COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.07.1999
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Commission opinion on the request by the United Kingdom to take part in certain provisions of the Schengen *acquis*

I. Introduction

1. Under the terms of the Protocol incorporating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty of Amsterdam (hereafter, "the Schengen protocol"), the signatory states of the Schengen agreements were authorised to establish closer cooperation among themselves within the scope of the agreements and related provisions. That cooperation is conducted within the institutional and legal framework of the European Union, and with due respect for the relevant provisions of the Treaty on European Union and the Treaty establishing the European Community.

In accordance with Article 4, first indent, of the Schengen protocol, the two Member States which are not bound by the Schengen *acquis* may at any time request to take part in some or all of the provisions of this *acquis*.

In a letter dated 20 May 1999 and addressed to the Presidency of the Council, the Government of the United Kingdom requested to take part in certain provisions of the Schengen *acquis*, relating to police and judicial cooperation in criminal matters, to narcotic drugs, and to the Schengen Information System.

This request was completed by a letter on 9 July 1999.

2. In accordance with Article 4, second indent, of the Schengen protocol, the Council shall decide on the request with the unanimity of the members representing the signatory States to the Schengen agreements and the representative of the Government of the Member State concerned.

In Declaration No 45 annexed to the Treaty of Amsterdam, the High Contracting Parties invite the Council to seek the opinion of the Commission before it decides on a request under Article 4 of the Schengen protocol.

At the meeting of the Council of Ministers held on 27 and 28 May 1999, the Commission representative, Mrs Gradin, indicated that the Commission was willing to deliver the opinion provided for in Declaration No 45. At its meeting of 24 June 1999, the COREPER formally invited the Commission to deliver its opinion.

The present opinion is the Commission's response to that invitation.

3. The present opinion is based on the information set out in the letter of the United Kingdom dated 20 May, and the supplementary letter of 9 July.

However, this request does not contain complete clarification of all aspects, in particular, the timeframe for adaptation of United Kingdom legislation to certain aspects of the Schengen *acquis*. Furthermore, the request embraces participation in the Schengen Information System, and given the complexity of the question, the Commission prefers to await the results of an in-depth technical analysis, to be undertaken in the context of the Council's work, before commenting. In addition, it is not impossible that other discussion points may arise in subsequent stages of the examination of the United Kingdom's request.

That being the case, the Commission reserves the right to refine and add to certain features of the present opinion during the course of discussion within the Council, notably when the technical clarifications relating to the SIS have been presented with the assistance of experts on the subject.

II. The Commission's guiding principles vis-à-vis requests pursuant to Article 4 of the Schengen protocol

4. Before turning to the request by the United Kingdom, the Commission would like to set out the guiding principles it proposes to follow in examining requests pursuant to Article 4 of the Schengen protocol.

5. Such requests must first of all be evaluated in the light of the general objective of maintaining and developing the European Union as an area of freedom, security and justice while respecting a fair balance between these three components.[1] A favourable decision on requests to participate in some or all the Schengen *acquis* does not diminish the Community's commitment to provide itself with the means to achieve this aim within five years of the Treaty of Amsterdam coming into force.

6. The Schengen protocol integrated the Schengen *acquis* in the framework of the European Union: save certain adaptations to the Union's institutional framework, this integration has not given rise to any renegotiation of the *acquis* as it was designed in the previous intergovernmental framework. The Commission's view is that there are no circumstances under which a request to participate pursuant to Article 4 could be the occasion for such a renegotiation.

7. Having regard to the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, annexed to the European Union Treaty and the Treaty establishing the European Community, Article 4 of the Schengen protocol leaves Ireland and the United Kingdom the possibility of requesting to participate fully *or in part* in the provisions of the Schengen *acquis*. The special character of this situation must not be overlooked: by virtue of Article 8 of the same Protocol, the Schengen *acquis* must be accepted in full by any country applying for membership of the Union.

8. When a request to participate in the Schengen *acquis*, presented in accordance with Article 4 of the Schengen protocol, relates not to the whole of the *acquis* but only to certain of its provisions, this incomplete participation should not affect the proper working of cooperation between the signatory states of the Schengen agreements. Such a request must consequently relate to a coherent set of the *acquis'* components capable of functioning without any technical or legal links to other aspects of the agreements not covered by the request.

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[1] See in this context the Communication of the Commission "Towards an area of freedom, security and justice", COM (1998) 459 final, p. 10.

9. Finally, application of Article 4 of the Schengen protocol should also pay due respect to the mechanisms which have hitherto contributed to building the mutual confidence which is essential between partners in such cooperation. In practice, it would be desirable if the distinction could be maintained between, on the one hand, the decision in principle by which the Council accepted a request to participate in all components and, on the other, the actual implementation of such a decision. The latter could be the subject of a phased approach, taking account in particular of the transitional periods which the United Kingdom might require to make the necessary legislative and technical changes.

10. As regards the question of the territorial application for participation in certain parts of the Schengen *acquis*, account must be taken of:

- Article 299 of the Treaty establishing the European Community;
- the possibility of a derogation from that Article, should it be justified by any objective considerations;
- the Protocols annexed to the Treaty of Amsterdam, and in particular the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland;
- the field of territorial application determined for similar instruments arising from Title VI of the Treaty on European Union.

III. Application of these guiding principles to the United Kingdom's request

11. In application of the guiding principles set out above, the Commission:

- takes note of the United Kingdom's request to participate in a part of the provisions of the Schengen *acquis*, whilst affirming its belief that this cooperation should in due course be extended to the aspects of freedom of movement covered by the Schengen *acquis*, thus opening the way to the United Kingdom's full participation in that area;

- considers that, following closely as it does the integration of the *acquis* in the framework of the European Union, such a request is an important stage in the aim of developing an area of freedom, security and justice;

In consequence, the Commission recommends to the Council:

- in principle, to view the United Kingdom's request favourably;

- to examine any technical difficulties which arise with regard to the parts of the *acquis* in which the United Kingdom has requested to participate;

- to adopt a favourable decision in respect of, in principle, all the components referred to in the request by the United Kingdom, whilst ensuring that those components may be applied in a coherent manner without reference to other aspects of the Schengen *acquis* not covered by the request and without

affecting the proper working of the whole between the states which were signatories to the Schengen Agreements.

The Commission invites the United Kingdom to examine the possibility of extending its participation to include certain components which would allow a better balance between freedom of movement and security. Thus for example the Commission considers that it should be possible for the United Kingdom to participate in the provisions of Article 21, paragraphs 1 to 3 (and in those of Article 25 of the Schengen Agreement) concerning the right to travel of nationals of non-member countries who are lawfully resident in a Member State. Such participation does not stand in the way of application of the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, since the granting of the right to travel does not imply abolition of checks on individuals at the United Kingdom's frontiers with the signatory states of the Schengen agreements.

12. In accordance with the principle set out in para. 9 above, the Commission considers that the Council should first decide on the principle of the request for participation as it is formulated, in accordance with Article 4, second indent of the Protocol integrating the Schengen *acquis*. The entry into force of the various dimensions of this participation by the United Kingdom could then follow in due course, either simultaneously or at dates varying in particular according to the need for transitional periods, and in any event after verification that all pertinent measures had been adopted and implemented.

13. In view of the methodological precautions referred to in para. 3 above, the Commission does not wish at this stage to discuss in detail specific aspects of the United Kingdom's request to participate, in particular as regards access to the Schengen Information System. These points should be examined in detail with a view to arriving at satisfactory solutions which enable full benefit to be derived from the United Kingdom's participation without prejudicing the efficiency of Schengen cooperation. The following general considerations are thus set forward in that same spirit:

- as far as police cooperation is concerned, the participation of the United Kingdom in the proposed provisions of the Schengen *acquis* will without doubt make good a significant weakness in practical and operational cooperation between the competent services of the Member States. The effect of such an integration will, of course, be further enhanced by participation in the corresponding data exchange in the framework of the SIS. In this matter, very particular attention should be paid to examination of certain reservations set out in the request by the United Kingdom, relating to the practicalities of implementing Articles 40 to 43 of the Convention applying the Schengen agreement. Furthermore, the Commission is unsure whether it is pertinent to authorise the United Kingdom to participate in the Schengen provisions relating to cross-border pursuit, since the crossing of the frontiers in question remains subject to controls and cross-border pursuit applies only to land frontiers (Article 41, Para. 5(b) of the Schengen Convention).

- similarly, the United Kingdom's participation in the Schengen *acquis* as regards mutual assistance in criminal matters will represent undoubted progress in this area. However, from the comments received, it is apparent that participation in certain provisions will involve in some cases transitional periods, and in others declarations or reserves. Much further information will be required here. This concerns in particular Article 49 (e) and (f) (scope of the reserve maintained with regard to the additional protocol to the 1959 Convention on Mutual Assistance in Criminal Matters), Article 50 (details of the nature of the transition requested), Article 53, paragraphs 1 to 4 (direct transmission between the competent judicial authorities), Article 66 (idem, in view of the ratification currently under way of the Convention on simplified extradition established within the European Union), and Articles 67 to 69 (same comment as for Article 49 (e) and (f));

- as regards narcotic drugs, the United Kingdom's request relates to the pertinent provisions of the Agreement, to the 1994 Decision of the Executive Committee on certificates for the transport of narcotic drugs and psychotropic substances in connection with medical treatment and to the Decision of the Executive Committee which consolidates the Schengen *acquis* in this area. However, this *acquis* includes furthermore, a number of declarations which, whilst not binding, may nevertheless be pertinent having regard to the efficiency of this cooperation;

- the Schengen Information System, although an essential component of Schengen cooperation, is not an end in itself: it serves to implement the measures and forms of cooperation set out in other chapters of the Schengen agreement. The SIS is thus a tool for use with other policies in the framework of Schengen. In so far as a request under Article 4 of the Schengen protocol relates to components of the Schengen *acquis* where cooperation relies on the SIS, it follows that the request to participate must also relate to the SIS, but that this participation in the SIS should be restricted to the data pertinent to the provisions of the Schengen *acquis* covered by the request. In-depth study will be needed of the technical feasibility of limiting participation in the SIS, and excluding from that participation the data which are not relevant to the domains covered, without prejudicing the integrity of SIS or its operation. Such a scrutiny should also take account of data security considerations. Finally, examination of this point should also take account of a future extension of the United Kingdom's participation to the Schengen provisions relating to freedom of movement of third-country citizens lawfully resident in a Member State.

14. As to the territorial scope for the United Kingdom's participation in certain provisions of the Schengen *acquis* relating to police cooperation and mutual assistance in criminal matters, the Commission recalls first that in accordance with Article 1 of the Protocol on the application of certain aspects of article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland, the United Kingdom may exercise at its frontiers with other Member States controls on persons seeking to enter the United Kingdom, and that the reference to the United Kingdom includes territories for whose external

relations the United Kingdom is responsible. Secondly, in accordance with Article 3 of the same protocol, the other Member States may at their frontiers exercise controls on persons seeking to enter their territory from the United Kingdom or any territories for whose external relations the United Kingdom is responsible.[2]

The exclusion of Gibraltar from the territorial scope of the provisions relating to mutual assistance in criminal matters (Articles 48 to 53 of the Schengen agreement) and extradition (Articles 59 to 66), by virtue of the fact that these provisions are complementary to two Conventions of the Council of Europe which do not apply to Gibraltar, amounts to an objective justification permitting the scope to be limited at this stage, though without prejudice to any future relevant development and in particular a potential extension of the scope of both Conventions.[3]

15. This opinion is addressed to the Council for its decision on the request by the United Kingdom pursuant to Article 4, second indent, of the Schengen protocol, and forwarded to the European Parliament for information.

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2 The United Kingdom's request mentions a possible future request for participation in certain provisions of the Schengen *acquis* by the Channel Islands and the Isle of Man. The Commission will express its opinion on this matter in due course, in the light of the principles set out in Para. 10 above.

3 Furthermore, it should not be forgotten that no decision of general application determines the territorial scope of measures decided by the Council in the framework of the former Title VI of the Treaty on European Union. Thus, though the conventions of 1995 and 1996, respectively on simplified extradition and extradition between Member States, have nothing to say on the subject, Article 18 of the Convention of 17 June 1998 on Driving Disqualifications (OJ C216 of 10.07.98) provides that the convention will apply only to the United Kingdom of Great Britain and Northern Ireland. The Joint Action of 29 June 1998 (OJ L191 of 07.07.98) on the creation of a European Judicial Network, contains an article specifically on territorial applicability, to the effect that it applies only in the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man. A Council declaration annexed to the Joint Action states that this article is without prejudice to the territorial application of other instruments.