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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

**Biannual report on the functioning of the Schengen area
1 November 2011 - 30 April 2012**

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1. INTRODUCTION

The right to free movement of persons is a cornerstone of the European Union and the Schengen area without internal border control is one of the most valued achievements of EU integration. The Schengen cooperation was established on the initiative of five EU countries – Belgium, France, Germany, Luxembourg and the Netherlands – through an agreement of 1985 and an implementing convention of 1990, both signed in the Luxembourg town of Schengen. In 1995, border control at internal borders was lifted and in 1997, these agreements were integrated into the framework of the European Union by the Treaty of Amsterdam. The Schengen Area has grown rapidly. Today it covers an area with 42 673 km of sea and 7 721 km of external land borders, where over 400 million Europeans from 26 European countries can enjoy passport-free travel.

The right to travel within the Schengen area without being subjected to border control is based on the condition that each participating state is fulfilling its obligations according to the Schengen acquis. Therefore, it is essential that the European institutions maintain vigilance over the functioning of the Schengen area and are ready to respond to any challenges it faces. Against this background, the Commission in its Communication 'Schengen governance – strengthening the area without internal border control' of 16 September 2011 announced its intention to present a biannual overview to the European Union institutions on the functioning of Schengen. The Council on 8 March 2012 welcomed the Commission's intention to present regular reports to the European Parliament and to the Council on the functioning of the Schengen cooperation.

The purpose of these reports is to provide the basis for a regular debate in the European Parliament and in the Council and so to contribute to the strengthening of political guidance and cooperation in the Schengen area. This first report covers the period 1 November 2011 - 30 April 2012 and complements the measures proposed in the Commission legislative proposals on Schengen governance¹, which are currently being discussed with the European Parliament and the Council. The report focuses on the functioning of the Schengen area, leaving aside other issues that may be related to the area of freedom, security and justice, but do not concern the core issue at hand, and issues that are dealt with in parallel in other

¹ COM (2011) 561 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Schengen governance – strengthening the area without internal border control, COM (2011) 559 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 and COM (2011) 560 Proposal for a regulation of the European Parliament and of the Council amending regulation (EC) No 562/2006 in order to provide for common rules on the reintroduction of border control at internal borders in exceptional circumstances.

documents. These issues include i.a. the Commission proposal on Eurosur² and the Commission proposal introducing a visa safeguard clause³ as well as questions dealt with in the Communication on the Global Approach to Migration and Mobility⁴ and the Annual Report on Migration and Asylum. The biannual report on the functioning of the Schengen cooperation should be understood as part of this broader context.

2. SITUATIONAL PICTURE

2.1. Situation at the Schengen external borders

The pressure at the Schengen external borders is focused at a limited number of hot spots.

During October-December 2011, the number of irregular border crossings increased compared to the previous year, to nearly 30,000 crossings. About 75 percent of those were reported from the Eastern Mediterranean route, whereby Afghans and Pakistanis were the most frequent nationalities. The Commission continues to support the Member States in managing these mixed migration flows, i.a. through EU funding (notably the External Borders Fund), cooperation with relevant third countries and via EU Agencies (e.g. Frontex)⁵.

The pressure at the Schengen external border is linked to developments in relevant third countries, which was evident during the Arab Spring in 2011. The Commission notes that the situation in Syria may prompt a future migration flow into the neighbouring countries, and also into the European Union. In October-December 2011, 578 Syrians were detected while attempting to cross the Schengen external land border between the official border crossing points, compared to 210 persons in the same quarter of 2010. 82 % of these were detected at the Greek external land border.

A more detailed situational picture can be found in Frontex annual risk analysis 2012 (http://frontex.europa.eu/assets/Attachment_Featured/Annual_Risk_Analysis_2012.pdf).

The Commission will continuously assess whether the current balancing of support measures (i.a. EU funding and Frontex operations) between the current hot spots and the rest of the external border is appropriate or whether another prioritisation should be foreseen, taking into account on the one hand the pressure at the current hot spots and on the other hand the possible displacement effects due to enhanced border control at these spots as well as new migration flows following developments in third countries.

² COM (2011) 873 Proposal for a regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR).

³ Proposal for a regulation of the European Parliament and of the Council amending Council regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

⁴ COM (2011) 743 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The Global Approach to Migration and Mobility

⁵ Frontex quarterly risk analysis October-December 2011

2.2. Situation within the Schengen area

The Schengen acquis allows third country nationals⁶ holding a residence permit or a long-stay visa issued by one Member State to travel to other Member States for up to three months in any six months period. However, asylum seekers awaiting a decision on their status are exempted from this right until the final assessment of their application for protection. In addition, a large majority of the third country nationals residing illegally within the Schengen area have entered the territory legally, but then remained after the permitted period (overstayers), whereas others have entered illegally. For these persons, either their stay is regularised by Member States in accordance with their national legislation or they should be subject to a return procedure. Many of these persons do not remain in the country of entry, but move on to other Member States.

In 2011, 350,944 third country nationals not fulfilling the conditions for stay were detected within the Schengen area⁷, which constitutes a 9.1 % decrease compared to the previous year. The top nationalities were Afghanis, Tunisians and Moroccans. According to Frontex⁸, secondary movements, originating at the Greek-Turkish land border, have been detected at the land borders between the Western Balkans and both Slovenia and Hungary, at the sea border of southern Italy and at a range of European airports, particularly in the Netherlands, Belgium and Germany.

There is limited information on the number of persons without the right to stay in the Schengen area who are seeking to move to another Member State. However a number of one-off data-gathering operations have provided at least some basic statistics. The most recent of these, operation DEMETER⁹, was carried out from 24 to 30 October 2011, in 21 Member States (i.a. France, Italy and Greece did not participate). During this week, the participating Member States, as part of their daily work, filled out a reporting form on each incident of suspected illegal residence in their territory. The reports were then sent to the Polish Border Guard, which compiled and analyzed the data. The aim of the operation was to collect information on migration flows in EU Member States, regarding in particular:

- Migratory pressures in various countries,
- main routes of movement of irregular migrants,
- main destination countries of migration,
- countries of origin of irregular migrants and
- places of detection of irregular migrants and means of transport used.

During the operation, 1936 third country nationals from 104 different countries were apprehended. The largest number of irregular migrants were found in Germany (360 persons), Spain (290 persons) and Hungary (260 persons). A majority had entered the Schengen area in Spain (207 persons), Greece (180 persons), Cyprus (161 persons) and Poland (121 persons).

⁶ For the purposes of this report, non-EU family members of EU citizens are not covered when referring to third country nationals, given the privileged status they enjoy under EU law on free movement of persons (Directive 2011/38/EC) and the Schengen acquis.

⁷ Frontex annual risk analysis 2012

⁸ Frontex annual risk analysis 2012

⁹ Summary report by the Polish Border Guard Headquarters, November 2011

The main countries of destination were Spain (288 persons), Germany (264 persons) and Austria (140 persons).

The conclusions from these operations display a need for continuously trying to improve the monitoring and analysis of migration flows within the Schengen area. This could be done i.a. by biannually carrying out DEMETER-style operations and regularly exchanging information at the European Union level. The Commission welcomes the coordination by the Danish presidency of Operation Balder from 16 to 22 April 2012.

Alongside reliable information on third-country nationals residing illegally within the Schengen area, the implementation of the directive on sanctions and measures against employers¹⁰ remains an important tool in the fight against illegal stay within the territory.

In addition to current and planned initiatives (i.a. operation Balder), the Commission will deliberate on whether other measures could be taken in order to provide more information on migration flows within the Schengen area.

3. APPLICATION OF THE SCHENGEN ACQUIS

3.1. Cases of temporarily reintroduced control at internal borders

Article 23 of the Schengen Borders Code¹¹ provides that, exceptionally, where there is a serious threat to public policy or internal security, a Member State may reintroduce border control at its internal borders. The Member State shall as soon as possible notify the other Member States and the Commission accordingly. Moreover, a report shall be presented to the European Parliament, the Council and the Commission, outlining, in particular, the operation of the checks and the effectiveness of the reintroduction of border control. Since the entry into force of the Schengen Borders Code in 2006, all cases of reintroduced control have been related to preventing and combating different types of crime in connection with high level meetings or major sports events.

During the period 1 November 2011-30 April 2012, control at the internal borders has been reintroduced only twice. France notified the Commission on 4 October 2011 that, because of the G-20 summit of Heads of State and Government, held in Cannes on 3 and 4 November 2011, it planned to reintroduce control at its border with Italy between 24 October and 5 November 2011. France subsequently reported to the Commission that, during this period, 38,620 persons were checked on entry (out of 563,158 persons crossing) and 15,303 persons were checked on exit (out of 605,062 crossings). 443 persons were refused entry, the majority because they did not possess valid travel documents.

On 20 April 2012, Spain notified the Commission that due to the meeting of the European Central Bank in Barcelona on 2-4 May 2012, it was to reintroduce control at the internal land border with France as well as at Barcelona and Gerona airports during the period of 28 April until 4 May 2012.

¹⁰ Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

¹¹ Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

3.2. Maintaining the absence of internal border control

Article 22 of the Schengen Borders Code requires Member States to remove all obstacles to fluid traffic flow at road crossing points at internal borders, in particular any speed limits not exclusively based on road safety considerations. Following action by the Commission, France has progressively removed obstacles hindering fluid traffic flow at several road crossing points at its internal borders with Spain, Belgium and Luxembourg. These measures allowed the Commission to, in January 2012, close the relevant infringement case against France.

The Netherlands plans to install a camera surveillance system (@migo-boras) close to the internal borders, as technical support for mobile police checks. The Commission in November 2011 addressed the Netherlands on a potential violation of the Schengen Borders Code, EU law on free movement of EU citizens and the data protection provisions of EU law. Explanations were requested especially as regards the necessity and proportionality of the system and the Commission is currently following up on the Dutch replies.

Moreover, in the period 1 November 2011 – 30 April 2012, the Commission requested information as to the correct implementation of EU law and namely the Schengen acquis in three new cases and continued working on eight existing cases, addressing in total ten different Member States (Austria, Belgium, the Czech Republic, Estonia, Germany, Italy, Latvia, the Netherlands, Slovakia and Sweden). These files regard mainly whether the carrying out of police checks close to the internal border have an effect equivalent to border checks (article 21 of the Schengen Borders Code) and the obligation to remove obstacles to fluid traffic flow, such as speed limitations, at road crossing-points at internal borders (article 22 of the Schengen Borders Code). In all cases, the exchange of information with the respective national authorities is still ongoing.

3.3. Pending infringement cases related to the Schengen acquis

Transposition of the Return Directive (2008/115/EC) into national legislation

The deadline for implementation of the Return Directive (2008/115/EC) expired on 24 December 2010. Twenty-six Member States have already adopted new legislation transposing the directive into their national legislation and taken onboard the common standards. By April 2012, only Lithuania, Poland and Iceland had not yet notified full transposition. The Commission has launched infringements procedures against the Member States which did not comply with their transposition and notification obligation.

A study launched in 2011 in order to evaluate the correct transposition of the Directive into national legislation, has produced its first results with eighteen reports now available and the rest to follow in the course of 2012. The Commission will thoroughly examine the transposition reports and pursue the full and correct application by the Member States of the provisions laid down in this directive.

Application of the Schengen Borders Code

In October 2009, allegations of serious difficulties faced by migrants in applying for asylum and ill-treatment by Greece of asylum-seekers and potential asylum-seekers, including the turning back of persons who may face serious harm or persecution, led the Commission to issue a letter of formal notice against Greece. The Commission takes the view that any violation of the EU asylum *acquis* and the Schengen Borders Code, in conjunction with

fundamental rights enshrined in the Charter of Fundamental Rights and the general principles of EU law and the European Convention on Human Rights, needs to be addressed as a matter of urgency.

The Commission recognises the considerable pressure faced by Greece as a result of the large number of persons from third countries entering its territory. At the same time, the Commission is concerned at the serious deficiencies of the Greek asylum system and the breach of fundamental rights. While acknowledging the Greek efforts to remedy the situation, the Commission will continue to closely monitor this matter and take the necessary steps to ensure that Greece abides by its legal obligations and benefits from the necessary support.

3.4. Weaknesses identified in the framework of the Schengen evaluation mechanism

The Schengen area is based on mutual trust between the Member States in their capacity to implement the measures allowing for the lifting of controls at the internal borders, in particular the control of the external border. In order to gain and maintain this mutual trust, the Schengen Member States in 1998 set up a mechanism¹², for verifying whether all preconditions for application of the Schengen acquis (i.e. lifting of border controls) have been met by Member States wanting to join the Schengen cooperation as well as verifying that the Schengen acquis is being correctly applied by the Member States already implementing the acquis. Member States are evaluated on a regular basis, by experts from the Member States, the Council general secretariat and the Commission. The evaluations are based on replies to questionnaires agreed by the Council as well as on-site visits and the findings are described in reports, including comments and recommendations for follow-up.

In the period 1 November 2011-30 April 2012, Schengen evaluations were carried out regarding air borders in Hungary, Malta and Slovenia, visa in the Czech Republic, Hungary, Malta and Slovenia, SIS/Sirene in Finland and Sweden, police cooperation in Malta, Slovenia, Sweden, Iceland and Norway and data protection in the Czech Republic, Hungary, Poland, Slovakia and Iceland. The reports are still being drafted, but are expected to include some positive as well as negative comments and recommendations on issues such as training, use of risk analysis, information exchange, international cooperation and infrastructure at border crossing points and embassies/consulates. Although there is generally room for improvement, none of these evaluations have shown the type of deficiencies that would require immediate action by the Commission.

During the Schengen evaluation of Greece in 2010-2011, several serious shortcomings were detected, especially as regards control of the external land- and sea borders. Given the extensive scope of the recommendations, Greece has drawn up a national action plan on how to remedy these shortcomings. This includes i.a. enhanced coordination of border management issues, increased deployment of personnel and equipment, improvement of infrastructure, a new programme for training as well as a review of the relevant legislation. In order to assess the progress so far and to identify topics where Member States could offer assistance, a review mission is scheduled for 28 May to 2 June 2012. This mission will go to the Athens International Airport 'Eleftherios Venizelos', the Port of Piraeus and the Evros region. While reiterating its commitment to support the Greek efforts to manage its external borders, the Commission invites Greece to continue the implementation of its Schengen

¹² SCH/Com-ex (98) 26 def.

action plan and to establish a comprehensive and systematic identification of needs as well as of available resources.

For an indicative calendar of Schengen evaluations in May-October 2012, see Annex I.

3.5. Lifting of control at internal borders with Bulgaria and Romania

Even though the Council in June 2011 concluded that both Romania and Bulgaria formally fulfil the criteria to apply in full the Schengen acquis, it has not been able to decide on the lifting of control at the internal borders to these countries. On 2 March 2012, the European Council requested the Council to identify and implement measures which would contribute to the successful enlargement of the Schengen Area to include Romania and Bulgaria and asked the Council to revert to this issue in order to adopt its decision at the meeting of the JHA Council in September 2012. The Commission stands ready to support any measure that might be required to ensure that the Council would take a positive decision in September.

4. FLANKING MEASURES

4.1. Use of the Schengen Information System

The Schengen Information System (SIS) is a common information system, allowing the Member States' competent authorities to obtain information related to alerts on persons and objects. This information can be used for police and judicial cooperation in criminal matters as well as for checks on persons at the Schengen external borders or on their national territories and for the issuance of visas and residence permits. Whereas the SIS is very successful and generates tens of thousands of hits per year, the Commission is working together with the Council to identify redundant working practices and rules.

Although Member States use a common legal basis for cooperation, the implementation can vary due to different national laws and procedures. This means i.a. that some Member States, using the SIS, have considerable success in tracking the movements of their serious criminals within other Member States, whereas other Member States make little use of this possibility.

Moreover, whereas cooperation between the authorities responsible for the exchange of supplementary information (the SIRENE bureaux) may be exemplary, delays often occur within Member States. When a person has been detained at a border and a SIRENE bureau urgently needs information on the person's background, it is not acceptable to have to wait hours or even days for this key piece of information. Such a detention cannot be justified and a person who has been detained for a legitimate reason may have to be released due to lack of information.

Not all Member States create, as a matter of course, alerts to highlight that a travel document has been invalidated by the issuing authority. This permits the third country national holding the document to use it illegally to try to enter the Schengen area, even though they may have been excluded following a criminal conviction.

The Commission will assess whether measures should be taken in order for the SIS and the SIRENE bureaux to be used to their full potential and if so, whether other measures could be considered, in addition to the issues above.

4.2. Use of the Visa Information System

The Visa Information System (VIS) is a system for exchange of information on short-stay visas, enabling the competent authorities of the Schengen States to process data on visa applications and on all visas that are issued, refused, annulled, revoked or extended. The VIS was successfully launched on 11 October 2011 in Member States' embassies and consulates in the first region of deployment (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia). According to the current planning, the VIS will start operating on 10 May 2012 in the second region (Israel, Jordan, Lebanon and Syria) and on 2 October 2012 in the third region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen). The VIS is working well and by 30 April 2012, the system had processed 775,489 applications, 611,419 issued visas and 99,242 refusals.

4.3. Visa policy and readmission agreements

Post-visa liberalisation monitoring mechanism for Western Balkan countries

Following the rapid increase of asylum applications in some Member States after the granting of visa liberalisation to the Former Yugoslav Republic of Macedonia, Montenegro and Serbia in December 2009 as well as Albania and Bosnia and Herzegovina in December 2010, the Commission established a post-visa liberalisation monitoring mechanism for all Western Balkan countries that achieved visa liberalisation. In December 2011, the Commission presented its second report on this monitoring¹³, picturing the recent actions undertaken, the current state of play and proposed next steps. Although the total number of asylum seekers from the region has decreased in the second half of 2011 in comparison with the same period in 2010, following fewer asylum seekers from Serbia and the Former Yugoslav Republic of Macedonia, this is counteracted by a considerable increase of asylum seekers from Albania and Bosnia and Herzegovina. Most asylum claims (based on lack of health care, unemployment and lack of schooling) are judged to be unfounded, whereby the asylum recognition rate is very low. Belgium, Germany, Luxembourg and Sweden remain the main destination countries, partly due to the duration of asylum procedures and the associated length of authorised stay. These Member States have taken measures to decrease the processing time, but there is still room for improvement as regards i.a. information exchange, investigation of facilitators, strengthened border control, targeted awareness campaigns and assistance to minority populations (in particular Roma communities).

On this basis, the Commission will analyse whether the post-visa liberalisation monitoring mechanism (including the Frontex alert mechanism) provides the necessary tools to monitor the migration flows following the visa liberalisation for the Western Balkan countries or if there are necessary improvements of this monitoring.

Readmission agreements

The conclusion of readmission agreements forms a central part of the European Union's cooperation with third countries in managing migration and asylum. The Commission in November 2011 finalised the negotiations on a readmission agreement with Cape Verde, which now opens the way to start the procedure for formal ratification. Technical negotiations with Turkey have been finalised and the signature of the readmission agreement and the

¹³ SEC (2011) 1570 Commission staff working paper - Second report on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010

launch of a dialogue on visa liberalisation are expected. Furthermore, negotiations have been launched with Armenia and Azerbaijan on visa facilitation and readmission agreements.

5. GUIDELINES ON THE FUNCTIONING OF THE SCHENGEN AREA

Measures carried out within the framework of the Schengen cooperation is a mixed competence, with responsibilities for the European Union as well as for the Member States. The proper functioning of the Schengen area depends not only on the uniform application of the EU acquis, but also on the use of national competences in line with the Schengen spirit. This fact may be illustrated by two examples: Member States may carry out police checks within their territories, in order to verify a person's right to stay within the territory, but these checks must not have an effect equivalent to border control. Further, whereas it is the competence of each Member State to issue travel documents and residence permits to third country nationals, its decisions are directly linked to the right to travel within the Schengen area and are therefore a concern also to the other Member States.

In its Communications on migration¹⁴ and on Schengen governance¹⁵, the Commission committed itself to issue guidelines in order to ensure a coherent implementation and interpretation of the Schengen acquis. The guidelines on issuance of residence permits and travel documents as well as police measures at internal borders, which were developed by the Commission in consultation with the Member States, are to be found in Annex II.

¹⁴ COM (2011) 248 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Communication on Migration

¹⁵ COM (2011) 561 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Schengen governance – strengthening the area without internal border control

ANNEX I: Indicative calendar of Schengen evaluations in May –October 2012¹⁶

Time	Member States	Theme
6-12 May 2012	Estonia, Latvia, Lithuania	Sea borders
28 May-2 June 2012	Greece	Peer-to-peer
17-22 June 2012	Hungary, Slovakia	Police cooperation
1-7 July 2012	Estonia, Latvia, Lithuania	Air borders
23-27 July 2012	Malta, Slovenia	Data protection
9–20 September 2012	Malta, Poland, Slovenia	Sea borders
23-29 September 2012	The Czech Republic, Poland	Police cooperation
7-12 October 2012	Denmark, Iceland, Norway	SIS/Sirene
7-13 October 2012	Latvia, Lithuania	Visa
14-20 October 2012	Estonia, Latvia, Lithuania	Data protection

¹⁶

Council document 5090/2/12 SCH-EVAL 1 COMIX 6 REV 2

ANNEX II: Guidelines to ensure a coherent implementation and interpretation of the Schengen acquis

On 16 September 2011, the Commission presented legislative proposals consisting of proposals on a Schengen evaluation mechanism and an amendment of the Schengen Borders Code in order to further strengthen the Schengen governance¹⁷. In addition, the Commission announced¹⁸ that it would explore areas where the development of guidelines could ensure a more coherent implementation of the Schengen rules. The Commission identified the issuance of residence permits and travel documents, as well as police measures at internal borders, as appropriate topics for such guidelines and organised two meetings with Member States' experts, on 20 July 2011 and 28 November 2011, to discuss the scope and content of such guidelines. The issuance of residence permits and travel documents was also discussed with Member States at the meeting of the National Contact Points of the Mutual information Mechanism held on 1 December 2011.

The guidelines presented below take into account valuable observations and suggestions submitted by the Member States during this consultation.

A. Issuing of temporary residence permits and travel documents to non-EU citizens¹⁹

I. Introduction

The Schengen acquis provides a harmonisation of the rules on short stays (the common visa policy, including the mutual recognition of short stay visas on the basis of the harmonised procedures and conditions for issuing visas set out in the Visa Code). The Schengen acquis does not provide for a harmonisation of the conditions for issuing long stay visas, residence permits and travel documents to non-EU citizens. These issues are governed by the national law of the Member States.

The EU acquis in the area of migration and asylum contains provisions on the conditions and procedures for issuing residence permits to certain categories of persons. Thus, e.g. as regards asylum seekers²⁰, no residence permits are to be issued under EU law, but only an authorisation to remain on the territory of the Member State.

In respect of beneficiaries of international protection²¹, refugees are to be issued residence permits valid for at least 3 years and renewable, whereas beneficiaries of subsidiary protection are to be issued residence permits valid for at least 1 year and renewable. Family members of beneficiaries of protection are to be issued residence permits as well, but their validity can be shorter.

If temporary protection is declared in accordance with the Temporary Protection Directive, Member States are to provide its beneficiaries with residence permits for the entire duration of

¹⁷ COM(559) 2011 and COM (560)2011

¹⁸ COM(2011) 561

¹⁹ For the purposes of these guidelines, non-EU family members of EU citizens are not covered when referring to third country nationals, given the privileged status they enjoy under EU law on free movement of persons (Directive 2004:38) and the Schengen acquis

²⁰ Article 6 of Reception Conditions Directive 2003/09/EC

²¹ Article 24 of Qualification Directive 2004/83/EC

the protection²². It is also the case for their family members who are reunited according to the rules of the Directive²³.

As regards the other categories, in particular humanitarian cases or regularisations, national rules are applied.

It remains in the national competence of Member States to grant an authorisation to stay and/or a travel document to non-EU citizens whose situation is not covered by EU law. Such decisions are taken on the basis of national rules.

With regard to the holders of long stay visas and residence permits, the Schengen *acquis* only states the principle of the equivalence between a long stay visa/residence permit and a short stay visa²⁴: according to this principle, the holder of a long stay visa or residence permit issued by a Schengen state is entitled to travel to the other Schengen states for short stay, if they meet the entry conditions, i.e. if they are in possession of a valid travel document; justify the purpose and conditions of the intended stay and have sufficient means of subsistence; are not a person for whom an alert has been issued in the SIS for the purpose of refusing entry; and are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States²⁵. It is the responsibility of the competent authorities of the Member State to which the holder of a residence permit issued by another Member State travels, to check whether the person concerned fulfils these conditions. This check can be done on the territory of the Member States. Should checks at the internal borders have been reintroduced, in accordance with the Schengen Borders Code²⁶ (hereinafter 'the Code'), this verification could take place at the internal borders. This also applies to a non-EU citizen who holds a provisional residence permit and a travel document issued by a Schengen State²⁷.

Member States have the obligation to notify to the Commission their types of long stay visa, residence permits and provisional residence permits that are equivalent to a short stay visa and the Commission makes this information available to the other Member States²⁸. Other Member States are obliged to accept that these long stay visas and residence permits are equivalent to a short stay visa for travelling within the Schengen area.

The EU legal framework does not define conditions for issuing travel documents to non-EU citizens, except for the provisions on the issuing of travel documents to persons recognised as in need of international protection. Thus, travel documents must be provided for refugees (obligation under the Geneva Convention) and for beneficiaries of subsidiary protection (at least when they need to travel for humanitarian reasons), unless compelling reasons of national security or public order otherwise require²⁹. Exceptionally, travel documents could be

²² Article 8 of Temporary Protection Directive 2001/55/EC

²³ Article 15(6) of Temporary Protection Directive 2001/55/EC

²⁴ Art. 21 (1) and (3) of the Schengen Convention as amended by Regulation (EU) n° 265/2010 of the EP and the Council of 25 March 2010, OJ n° L85, 31.3.2010, p.

²⁵ Article 5 of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105 of 13.4.2006, p.1

²⁶ Article 23 *et seq* of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105 of 13.4.2006, p.1

²⁷ Article 21(2) of the Schengen Convention.

²⁸ See Annex 22 of the Commission Recommendation 06/11/2006 establishing a common "Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States' competent authorities when carrying out the border control on persons, C(2006) 5186 final

²⁹ Article 25 of the Qualification Directive 2004/83/EC

provided to asylum seekers for serious humanitarian reasons³⁰. A *laissez-passer* could be supplied to an asylum applicant subject to a Dublin transfer, with the purpose of identifying the person and allowing him/her to enter the territory of the responsible Member State³¹. Finally, if temporary protection is declared, Member States are to use a specific type of pass for transfers of beneficiaries between Member States³².

II. Guidelines for Member States

Events in 2011 have shown that the issuing of long stay visas, residence permits including provisional ones and travel documents to non-EU citizens, in cases of a sudden large scale inflow of migrants, may impact negatively on the proper functioning of the Schengen area without internal borders.

If a Member state is confronted with a sudden large scale inflow of non-EU citizen migrants and where this does not trigger the application of the Temporary Protection Directive:

- 1) This Member State should inform in a timely manner the other Member States and the Commission of the decisions it intends to take with regard to the issuing of residence permits including provisional ones and travel documents to the non-EU citizens concerned in the framework of the Mutual Information Mechanism (MIM).³³ On the basis of the information provided, ad hoc debates could be initiated by the Commission working together with the Council Presidency and in consultation with the Member State providing the information, at an appropriate level within the Council.
- 2) If a Member State decides to issue residence permits and has the choice amongst different types of residence permits in accordance with its national legislation, it should opt for issuing residence permits or provisional residence permits that are not equivalent to a short stay visa if the migrants do not meet the conditions for travelling within the Schengen area.
- 3) When issuing residence permits or provisional residence permits that are equivalent to a short stay visa, it should inform the holders of such documents in an appropriate and efficient way, about the conditions on which they can (or can not) travel within the Schengen area. Member States are encouraged to provide this information on their national websites which are linked to the EU Immigration Portal.

Furthermore:

- 1) On the basis of the information already provided by the European Migration Network (EMN) study on non-EU Harmonised Protection Statuses³⁴, which identified the many conditions for and types of residence permits/long stay visas issued for protection purposes, Member States should exchange information on their existing national practices in this area in the framework of the Committee on Immigration and Asylum (CIA).

³⁰ Article 6 of Reception Conditions Directive [2003/09/EC](#)

³¹ Article 19(3) and Article 20(1)(e) of Dublin Regulation 343/2003 and Article 7(2) of Dublin implementing regulation 1560/2003

³² Article 26(5) of Temporary Protection Directive 2001/55/EC

³³ Established by Council Decision 2006/688/EC.

³⁴ Available from <http://www.emn.europa.eu> under "EMN Studies"

- 2) Member States should be ready to contribute to a future EMN Ad-Hoc Query on details of national legislation on the conditions under which Member States issue identity or travel documents to non-EU citizens who do not hold a travel document issued by their country of origin and on the existing practices in this area.

For its part, the Commission will continue to promote exchange of information through the MIM, CIA, EMN and other channels.

B. Police measures in the internal border zones

I. Introduction

The situation might arise where Member States consider that, in order to more effectively combat cross-border crime, they need to implement additional measures in their internal border areas. While these measures must not have an effect equivalent to border checks, they may still have an adverse impact on neighbouring countries and on the free movement of persons, including EU citizens and their family members. Travellers may perceive such measures as infringing on one of the fundamental achievements of the European Union.

Title III of the Schengen Borders Code provides that internal borders between Schengen states may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. The abolition of border control at internal borders also entails the abolition of border surveillance. This does not preclude the right of Member States to exercise police powers by the competent national authorities under national law, including in the internal border zones, insofar as this exercise does not have an effect equivalent to border checks. The Code includes a non-exhaustive list of criteria to assess whether the exercise of police powers is equivalent to border checks or not. Police measures are for instance not considered to be equivalent to border checks if they do not have border control as an objective, are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks.

In October 2010, the Commission reported to the European Parliament and to the Council on the application of the provisions related to the absence of internal border controls. In its report³⁵, the Commission concluded that *the setting up of an area without internal borders where the free movement of persons is ensured represents one of the most substantial and tangible accomplishments of the Union. Any restrictions, such as police checks in the vicinity of internal borders, are perceived by citizens as hampering their right to free movement. Persons cannot be checked solely because they are crossing an internal border, neither at the border nor in the border areas.*

The Commission expressed concern in the report about difficulties reported by travellers in connection with alleged regular and systematic checks carried out by the national authorities of some Member States in internal border zones and committed itself to closely monitor the situation in the internal border zones to ensure the correct application of EU law.

³⁵ Report from the Commission to the European Parliament and the Council on the application of Title III (Internal Borders) of the Schengen Borders Code, COM(2010) 554 final

On 22 June 2010, in a landmark judgment³⁶ the Court of Justice of the EU clarified that national legislation conferring on the police authorities of a Member State the competence to check the identity of persons present exclusively in a 20-kilometres internal border zone, independently of their behaviour and any particular circumstances presenting a risk to public order, for the purpose of verifying compliance with the obligation to hold or carry papers and documents required by law, without providing for the necessary framework to guarantee that the practical implementation of this competence does not have an effect equivalent to border checks, is in breach of Article 67(2) TFEU as well as Articles 20 and 21 of the Code.

Following the judgement, the Commission requested Member States to adapt accordingly any national legislation conferring specific competences on national police authorities within internal border zones.

Consequently, some Member States modified their national legislation so as to limit the exercise of police powers in internal border zones in relation to location, specific means of transport and time (e.g. limitation of the area near the internal border where checks can be carried out on international trains or vehicles after the crossing of the border; definition of a maximum time limit per day, week or month, limitation of a maximum number of train carriages to be checked per train).

II. Guidelines for Member States

- 1) In accordance with the Schengen Borders Code, Member States may exercise police powers within their territories including in internal border zones, in order to verify a person's right to stay within the territory. However, these checks are to be targeted and based on updated and concrete police information and experience as regards threats to public security. Consequently, checks may only be carried out as spot-checks according to the assessment of the risk.

Simply moving the checks from the internal border line itself to an area e.g. 800 metres behind this line would not suffice to consider that such checks were not equivalent to border checks.

- 2) In case the need arises to carry out regular and systematic checks as a response to the security situation in their territories, Member States could envisage the temporary reintroduction of border control at the internal borders in accordance with the Code³⁷.
- 3) In accordance with the statement by the Court in points 73 and 74 of the Melki judgment, legislation concerning checks only in internal border zones, needs to contain limitations in particular in relation to the intensity and frequency of controls. In addition, if a check does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order, it must provide for the necessary framework to guide the practical application.

Therefore, legislation containing precise objectives for carrying out these checks and possible limitations in time may provide for the necessary guarantees, in particular if they are based on general police information and experience.

³⁶ Joint Cases C-188/10 and C-189/10, Melki and Others

³⁷ Article 23 *et seq.*

- 4) When assessing the compatibility of police checks in internal border zones with the Schengen acquis, it is necessary to examine how these checks are implemented in practice. Hence, when the Commission is confronted with serious allegations of borders checks in internal border zones, as stated in the 2010 report, it needs to seek concrete statistical information from Member States; it may therefore request the Member State concerned to submit information on checks performed at the border during a given period (time, locations, reasons and the national authority responsible) as well as on how these have contributed to reaching the aims laid down in national legislation or strategies, i.a. on combating cross-border crime.

In this context, the existence of a risk assessment and the fact that the Member State concerned is taking measures not only in the internal border zone but in other parts of its territory will be taken into account by the Commission. Member States are therefore again encouraged, as already done in the Commission 2010 report, to take to the extent possible the necessary measures to collect this information, in the internal border zones and on the rest of their territories. This will then make it possible, when needed, to make a sound assessment that checks carried out in internal border zones are proportionate to the objectives. Moreover, these statistics, combined with ex post assessments of the results of the checks, may also prove useful for the Member States themselves when evaluating national strategies and planning future deployment of resources.