE OF PLAY – A PROBLEM OF LEGAL BASIS

The Commission decided to base the proposal on Article 77.2 (e) of the Treaty on the Functioning of the European Union (TFEU). While this provision allows the EP to take part in the decision-making process, it seems that the Commission's choice of legal basis is false. It should have grounded the proposal on Article 70 (TFEU), but such a legal basis would have excluded the EP from the procedure. This creates a nexus between legal obligations and political issues.

### A questionable legal basis

According to the Commission's proposals, the appropriate legal basis is Article 77.2 (e). Under this provision, the Council and the EP shall adopt measures concerning "the absence of any controls on persons, whatever their nationality, when crossing internal borders".

For the Commission, the absence of internal border checks is made possible by a series of accompanying measures related *inter alia* to external border management, visa policy, and police and judicial cooperation. Hence, the evaluation of these measures falls within the scope of Article 77, as they serve the objective of "maintaining the area free of internal border controls". However, there are a number of doubts regarding this choice of legal basis.

Firstly, Article 77 deals specifically with issues related to internal and external border checks. The fact that this provision pursues the objective of setting up an area of free movement of persons without internal border checks does not extend its scope to matters related to police and judicial cooperation, or even drug policy.

Secondly, the current situation regarding internal border checks is totally different from that which existed when the Treaty of Amsterdam entered into force. In 1999, the Treaty of Amsterdam set the objective of maintaining and developing "the Union as an area of freedom, security and justice, in which the free movement of persons is assured". In order to establish this area, the Council was entitled to adopt, on the one hand, measures with a view to ensuring the absence of any controls on persons when crossing internal borders and, on the other, flanking measures with respect to external border checks, asylum and immigration.

The exceptional development of EU policies in the field of migration, asylum, border control and criminal law since 1999 has radically modified the situation by satisfying the conditions for the existence of an area without internal border checks. This derives from the Lisbon Treaty, which states that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which free movement of persons is ensured". The objective of the Treaty of Amsterdam was to "maintain and develop" the area, whereas the Lisbon Treaty "shall offer" an area without internal checks.

Article 77 of the Lisbon Treaty reflects the new situation. Hence the absence of internal border checks is a matter of fact and is ensured by existing and forthcoming measures adopted in various fields listed in Article 77.2, i.e. visa policy, external borders check and a forthcoming integrated management system for external borders. In this context, Article 77.2 (e), which is specifically devoted to the absence of internal border checks, takes on a specific meaning.

"The absence of any controls of persons" referred to in Article 77.2 (e) does not concern the reintroduction of internal border checks but instead relates to the lifting of border checks. This provision relates to the putting-into-effect mechanism rather than the implementation mechanism, which is embedded in other provisions.

Hence, a proposal seeking to strengthen the implementation evaluation mechanism cannot be based on this provision. In addition, this legal basis does not allow the Commission to ask one Member State to take specific measures such as the "closing of a specific border crossing point for a limited period of time".

While Article 77.2 (e) is not the appropriate provision on which to base action, the Commission should be able to employ Article 77.2 in its entirety as a legal basis for the evaluation mechanism. But such a modification would disregard the existence of a specific legal basis devoted to evaluation mechanisms covering the scope of the Commission's proposal: Article 70 TFEU.

### A more appropriate legal basis

Article 70 is a specific provision introduced by the Lisbon Treaty. It paves the way for the Council to adopt measures

"laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies (...) by Member States' authorities".

This specific provision was proposed by the Constitutional Convention. The final report of a working group on 'Liberty, Security and Justice' highlighted the importance of evaluation mechanisms in particular regarding the effective implementation of rules adopted in the fields of freedom, security and justice. In more concrete terms, it called for "an explicit mention in the Treaty of this technique of mutual evaluation which is to be implemented flexibly with the participation of the Commission through procedures guaranteeing objectivity and independence". This was done through Article III-260 of the Constitutional Treaty, which then became Article 70 of the Treaty on the Functioning of the European Union after minor changes.

This historical insight reinforces the statement that Article 70 is the appropriate legal basis for establishing the evaluation mechanism proposed by the Commission for three key reasons.

Firstly, Article 70 is the result of a large-scale process which started with the Constitutional Convention, which involved all relevant EU actors and national parliaments. This was followed by an intergovernmental conference and finalised by a decision taken by heads of state and government. Article 70 is therefore the result of the willingness of all parties involved to establish an evaluation mechanism specifically applicable to issues related to the area of freedom, security and justice. In this sense, Article 70 constitutes a *lex specialis* for the creation of an evaluation mechanism that ensures the existence of an area of free movement of persons.

Secondly, the historical insight highlights the provision's underlying rationale for setting up an evaluation

mechanism for implementation measures covering not only migration-related issues but also issues related to judicial and police cooperation. In this context, it is hard to decouple the Commission's justification laid down in the proposal from the scope of Article 70. The Commission explains that "the abolition of internal border controls must be accompanied by measures in the field of external borders, visa policy, the Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters and drugs policies. (...) Evaluation of correct application of these measures therefore serves the ultimate policy objective of maintaining the area free of internal border controls".

Finally, Article 70 indicates that evaluations must be conducted "in collaboration with the Commission". One could argue that this provision allows the Council to entrust the Commission with implementing powers. Despite their importance, implementing powers are not absolute. Thus the Commission may be entitled to exercise tasks such as sending evaluation questionnaires, establishing the annual evaluation programme, and drawing up lists of experts or accompanying national experts for on-site visits. However, it may not be entitled to exercise on-site visits on its own, as this would create problems related to sovereignty. Nor could the Commission take a decision requesting Member States to close a specific border crossing point, since that is related to legislative power.

The Commission's proposal should be modified as the appropriate legal basis is Article 70. While this relates to the correct legal implementation of the treaty provisions, a decision not to use Article 70 as a legal basis could set a precedent and definitively obliterate the provision and its *effet utile*.

However, modifying the legal basis would raise the issue of how to cope with the subsequent exclusion of the EP from the procedure.

## PROSPECTS – INSTITUTIONAL PROBLEMS AND THE WAYS OUT

### The exclusion of the EP from the procedure

Article 70 excludes the EP from the process leading to the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. This situation creates major legal and political problems, as the EP will oppose the modification of the legal basis.

The EP rejected the initial 2009 proposal precisely because it was not based on the co-decision procedure. There is no reason for the EP to abandon this position. The EP has a democratic obligation to try to involve itself in the legislative procedure as much as possible, in particular when proposals deal with issues related to the free movement of people. In addition, the EP's rapporteur

is the same person who was appointed in 2009 - and it would be a surprise if MEP Carlos Coelho were to change his position. Finally, parliamentary work on the proposal is ongoing and any delays in deciding to change the legal basis would strengthen the political position of the EP to maintain the current legal basis.

In the end, and whether or not the legal basis is modified, the procedure is trapped in a political nexus which in any case leads to a deadlock.

If the proposal is adopted under the current legal basis, the regulation would be at risk of being annulled by the European Court of Justice due to inappropriate legal foundation. A demand for its annulment is even more likely to be introduced by a Member State given

that the use of Article 77.2 (e) will have the effect of excluding the UK and Ireland from participating in the evaluation mechanism.

On the other hand, if the decision to change the legal basis is adopted, the EP would oppose it. It would be entitled to use this exclusion as grounds for making the adoption of other proposals presented in the 'Schengen package' - the modification of the Schengen Borders Code - far more difficult, as in this case the EP is involved as co-legislator.

In both cases, there is a major risk of the proposal not being adopted. This would mean that the evaluation of the implementation of the Schengen acquis would remain unchanged. Mutual trust would not be strengthened and the free movement of persons would consequently be weakened.

Although the situation appears highly complicated and politically sensitive, there are nevertheless still ways to get out of the trap and to limit the collateral damage.

### **How to get out of a tricky situation - The way forward**

The first issue to resolve is how to convince the EP to accept modification of the legal basis. This may be possible on the basis of the Council's rules of procedure. According to Article 19.7, COREPER may adopt a decision to consult an institution or body wherever such consultation is not required by the Treaties. Hence, the issue is not a legal problem but relates to the capacity of the Council to persuade the EP that it will still be part of the process.

In this view, the Council is able to circumvent the limits set up by the Treaty and engage in an in-depth consultation process with the EP regarding the evaluation mechanism proposal. Moreover, the EP's role in this consultation process may be as strong as that of co-legislator. Indeed, the EP is currently co-legislator on the proposal to modify the Schengen Borders Code, which is the other part of the Schengen package. It may well make an extensive consultation process a condition of its acceptance of that proposal. At the end of the day, the EP is in a powerful bargaining position and the consultation process might be similar to a co-decision process.

Secondly, the modification of the legal basis for the evaluation mechanism should be accompanied by a

restructuring of all the Schengen package proposals. More precisely, the evaluation mechanism should be redesigned to concentrate on arrangements concerning the evaluation of the implementation of the Schengen acquis; i.e. how evaluations should be conducted. This means that Article 14 of the current proposal, which allows the Commission to ask Member States to take specific measures such as reintroducing internal border checks, should be removed from the proposal and reintroduced into the draft Schengen Borders Code.

This would make the Schengen package more consistent. One tool would address evaluation issues, whereas the other would deal with decisions to be taken should a Member State encounter difficulties in managing its external border properly. In addition, in shifting Article 14 from the evaluation proposal to the Schengen Borders Code proposal, the Commission would introduce a central element that is sorely lacking - solidarity. Indeed, Article 14 of the current 'evaluation proposal' emphasises the need to support Member States facing difficulties before envisaging the reintroduction of internal border checks.

It is worth noting that by restructuring the proposals with a view to inserting more solidarity into the Schengen package, the Commission would comply with the June 2011 European Council Conclusions. These made the reintroduction of internal border checks conditional upon a series of clear criteria, including undertaking as a first measure to assist Member States whose external borders are under heavy pressure.

In conclusion, there are ways out of the current legal and political deadlock. However, it is uncertain whether the route towards a compromise with the EP will be taken. More precisely, some Member States do not want the Schengen evaluation mechanism to be modified, as the proposal awards too much power to the Commission. Hence, maintaining the current situation gives them a good opportunity to torpedo the process. Forthcoming discussions will reveal whether or not the area of free movement will be strengthened or further weakened.

*Yves Pascouau is a Senior Policy Analyst at the European Policy Centre.*

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium  
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: [info@epc.eu](mailto:info@epc.eu) ■ Website: [www.epc.eu](http://www.epc.eu)



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