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Fields of Justice and Home Affairs

Delegations will find attached a draft Common Position on the above-mentioned chapter, submitted by the Commission¹⁾.

¹⁾ This document has been transmitted to the Council in English only.



EUROPEAN COMMISSION

Brussels, 10 July 2001

ACCESSION NEGOTIATIONS

INFORMATION NOTE

SCHENGEN AND ENLARGEMENT

Negotiation Chapter 24
Justice and Home Affairs

1. Introduction

1. The progressive establishment of an area of freedom, security and justice is one of the main objectives of the Treaty of Amsterdam. The abolition of controls on persons when crossing the internal frontiers, as provided for under Schengen, constitutes a key component of the “freedom” part of this triptyque. But Schengen also makes it clear that this aim cannot be achieved without a solid and coherent external border control policy and by other so-called “compensatory measures” of a more security-related nature but still in the justice and home affairs area. With the Treaty of Amsterdam, the Schengen *acquis* became part of the EU/EC *acquis*, and as such, an integral part of justice and home affairs.
2. The current enlargement process is the first since the integration of the Schengen *acquis* into the Union. The purpose of this non-paper is to identify a number of legal and practical issues concerning Schengen and the enlargement process.

II. Legal and Practical Questions relating to Schengen *Acquis* Implementation

3. Article 8 of the Schengen Protocol makes it clear that candidate countries must accept the Schengen *acquis* in full. Developing this theme, the first EU Common Positions of May 2000 concerning the Luxembourg countries provide, inter alia, that:
 - (1) A high level of border control will have to be achieved upon accession.
 - (2) The candidate countries are required to
 - a) Accept in full on accession the JHA provisions and the working practices designed to give them effect.
 - b) In respect of conventions and other instruments, undertake to accede to them or, if under negotiation, accept the points which have been agreed upon.
 - c) Accept on accession joint actions and joint positions as well as resolutions, decisions and statements.
 - d) Introduce administrative and other arrangements, as is necessary to effectively implement the *acquis*.
 - e) Bring institutions, management systems and administrative arrangements up to Union standards.
 - (3) The candidate countries are invited to establish, as soon as possible, a Schengen action plan.
4. In other words, as far as the substance of Schengen is concerned, no opt outs are possible. In addition, the above elements in the Common Positions spell out what is meant by the basic idea of the integration of Schengen: making the Schengen *acquis* an integral and “normal” part of the EU/EC legislation in the field of justice and home affairs. This means that the starting point is that the application of the Schengen *acquis* upon accession should be considered the norm, and that any postponement of implementing measures to the time when internal controls are in fact abolished, should be regarded as the exception.

5. However, the Schengen rules also make clear that a separate and unanimous Council decision will be needed before the Schengen *acquis* can be implemented in full, including most importantly the key question of the lifting of internal border controls. For such a decision to be taken the existing Schengen partners will have to verify, by means of a special evaluation process, that the new Member State concerned is able to apply the compensatory measures in full. However, the existence of this special implementation mechanism of Schengen does not at all mean that candidate countries should not be ready and able for the partial application of Schengen upon accession. On the contrary.
6. The reality is that a full implementation of the Schengen provisions immediately upon accession is most unlikely to be a practical possibility for technical and operational reasons. For example, a functioning Schengen Information System (SIS) is one of the most important preconditions for such a decision. Considering that the lifting of internal border controls is dependent on the timetable of the (second generation) SIS II, which is now estimated to be operational in the end of 2005 at the earliest, it is not realistic to imagine that any decision concerning the lifting of internal border controls will take place before that time. In addition, it should be taken into account that the Schengen evaluation process itself will take some time.¹ Consequently, the full implementation of the Schengen *acquis*, in the sense of the lifting of internal border controls, cannot be applied upon accession.
7. The implementation mechanism of Schengen does not contain any predetermined timetable for the lifting of internal border controls after accession². To ensure the balance between the security and freedom aspects, ideally the target should be that the full implementation of the Schengen *acquis*, including the lifting of internal border controls, should be achieved as quickly as possible after accession. It will inevitably, however, be subject to the capacity of the country concerned to fulfil the necessary requirements. In the Common Positions concerning the Luxembourg countries, the EU underlined that the candidate countries will need to satisfy as soon as possible all the preconditions to bringing the full Schengen *acquis* in force. The candidate countries have been encouraged to start preparing early for the full Schengen implementation as the related national measures involve extensive organisational, structural and financial challenges.

III. Categories of Schengen *Acquis* Provisions

8. The existence of this two-stage Schengen implementation process means that there is a need for further definition of those requirements that have to be implemented upon joining the EU and those that are linked to the full Schengen implementation phase.

¹ The traditional Schengen evaluation process should be postponed until the moment when the Schengen States and the new Member States are getting prepared to abolishing the internal border controls. All parts of the Schengen *acquis* would be evaluated in that point of time in accordance with the relevant rules of the Schengen *acquis*.

² The Schengen Convention was signed in 1990 and it entered into force in 1993, but the full *acquis* was put into effect and the internal border controls were lifted only in 1995 (for Benelux, France, Germany, Spain and Portugal). For Austria, Italy, Greece and the Nordic countries there were several years between the signing of the Schengen accession agreement and the lifting of internal border controls (from 3 to 8 years).

9. The current enlargement process being the first after the integration of Schengen, there is no precedent for defining a list of Schengen provisions that would have to be applied upon accession. As a matter of principle, the Schengen *acquis* should be applied upon accession, because the measures concerned are now an integral part of the justice and home affairs *acquis*. However, as there will be a separate decision concerning the lifting of internal border controls, it is evident that there is a need to identify those provisions of the Schengen *acquis* which are so intrinsically linked to the lifting of internal border controls, that it would neither be necessary nor technically possible to apply them until the moment when the internal border controls are ready to be lifted. An indicative list of Schengen provisions divided into two categories is attached.
10. Concerning the requirement to achieve a high level of external border control, the candidate countries must be able to fulfil the requirements of the *acquis* on external border control by the time of accession. Some of the minimum standards to be met upon accession are presented in the Annex to this paper (p. 5 – 6).

IV. Schengen Action Plan

11. In the EU Common Positions concerning the Luxembourg countries, the candidate countries have been asked to provide an action plan for implementing the necessary preconditions for participating in Schengen (the Schengen action plan). The Commission has sought to clarify the contents of this requirement for the candidate countries during the technical discussions. The candidate countries must display a complete understanding of what is required for full implementation of Schengen, some real and concrete results already achieved and a detailed and verifiable programme for the adoption and implementation of the rest.
12. The Schengen action plans could serve at least two purposes. For the candidate countries, they will provide an appropriate instrument for them to demonstrate their commitment and planning for the full implementation of Schengen. For the EU and the existing Member States, these action plans should help them to make an estimation of the time that could be needed between the moment at which a candidate country joins the EU and the moment at which its internal border controls with the existing Schengen states can be lifted.
13. Schengen is not about border control issues only, it covers other policy areas in the field of justice and home affairs designed to minimise the possible reduction of internal security resulting from the abolition of internal border controls (compensatory measures). The Schengen action plan should therefore cover all policy areas included in the Schengen Convention:
 1. External border controls and surveillance
 2. Visa policy
 3. Police cooperation
 4. Drugs
 5. Judicial cooperation in criminal matters, extradition
 6. Schengen Information System
 7. Protection of personal data

14. Taking into account the distinction between parts of the Schengen *acquis* to be applied as from accession and those to be applied as from the lifting of internal border controls, each of the policy areas in the Schengen action plan should be expanded to cover the objective, the national action needed, the timetable for adoption and the state of play. Preparations for the full Schengen implementation is a continuous process. Therefore the action plan should cover the entire period prior to the lifting of internal border controls, so the focus should not be on the date of EU accession only.
15. The approach in the Schengen action plan should be strategic, and it should not address legislative measures only. The capacity for operational action and implementation in practice is equally important due to the special nature of the Schengen cooperation. In this, the description of equipment and infrastructure, training as well as budgetary measures, are essential elements.

ANNEX

Category 1: Indicative list of provisions of the Schengen *acquis*³ which should be applied upon accession as an integral part of the EU/EC *acquis* in the field of JHA, including the provisions relating to the high level of external border control.

CROSSING EXTERNAL BORDERS

Article 3 (crossing of external borders)

Article 5 (conditions for entry, excluding para 1. c - e)

Article 6 (common standards for external border control)

Article 7 (co-operation and information exchange connected to external border control)

The EU Common Positions define two essential elements of high level of external border control: 1) all persons crossing the external borders are checked in a systematic way and 2) effective border surveillance is ensured between authorised border crossing points. However, there is no fixed list defining the practical measures relating to “a high level of external border control” to be achieved at the moment of the EU accession.

The Union has practically no other *acquis* concerning external border control other than the Schengen *acquis*. Therefore the guidance for interpreting the notion “a high level of external border control” has to be sought from there, while appreciating that it is partly a political notion.

The basic requirements for effective external border control can be found in Chapter 2 of Title II of the Schengen Convention and the so-called Common Manual on external borders.⁴ Besides these specific rules it is a task of the Schengen Evaluation working group to specify certain criteria and requirements, including the requirements related to external border control, to be fulfilled before the internal border controls can be lifted. These criteria and requirements would not be directly applicable to the current enlargement process as they are formulated on a case-by-case basis, taking into account the specific characteristics of the country (including geographical situation) to be evaluated.

³ To the extent that the provisions do not relate to the lifting of internal border controls or the use of the SIS. This list applies also to the secondary rules adopted on the basis of the articles listed.

⁴ Some parts of the Common Manual still remain confidential, see Council Decision 2000/751/EC.

Ideally, the external border control shall be conducted by professionals, trained for that purpose, with the help of equipment and sufficient facilities and in cooperation with the colleagues on the other side of the border. These characteristics will guarantee an effective border surveillance as well as an effective and smooth border crossing where the crossing is not subject to long queues, arbitrary treatment and corruption.⁵

Upon accession, a reliable level of border control will also be required on the temporary external borders⁶ while appreciating that special arrangements at these borders are justified, to tighten the cooperation between the future Schengen partners, in order to allow for a smooth transition when internal border controls will be abolished, and to avoid unnecessary investments. The border control system should be based on functioning cooperation with the authorities of the other side of the border. Practical cooperation models across the temporary external border should be accepted: for instance, everyone crossing the border is checked but the control authorities on each side of the border would cooperate so that the administrative and logistical burden would not lie with one country only. Shared infrastructure and removable and/or shared equipment could be considered, wherever possible, as well as joint patrols.

Such mechanisms, infrastructure and equipment offer a good basis for effective cooperation between relevant authorities working at the border even after the candidate countries in question have all acceded to the Union, especially to implement cross-border cooperation.⁷ In addition, for the “user’s” point of view, these arrangements would facilitate the movement of people and goods as they would render the control procedures more simple and smooth.

Concerning the international ports and airports, there is no need to separate extra- and intra-Schengen passenger flows before the internal border controls are lifted. However, this question should be addressed in the Schengen action plan, in order to give a clear picture of the plans, including the financial implications and the timetable.

Finally, it should be emphasised that the current Schengen States will be responsible for the control of Schengen external borders until the internal border controls will be lifted *vis-à-vis* new Member States. However, after accession, the nationals of the new Member States would not any more be third country nationals who will have to fulfil all entry conditions required. For nationals of the EU Member States, a mere presentation or production of a travel document is sufficient.

⁵ In addition, the JHA Council has accepted a “Guide for effective practices for controls of persons at external frontiers” (26 – 27 May 1997 (2008e), pt. A 17). This guide was prepared for the candidate countries who wished to improve controls at their external borders. The importance of this guide has somewhat diminished because the candidate countries now have the Common Manual at their disposal. In any case, these documents facilitate the effective application of legislation through appropriate administrative structures, as required in the EU Common Positions.

⁶ National borders between the new Member States and the remaining candidate countries. In principle, the same applies to national borders between the new Member States and between the new Member States and the current Schengen states.

⁷ It should be noted that the control arrangements at the temporary external borders could remain useful after the lifting of internal border controls to apply Article 2(2) of the Schengen Convention.

VISAS

Article 13 (the quality of travel document to which a visa may be affixed)

Article 13 is related to the realising the requirement of a high level of border control. This article is a clear example of a provision which not only supports the application of Chapter 2 of Title II of the Schengen Convention but also the application of the EU regulations concerning the uniform format for visa and the common visa lists, which are to be applied upon accession.

CONDITIONS GOVERNING THE MOVEMENT OF ALIENS

Articles 21 – 22 (movement of third country nationals, residence permit)

Article 23 (as far it relates to residence permits)

Concerning the movement of third country nationals, the Commission stated in its opinion concerning the UK's Schengen application that participation in Article 21(1 - 3) would be possible without lifting the internal border controls. In the context of the current enlargement, it should be considered whether Articles 21, 22 and 23 (as far as it relates to residence permits) concerning the right to travel of third country nationals lawfully resident in the new Member States could be applied as from the moment of accession. The application of these provisions would contribute to a better balance between freedom of movement and security.⁸

ACCOMPANYING MEASURES

Article 26 – 27 (accompanying measures)

Articles 26 – 27 contain measures intended to combat illegal immigration and can as such be applied independently from the lifting of internal border controls. The Council has adopted in June 2001 a directive supplementing to provisions of Article 26.

POLICE COOPERATION

Article 39 (mutual assistance between police authorities for preventing and detecting criminal offences)

Article 44 (co-operation on telecommunications)

Article 45 (hotel registration forms for other EU nationals and non-EU nationals)

Article 46 (unsolicited communication of information and cooperation in matters relating to public policy and security)

⁸ The Commission has adopted on 10 July 2001 a proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months (COM (2001) 388 final) which would replace these articles.

Article 47 (bilateral agreements on exchange of liaison officers)

The application of Article 39 and some other articles relating to police cooperation is possible in the situation where the internal border controls have not been lifted. The possibility of bilateral agreements or agreements between neighbouring countries is foreseen at Article 39 (4) and (5). Even if Article 44 refers to transmission of information for the purposes of cross-border surveillance and hot pursuit, the candidate countries should prepare for future cooperation and develop possibilities offered by Article 44, *e.g.* voluntary agreements between Member States.

The cooperation possibilities provided for in Article 47 should be looked into. This article specifically concerns secondments, for specified or unspecified periods, of liaison officers to provide advice and assistance aimed at furthering police co-operation. Such agreements with candidate countries are already possible (Art. 47.4).

MUTUAL COOPERATION IN CRIMINAL MATTERS

Articles 48 – 53 (mutual assistance in criminal matters)

Articles 54 – 58 (ne bis in idem)

Articles 59, 61 – 63 and 65 – 66 (extradition)

Articles 67 – 68 (transfer of enforcement of criminal judgements)

The purpose of the above articles is to complement or specify the provisions of existing international agreements in these fields. These agreements are mentioned in the articles. In addition, there are several third pillar agreements between the Member States: Convention on Simplified Extradition Procedures (1995), Convention relating to Extradition (1996) and Convention on Mutual Assistance in Criminal Matters (2000). The Member State agreements replace some articles of the Schengen Convention.⁹ All international agreements mentioned in the above articles and the Member State agreements have already been deemed agreements to which the candidate countries must accede upon accession.

NARCOTIC DRUGS

Article 71 (fight against illegal import of narcotics drugs and psychotropic substances)

Article 72 (seizure and confiscation of the proceeds of illicit trafficking in narcotics drugs and psychotropic substances)

Article 73 (controlled delivery for narcotics drugs and psychotropic substances)¹⁰

⁹ The discussion to what extent the Member State agreements repeal provisions of the Schengen Convention concerning extradition is still going on in the Council. Upon the entry into force of the Convention of Mutual Legal Assistance in Criminal Matters, the Convention will replace Articles 49(a), 52 and 53 of the Schengen Convention.

¹⁰ Upon the entry into force of the Convention of Mutual Legal Assistance in Criminal Matters, the Convention will replace Article 73 of the Schengen Convention. The Convention concerning mutual legal assistance has not yet entered into force.

Article 75 (transport of narcotic drugs and psychotropic substances for medical treatment)

Article 76 (measures for the control of narcotic drugs and psychotropic substances)

The articles concerning narcotic drugs mainly confirm what has been prescribed in the relevant UN Conventions. The candidate countries already have an obligation to accede to these Conventions.

FIREARMS AND AMMUNITION

Article 82 (firearms)

Article 91 (exchange of information on firearms)

Most of the provisions concerning firearms have been superseded by Community legislation. See Council Directive 91/477/EEC of 18 June 1991 on control of the *acquisition* and possession of weapons (OJ L 256, 13.9.1991, p. 51) and Commission Recommendation 93/216/EEC of 25 February 1993 on the European firearms pass (OJ L 93, 17.4.1993, p. 39) as modified by Commission Recommendation 96/129/EC of 12 January 1996 (OJ L 30, 8.2.1996, p. 47).

PROTECTION OF PERSONAL DATA

Articles 126 – 130 (protection of personal data)

Candidate countries should adopt the necessary national provisions in order to achieve a level of protection of personal data at least equal to that resulting from the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981. Candidate countries should take into account Recommendation N. R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector. See also Directive 95/46/EC, particularly as for Article 127 of the Schengen Convention. Candidate countries should also set up an independent supervisory authority for personal data.

Category 2: Indicative list of other provisions of the Schengen *acquis*¹¹ which are directly connected to the abolition of internal border controls and should be implemented simultaneously with lifting of internal border controls at the latest.¹²

The implementation of these provisions is consequently **not required** from the candidate countries at the time of their accession to the EU. Nevertheless, an early preparation for the implementation of these provisions is of utmost importance. The candidate countries shall deal with these provisions and the implementation timetable in their Schengen action plans.

¹¹ This list applies also to the secondary rules adopted on the basis of the articles listed.

¹² In order to verify this precondition, it is possible that the provisions concerning the SIS are put into effect some time before the lifting of internal border controls – as happened in the case of the Nordic countries.

CROSSING INTERNAL BORDERS

Article 2 (abolition of the internal border controls)

CROSSING EXTERNAL BORDERS

Article 5, paragraph 1(c - e) (conditions for entry)

VISAS

Articles 9 – 12, 14 – 18 (common visa, long term visa)

The common visa policy is one of the key elements supporting the high level of external border controls. However, most parts of the Schengen *acquis* concerning visa policy are so closely linked to the lifting of internal border controls that these provisions cannot be applied or it is not sensible to apply them before that time. For instance, the new Member States will not be issuing Schengen visas valid for travel in all Schengen States before the internal border controls are lifted. Therefore, they would not be implementing the EU provisions on the Schengen visa fees either. The new Member states could still be determining their own visa fees for some years.

Concerning visa policy in general, it should be stressed first of all that although Schengen related instruments, the EU instruments concerning the uniform format for visa and the common visa list¹³, are EU *acquis* that has to be accepted and implemented upon accession. The relevance of the general visa policy article of the Schengen Convention (Article 9) has somewhat diminished after the entry into force of the new visa regulation. Article 9 could still have some meaning as the basis for the Schengen visa.

Although the new Member States would not be delivering Schengen visas before the internal border controls are lifted, they will have to ensure proper functioning of the visa issuing procedures as well as administrative management and organisation as from EU accession. Guidance for applying the visa procedures could be sought from the Common Consular Instructions.

CONDITIONS GOVERNING THE MOVEMENT OF ALIENS

Articles 19 – 20, 23 – 25 (movement of third country nationals)¹⁴

POLICE COOPERATION

Articles 40 – 43 (cross-border forms of police co-operation)

Although the provisions concerning cross-border cooperation would be applicable after the lifting of internal border controls only, bilateral arrangements could be developed even before.

¹³ EU Regulations 1683/1995 and 539/2001.

¹⁴ See COM (2001) 388 final which would replace Articles 18 – 23 and 25

In Common Positions concerning the Luxembourg countries, the EU underlined that the candidate countries should, for each Member State with which they have common border, make a declaration in accordance with paragraph 9 of Article 41 upon signing the EU accession Treaty. However, such declarations would probably be quite general or vague by nature, and would have to be replaced later by specific declarations. Firstly, the implementation of Article 41 would still be quite far away. Secondly, the candidate countries could not yet specify all the cooperation partners, because only the existing Schengen States are known at the moment.

SCHENGEN INFORMATION SYSTEM

Article 64 (SIS alert as a request for arrest)

Articles 92 –101 (acquis regulating the SIS)

The Schengen Information System (SIS) is regarded as one of the preconditions for the lifting of internal border controls. The system is one of the key compensatory measures to maintain public policy and public security, including national security, and to apply the provisions related to movement of persons within the EU/Schengen area. The SIS is not only used at border checks but also for internal police activities. The second generation SIS will probably not be operational before the end of 2005. Discussions are still on going as regards its future technical specifications and new functional requirements.

It is useful for the candidate countries to create national databases for the purposes of Article 95 and 97 – 100 (police registers) and Article 96 (entry refused) so that they can easily be linked to an integrated information system and eventually connected to the N.SIS after accession. It is also essential to plan in advance the setting up of the SIRENE bureau.

Articles 102 – 118 (protection of personal data in the SIS)

The purpose of these articles is to ensure the security of data in the SIS. Upon accession candidate countries will have already adopted the necessary national provisions in order to achieve a level of protection of personal data required elsewhere in the *acquis*.

Article 119 (distribution of costs for SIS)