



EUROPEAN COMMISSION
DIRECTORATE-GENERAL HOME AFFAIRS

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Your Excellency, *Dear Jeppe*

As indicated by President Barroso in his letter of 13 May 2011 to Prime Minister Rasmussen, the intention announced by the Danish Government to introduce strengthened control measures at the Danish internal borders to fight cross-border crime and tax evasion raises grave concerns with regard to the freedoms provided for by the Treaty on the Functioning of the European Union (TFEU) and to the Schengen acquis.

As far as the free movement of goods is concerned, Articles 34-35 TFEU prohibit quantitative restrictions on imports and exports and all measures having equivalent effect. In this context a Member State may carry out controls at its internal borders only to the same extent it does within its own territory. In exceptional cases border controls may be justified under Article 36 TFEU, e.g. for reasons of public security. But even then the measures must be proportionate and not go beyond what is necessary to achieve the goal pursued.

Furthermore, Article 56 TFEU guarantees the freedom to provide services within the EU to nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

In particular, as regards the provision of services involving the posting of workers, the European Court of Justice (ECJ) has recognised that the Member States have the power to verify compliance with the national and Community provisions in respect of the posting of workers. Likewise, it has accepted that Member States may carry out the checks that are necessary to verify compliance with requirements which are themselves

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justified by grounds of public interest.¹ However, the Court has also held that those controls must comply with the limits imposed by Community law and must not render the freedom to provide services illusory.² The ECJ has considered that, even in the area of posting of workers, prior control measures are not appropriate to ensure the protection of workers and in particular to ensure compliance with national legislation aiming at implementing the Posting of workers directive.³

Moreover, as regards self-employed service providers, Article 16(1) of Directive 2006/123/EC on services in the internal market⁴ prohibits Member States to impose requirements on cross-border service providers when these requirements are not justified for reasons of public policy, public security, public health or the environment. In addition, any such requirements have to comply with the principles of non-discrimination, necessity and proportionality. Article 16(2)(b) prohibits Member States to restrict the freedom to provide services in the case of a provider established in another Member State by imposing an obligation on the provider to obtain an authorisation from their competent authorities, including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of EU law.

Finally in relation with the free movement of persons, Article 20 of the Schengen Borders Code⁵ (SBC) provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. The abolition of internal border control also entails the abolition of border surveillance. This does not preclude the right of Member States to exercise police powers under national law within their territories, including in the internal border zones, insofar as this exercise does not have an effect equivalent to border checks. Article 21(a) SBC provides for a non-exhaustive list of criteria which allow assessing whether the exercise of police powers has an effect equivalent to border checks or not. Thus, checks should not have border control as an objective, must be based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime. Also, checks cannot be carried out in a systematic way but on the basis of spot-checks. Member States have the freedom to decide which body carries out these checks.

Also, under Article 22 SBC, Member States have the obligation 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.

Permanent checks, constant video surveillance of vehicles crossing the border and the installation of border control infrastructure as announced by the Danish government seem

¹ C-369/96, *Arblade*, paragraph 38.

² C-113/89, *Rush Portuguesa*, paragraph 17.

³ E.g. C-445/03, *Commission v Luxembourg*, paragraph 36; C-244/04, *Commission v Germany*, paragraph 42.

⁴ Directive 2006/123/EC of the European parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27.12.2006, p. 36.

⁵ Regulation (EC) N°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.

to be in contradiction with these provisions and raise questions as to their compatibility with EU data protection legislation.⁶

Considering the concerns to the fundamental freedoms of the Treaty as explained above, I invite the Danish authorities to provide answers to the following questions:

- What will be the legal basis for the announced customs controls?
- What will be the sources of information on which these controls will be carried out (police information or experience, profiling, risk analysis, etc.) and what will be their objectives?
- Will the announced measures be part of larger measures to combat crime throughout the whole Danish territory?
- Will the announced controls be carried out on a regular and/or systematic basis? Concretely, will all vehicles or persons crossing borders between Denmark and other Member States be submitted to these controls?
- Could you provide concrete details on how the video surveillance to be established on the highway will be used to trigger controls?
- Will there be controls specifically targeting transported goods? If so, which categories of goods will be concerned?
- How will Denmark ensure that these controls will not lead to an obstacle to trade and to fluid traffic flow at road crossing-points concerned at internal borders infringing the free movement of goods and persons guaranteed under EU law?
- Is Swedish cooperation on controls on the Swedish side of the Oresund Bridge confirmed? What would be the legal basis for such cooperation?
- Should the implementation of the measures announced by the Danish Government have the potential to lead to serious disruption of the free movement of goods, are the Danish authorities aware of their obligation under Council Regulation (EC) No 2679/98 of 7 December 1998 (“Strawberry” Regulation) to immediately inform the Commission on any occurrence or threat of an obstacle to the free movement of goods among Member States and to take all necessary and proportionate measures so that the free movement of goods is assured in the territory of the Member State in accordance with the Treaty?
- Given the RUT registration system⁷ allowing the Danish authorities to check, wherever necessary, the compliance with their social legislation during the posting of workers, could Denmark explain the purpose of introducing an additional prior control

⁶ In particular Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1996, p.31.

⁷ Register over Udenlandske Tjenesteydere (Register of foreign enterprises providing services)

measure at the internal borders and in what way this would be necessary to achieve the purpose to be achieved?

- Could Denmark confirm whether the intended border controls would, among others, specifically aim at checking compliance with the registration requirement in RUT imposed on self-employed service providers? And if so, could Denmark explain what the justification of such border controls would be and why such controls would be necessary and proportionate to the aim to be achieved?

In view of the meeting to be held between the Commission services and the Danish authorities, I would be grateful to receiving the information requested in this letter by 24 May 2011.

Yours faithfully,



Stefano MANSERVISI