EUROPEAN
COMMISSION

Brussels, 23.11.2012
COM(2012) 686 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Second biannual report on the functioning of the Schengen area
1 May 2012 - 31 October 2012

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1. INTRODUCTION

As announced by the Commission on 16 September 2011 in its Communication on strengthening Schengen governance[1] and supported by the Justice and Home Affairs Council/Mixed Committee on 8 March 2012, the Commission on 16 May 2012 adopted its first biannual report to the European Parliament and to the Council on the functioning of the Schengen area[2]. Consequently, it was discussed in the Council meeting on 7 June 2012 and in the plenary session of the European Parliament on 4 July 2012. This second report covers the period 1 May 2012 – 31 October 2012.

2. SITUATIONAL PICTURE

2.1. Situation at the Schengen external borders

During April-June 2012, approximately 23 000 irregular border crossings were detected, consisting of mixed migration flows. This constitutes a 44 % decrease within the EU compared to the same period in the previous year, in the midst of the Arab Spring. In contrast, Greece reported a 29% increase compared to the year before. The majority of all detections, 56%, were made at the land border between Greece and Turkey, which means that this border section remains the hotspot for irregular migration into the EU. The most commonly detected nationality at this part of the border was Afghan nationals, followed by Bangladeshi and Syrians.[3]

However, following the Greek launch in August 2012 of operation Shield, in which Greece has redeployed some 1 800 border guards to the Greek-Turkish land border, the previous strong increase in the number of detected irregular border-crossings has been followed by a significant decrease. So far, Greek authorities have reported a substantial decrease in the number of apprehensions in the Evros area.

Following the deteriorating humanitarian and security situation in Syria, there has been a significant increase of Syrians in detections of irregular border-crossings as well as irregular stays, primarily in Greece. Furthermore, Syrians are ranked second among applicants for international protection, mostly in Sweden and Germany, where Syrian nationals claiming asylum are granted protection. Any further deterioration of the situation in Syria is likely to result in a further increased number of persons seeking refuge in neighbouring countries and, eventually, in EU Member States.[4]

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1 COM (2011) 561 final
2 COM (2012) 230 final
3 Frontex quarterly risk analysis April-June 2012
4 Frontex quarterly risk analysis April-June 2012

2.2. Situation within the Schengen area

Although Greece is currently the main entry point for irregular migrants, it is a transit rather than destination country for the majority of migrants. The secondary movements are reflected in the detections of irregular border-crossings throughout the Western Balkan land borders, the Italian sea borders and flights from Greek airports to many major EU airports[5].

The most recent information-gathering exercise on migration flows within the EU/Schengen area, operation Balder, was carried out from 16 to 22 April 2012, in 24 Member States[6] as well as in Norway and Switzerland. The aim of the operation was to collect data on migration flows in the Member States, regarding in particular migratory pressures in various countries, main routes used by 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.

According to the data reported by the participating Member States, compiled by the Danish National Police[7] and communicated in June 2012, 2 396 third country nationals from 115 different countries were apprehended during this week. The largest number of irregular migrants within the Schengen area were found in Germany (520 persons), Spain (369 persons) and Austria (178 persons) and had entered the EU in Spain (207 persons) and Greece (180 persons). The main countries of destination were Spain (341 persons), Germany (281 persons) and Austria (175 persons).

Although providing some valuable basic information, the data collected in this type of operations is rather incomplete, as it covers only a couple of weeks per year and not all Member States participate. Hence, as noted by the Commission in its first biannual report on the functioning of the Schengen area and by the JHA Council/Mixed Committee on 7 June 2012, there exists a need for improved data collection and analysis of the irregular migratory movements within the EU. As Member States have agreed that the Commission should play a role in this and that existing structures should be used to the greatest extent possible, the Commission, together with Frontex, invited Member States to an expert meeting on 2 October 2012 to discuss how a better situational awareness could best be achieved. Member States confirmed the need for data to be collected and analysed on regular basis, while at the same time raising concerns regarding the additional workload and the use of the analyses. The Commission, together with Frontex, is currently deliberating on how to best proceed.

3. APPLICATION OF THE SCHENGEN ACQUIS

3.1. Cases of temporarily reintroduced control at internal borders

Article 23 of the Schengen Borders Code[8] 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. During the period 1 May – 31 October 2012, control at the internal borders has been reintroduced twice.

First, on 20 April 2012, Spain notified the Commission that on the occasion of the meeting of the European Central Bank in Barcelona on 2-4 May 2012, it was to reintroduce control at the

5 Frontex quarterly risk analysis April-June 2012

6 France, Greece and Ireland did not participate.

7 Summary report by the Danish National Police, June 2012

8 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)

internal land border with France as well as at Barcelona and Gerona airports from 28 April until 4 May 2012. During this week, Spain perfomed border checks on 669 385 persons, whereof 68 persons were refused entry, either on grounds of public policy or internal security, or for having no valid travel documents[9].

Second, on 4 May 2012, Poland informed the Commission that due to the EURO 2012 football championships from 8 June to 1 July 2012, it had decided to reintroduce control at its internal borders between 4 June and 1 July. During this period, 28 980 persons were checked, of whom 22 persons were refused entry and 15 were apprehended[10].

3.2. Maintaining the absence of internal border control

The large majority of alleged violations of the Schengen acquis regard 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 the period 1 May - 31 October 2012, the Commission requested information on possible violations of articles 21 and/or 22 of the Schengen Borders Code in two new cases (regarding Germany and Lithuania), while it closed three cases (involving Belgium, Estonia and the Netherlands) and continued investigating seven existing cases (regarding Austria, the Czech Republic, Germany, Latvia, the Netherlands, Slovakia and Sweden). Recently there have been several cases in different Dutch courts dealing with the question whether the mobile surveillance carried out by the Koninklijke Marechaussee close to the Netherlands' internal land borders with Belgium and Germany (article 4.17a of the Aliens Decree 2000) is compatible with articles 20 and 21 of the Schengen Borders Code. The Rechtbank Roermond on 7 February 2012 in case C-88/12 (Jaoo) submitted for preliminary ruling by the Court of Justice of the European Union the question whether this mobile surveillance contravenes the prohibition of checks equivalent to borders checks (article 21 of the Schengen Borders Code). Moreover, the Raad van State on 4 June 2012 submitted in case C-278/12 (Adil) the same question for an urgent preliminary ruling by the Court of Justice.

On 19 July 2012, the Court of Justice rendered judgment in case C-278/12 (Adil). The Court concluded that articles 20 and 21 of the Schengen Borders Code do not preclude checks by officials responsible for border surveillance and the monitoring of foreigners in a geographical area close to an internal border with a view to verifying the requirements for lawful residence, as long as the check is based on general information and experience on irregular stay in this location or, to a limited extent, in order to obtain such information and experience, and these checks are conditioned by certain limitations, especially as regards intensity and frequency. Since the Dutch mobile surveillance is aimed at combatting irregular stay and therefore has a purpose different from border checks, is based on general police information and experience, is carried out in a different manner than border checks and is conditioned by the necessary limitations, the Court concluded that it does not have an effect equivalent to border checks.

The Commission notes that, apart from the Netherlands, also France and Germany retain specific legislation applicable only in internal border areas. Furthermore, it is noted that the Dutch and the French legislations have been amended already following the Melki-

[9] Council document 10491/12 FRONT 84 COMIX 337

[10] Council document 13219/12 FRONT 115 COMIX 467

judgment[11]. To that end, the Commission invites Member States which provide for this type of specific legislation to ensure that it is in line with the above mentioned judgments and stands ready to offer its advice to Member States on the interpretation thereof.

3.3. Alleged violations of other parts of 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. All EU Member States bound by the Directive and all associated countries except Iceland have notified full transposition of the Directive into national law. The Commission has started examining the legal transposition and the practical application in the Member States in detail and will present its first application report by the end of 2013.

Implementation of the Regulation on Local Border Traffic (EC No 1931/2006)

Since the entry into force of the local border traffic regime in 2006, the Commission has been monitoring its implementation. In July 2012, the Commission decided to request information from three Member States (Latvia, Poland and Slovenia) on the bilateral agreements that these countries have concluded with their third country neighbours. The concerns differ between the Member States, but include the requirements for a travel medical insurance as well as limitations of the scope only to the citizens of the contracting parties, lack of a requirement for a minimum period of residency in the border area, etc.

Application of the Schengen acquis during sea border surveillance

As previously reported, the Commission in October 2009 issued a letter of formal notice to Greece, following allegations of serious difficulties faced by migrants in applying for asylum and ill-treatment of asylum-seekers, including the turning back of persons who may face serious harm or persecution. The Commission's analysis is being carried out in the light of constant developments, such as the progress made in the implementation of the Greek National Action Plan.

Further, due to groups of migrants allegedly intercepted by Italian authorities on the high seas and sent back to Libya, the Commission in July 2009 requested Italy to provide information on the measures to avoid the risk of refoulement and on reassurances obtained from the Libyan authorities with regard to the persons concerned. On 23 February 2012, the European Court of Human Rights found Italy to be in violation of the European Convention of Human Rights on the basis of these same facts[12]. Against this background, the Commission is now analysing the implications of this ruling on border surveillance operations at sea and on the asylum acquis.

3.4. Carrying out of sea border operations coordinated by Frontex

On 5 September 2012, the Court of Justice[13] annulled Council Decision 2010/252/EU, supplementing the Schengen Borders Code as regards sea border operations coordinated by Frontex, because it contains essential elements of surveillance of external sea borders which go beyond the scope of additional measures within the meaning of article 12(5) of the

[11] Judgment of 22 June 2010 in case C-188/10

[12] Case of Hirsi Jamaa and others v. Italy. Application no. 27765/09

[13] Judgment of 5 September 2012 in case C-355/10, European Parliament v. Council

Schengen Borders Code, and only the European Union legislature is entitled to adopt such a decision. The Court maintained the effects of the annulled decision until the entry into force, within a reasonable time, of new rules intended to replace it. The Commission will present a legislative proposal in the beginning of 2013.

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

In the framework of the current Schengen evaluation mechanism[14], Member States' application of the Schengen acquis is regularly evaluated by experts from the Member States, the Council General Secretariat and the Commission.

In the period 1 May 2012-31 October 2012, Schengen evaluations were carried out regarding sea borders in Estonia, Latvia, Lithuania, Malta, Poland and Slovenia, police cooperation in Hungary, Slovakia, the Czech Republic and Poland, air borders in Estonia, Latvia and Lithuania, data protection in Estonia, Latvia, Lithuania, Malta and Slovenia, SIS/Sirene in Denmark, Iceland and Norway as well as visa in Latvia and Lithuania. The reports are still being finalised, but are expected to include 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. As was the case also during the previous six months, there is generally room for improvement, but no deficiencies have been found that would require the Commission to take immediate action.

Moreover, from 28 May to 2 June 2012, a peer-to-peer mission to Greece was carried out in order to assess the progress of the Greek action plan to remedy the shortcomings detected in the Schengen evaluation in 2010-2011 and to identify topics where Member States could offer assistance. This mission went to the Athens International Airport 'Eleftherios Venizelos', the Port of Piraeus and the Evros region and hence covered all types of borders. It was noted that although visible improvements have been made, these still need to be fostered and advanced.

The Commission invites Greece to continue the implementation of its Schengen action plan and reiterates its commitment to support the Greek efforts to manage its external borders, i.a. through the External Borders Fund and Frontex assistance.

For an indicative calendar of Schengen evaluations in November 2012 – April 2013, see Annex I.

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

Following the Council Decision in June 2011 that both Romania and Bulgaria fulfil the criteria to apply in full the Schengen acquis, the European Council in March 2012 requested the Council to identify and implement measures which would contribute to the accession of these two countries. The Council has since then identified a number of such measures, including ongoing and planned Frontex activities, measures relating to the fight against false documents and identity fraud and measures concerning the fight against smuggling and trafficking in human beings. The implementation of these measures is continuously monitored.

[14] SCH/Com-ex (98) 26 def.

4. FLANKING MEASURES

4.1. Use of the Schengen Information System

As highlighted in the previous report, the Schengen Information System (SIS) is a very successful system which provides many thousands of successful outcomes every year. This success brings with it a significant workload in cross-border cooperation between the SIRENE Bureaux. A seminar has taken place where Member States' SIRENE Bureaux delegates and the Commission discussed ways to make working practices more efficient. The seminar generated several proposals that could be implemented in the short term. Other proposals will be addressed collaboratively by the Member States and Commission to assess whether the issue will, in any case, be solved in 2013 by the features of SIS II or needs to be refined into a revised working practice.

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 visas issued, refused, annulled, revoked or extended. On 10 May 2012, the VIS was successfully launched in the second region, the Near East (Israel, Jordan, Lebanon and Syria). Further, the VIS on 2 October 2012 started operations in a third region, the Gulf (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen). The dates for the remaining regions of deployment are being discussed among Member States and will be agreed in the coming months.

The VIS is working well operationally and by 4 November 2012, the system had processed 1 774 965 visa applications, issued 1 457 708 and refused 220 644 visas.

The main issue of concern remains the quality of data (both biometric and alphanumeric) introduced by the consular authorities of Member States into the VIS. These issues have affected at times the performance of the system and should be avoided in the future, given the continuous deployment throughout all world regions. Despite the gradual improvements, efforts should be made to further improve the capturing of good quality fingerprints and to fill in to the VIS all mandatory fields from the visa applications.

4.3. Visa policy and readmission agreements

Post-visa liberalisation monitoring mechanism for Western Balkan countries

In August 2012, the Commission presented its third post-visa liberalisation monitoring report for the Former Yugoslav Republic of Macedonia, Montenegro, Serbia, Albania and Bosnia and Herzegovina[15], setting out the recent actions taken and proposed next steps. While the number of asylum seekers from Serbia and the Former Yugoslav Republic of Macedonia decreased in the first half of 2012 in comparison with the same period in 2011 (-13% for Serbia and -48% for the Former Yugoslav Republic of Macedonia when comparing May 2011 to May 2012), there was a considerable increase of asylum seekers from Albania (+725%), Bosnia and Herzegovina (+14%) and Montenegro (+77%). Most asylum claims are deemed to be unfounded, and the asylum recognition rate remains very low. Belgium, Germany, Luxembourg and Sweden remain the main destination countries. These Member States have taken measures to decrease the processing time, but there is still room for improvement as

[15] COM (2012) 472 final

regards, inter alia, information exchange, investigation of facilitators, strengthened exit and entry checks, targeted awareness campaigns and assistance to minority communities.

Readmission agreements

The Commission in April 2012 initialled a readmission agreement with Cape Verde and subsequently launched the procedure for formal ratification. Negotiations with Turkey on a readmission agreement have been finalised and the text was initialled in June 2012. The signature of the readmission agreement and the launch of a dialogue on visa liberalisation are expected. In October 2012, a readmission agreement with Armenia was initialled and the Commission is now working towards its signing and conclusion as quickly as possible. Furthermore, negotiations have been launched also with Azerbaijan on visa facilitation and readmission agreements.

ANNEX I: Indicative calendar of Schengen evaluations in November 2012 – April 2013[16]

Time	**Member States**	**Theme**
11-17 November 2012	Estonia, Latvia, Lithuania	Police cooperation
18-28 November 2012	The Czech Republic, Poland, Slovakia	Air borders
20-26 January 2013	Estonia	Visa
10-20 March 2013	Poland, Slovakia	Visa
14-25 April 2013	Estonia, Latvia, Lithuania	Land borders

[16] Council documents 5090/4/12 SCH-EVAL 1 COMIX 6 REV 4 and 12032/12 SCH-EVAL 99 COMIX 423