ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA Submissions to the House of Lords Select Committee on the European Communities: Sub-Committee F

Enquiry into the Schengen Acquis

The Immigration Law Practitioners' Association has been asked by the Clerk to the Sub-Committee to give some initial comments on two documents produced by the European Council relating to the Schengen acquis and its transposition under the provisions of the Amsterdam Treaty into the EC Treaty and the Treaty on European Union. The two documents are:

1. 7233/1/98: Definition of the Schengen Aquis for the purposes of its incorporation into the EU;

2. 6816/2/98: Allocation of legal base for incorporation of the Schengen acquis.

In view of the very short time period available for this initial response, our comments will be fairly limited. We would seek to stress here only our preliminary views on major points. As the Sub-Committee is aware, the Schengen Agreement and Convention (1985 and 1990) arose from a decision of some Member States to proceed more quickly towards the abolition of border controls between them than was acceptable to all Member States. The pressure for the 1985 Agreement, which is fundamentally a framework agreement, came primarily from the transport industry concerned about lengthy delays to road traffic as a result of customs and other checks at internal EU borders.

The objective of the abolition of intra-EU border controls was subsequently incorporated into the EC Treaty through Article 7A EC through the Single European Act. The issue of border controls has been the subject of more than one inquiry by your Lordships therefore we will not make any further comment on that here. Suffice it to add that the Schengen Convention 1990 gave particularity to the 1985 Agreement as regards persons. It has then been supplemented by decisions of the Executive Committee to give effect to the intention of the Convention and Agreement.

In accordance with the Schengen Protocol of the Amsterdam Treaty, the contents of part of the new Title IV (Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons) of the EC Treaty as amended is to be filled by the transposition of the relevant parts of the Schengen Agreement, Convention and Decisions. The remainder of the so-called Schengen Acquis either does not require transposition because it is programmatic in nature, or relates to aspects of competence which have been left in Title VI of the Treaty on European Union.

The two Council proposals currently under consideration by your Lordships are the efforts of the Working Party to make sense out of this arrangement. The whole issue is further complicated by the fact that the asylum related provisions of the Schengen Convention in accordance with the Bonn Protocol ceased to have effect on the coming into force of the Dublin Convention determining the State responsible for considering

ILPA • Lindsey House • 40/42 Charterhouse Street • London EC1M 6JH • Tel: 0171-251 8383 • Fax: 0171-251 8384
EMail: ilpa@mqr1.poptel.org.uk

asylum applications. Therefore those parts of the Schengen Convention (Articles 28 - 38) are left without a legal base.

Two practical problems have hampered our work: first we have not had sight of the footnotes relating to the two proposals so cannot make sense of a number of aspects, including the meaning of the mysterious "PM" which appears extensively in Annex A of the Allocation proposal; secondly, we do not have copies of the implementing decisions of the Schengen Executive Committee, which are not published, and therefore are unable to comment on any.

7233/1/98: Definition of the Schengen Acquis for the purposes of its incorporation into the EU

This proposal seeks to set the parameters of the activity: what are we trying to insert? The question: "into what" is much easier as this is limited to the EC Treaty and the Treaty on European Union. There are three main issues here:

1. not insignificant parts of the Schengen Agreement and Convention (let alone the Decisions about which we are ignorant) have been absorbed into Community law already. This is particularly true of the provisions relating to customs controls. Other parts of the Schengen Convention have been absorbed elsewhere - ie the Dublin Convention. So the first task is to determine what remains properly within the Schengen realm for the purposes of the exercise;

2. substantial proportions of the Schengen Acquis are programmatic only and therefore are not amenable to incorporation into the Treaties. This is particularly true of the Schengen Agreement 1985 which has been defined as part of the Acquis but left in its entirety without a legal base. This is delicately described by omission in the preamble of the Decision which only searches out a legal base for measures which "do not belong in the domain of the exclusive competence of the Member States and are intended to have legal effects";

3. of what is left, that is to say, matters which remain part of the Schengen Acquis and have sufficient particularity to withstand absorption, to what should they be attached? Here arises the great contamination between the Pillars argument: what is the proper scope of Community law and what belongs properly to the Third Pillar? While we were just beginning to get a grip on this under the pre Amsterdam arrangement of responsibilities everything has now changed with the creation of the new Title IV EC and new balance between the First and Third Pillars. Under the pre Amsterdam arrangements, we also had the assistance of the first decision of the Court of Justice on the dividing line between the two Pillars (Case C-170/96 *Commission v Council (re: Airport Transit Visas)* Judgment of 12.5.98) which while still interesting is now part of past history (in which we continue to live awaiting the ratification of the Amsterdam Treaty).

To investigate properly these three issues would require a number of months work and a great deal of expertise on Community and Third Pillar competence. While such an investigation is terribly important to the coherence and proper application of the

European Union, it is with regret that we are unable to undertake it forthwith. Without such a proper analysis, any investigation in this area is a minefield and one is humbly aware that as one focuses on one issue, there may be another which has escaped attention as it is an issue of omission: some provision of the Acquis which has not been given a legal base and therefore has not been listed. A troubling example of this possibility is the omission of the whole of the Schengen Agreement 1985 from the legal base exercise. Is it really the case that there is no provision in that Agreement which ought to be part of the transposition exercise?

Turning to the contents, then of Annex B of the proposal, this contains specific provisions of the Schengen Convention which will not be given a legal base. Of the hotch pot of Articles, it appears, from a very cursory initial view that most of these relate to provisions which have moved elsewhere: ie baggage related into the EC Treaty or asylum related into the Dublin Convention. However, a number of questions arise for which there may be perfectly good answers but these are not immediately apparent to us.

1. As regards Articles 10(2) and 19(2) these relate to the mutual recognition of visas valid for a period of three months. We are not aware of any Community measure yet adopted which provides for such mutual recognition: there are the three proposals for directives of 1995 including one on a right to travel for third country nationals but none of these has been adopted. Where then can we find the protection of this cross recognition which is very important for third country national travellers?

2. Article 28 reaffirms the commitment of the Member States to the Geneva Convention relating to Refugees and its 1967 Protocol. This has been omitted from the transposition exercise. While it is true that this relates more specifically to the parts of the Schengen Convention which have been replaced by the Dublin Convention, there remains the border control aspects of the provisions which must be operated with regard to the Member States obligations under the Geneva Convention: in particular Articles 32 and 33 relating to non-refoulement. Article 63 EC (as renumbered following the Amsterdam amendments) requires regard to be had to the Geneva Convention but only in relation to the specific issues set out in its sub sections (a) to (d). The border control issues come within Article 61 and 62 EC (as renumbered following the Amsterdam amendments). So does this mean that the transfer from Schengen to EC means a weakening of the commitment to uphold the Geneva Convention?

6816/2/98 Allocation of legal base for incorporation of the Schengen acquis

Here we find the detail of what to do with the bits of the acquis which have been identified as needing transposition in one place or another. This decision, oddly appears to predate the previous one but clearly must come after it as only once the acquis is identified can it be allocated a slot. Annex A is a formidable object, listing the Articles of the Schengen Convention and Accession Agreements and the prospective legal base. It deserves detailed analysis which cannot be provided in the period

currently available to us. We will, therefore, limit our comments to some points which have come to our attention and raise questions or concerns.

1. The allocation of Article 27 of the Schengen Convention exemplifies the problems of the two Pillar division. While 27(1) requires Member States to impose penalties on persons assisting the entry of aliens contrary to the laws of any one of the Member States (a highly dubious provision in itself) 27(2) and (3) relating to passing information from one State to another about activities under 27(1) are allocated to the Third Pillar TEU. The immediate question is as to data protection in the two different realms of the Union. It is difficult to understand why not all of Article 27 is allocated to the First Pillar following the example of Council Regulation 515/97 on the mutual co-operation between the administration authorities of member states to ensure correct application of the law of customs. Such a solution would avoid the possibility difficulties in the application of the Data Protection Directive 95/46 (Article 3(2)).

2. Article 41(10) of the Schengen Convention raises other difficulties. It is allocated to Articles 34 and 32 TEU. It relates to police co-operation but its specific scope seems particularly inappropriate to the whole operation: "The Contracting Parties may on a bilateral basis extend the scope of paragraph 1 and adopt such additional provisions in implementation of this Article". Article 34 TEU sets out the specific procedural framework for the adoption of provisions. How can this framework then incorporate as subsidiary legislation a provision which dispenses with it altogether?

3. All the provisions relating to the establishment of the Schengen Information System, Articles 92 - 119 of the Schengen Convention are designated PM, which presumably, though we are not sure, means not yet sorted out. This is not surprising as if there is one area where problems of overlap occur it is here with this information system which is used both in respect of migration related matters and police co-operation in the fight against crime. This is also, as we understand it one of the areas of greatest interest to the UK.

As a general observation, we are not satisfied that sufficient care has been taken in this allocation process.

Conclusions

These two proposals will set the stage of the content of the Union's visa and border policies, police co-operation and mutual assistance in criminal matters, to name only a few areas covered. It will shape the Union's external and internal policies in these fields, which impinge directly on the rights of individuals.

From a very cursory first examination, we are not satisfied that sufficient care and attention has been paid to the allocations and the overall consideration of legal bases. We consider that it would indeed be wise for your Lordships to appoint an expert consultant to prepare for you an in depth analysis covering at least the three questions

raised in our first section. We would add, that as far as we are aware, no other national parliament is undertaking the kind of analysis which your Lordships have commenced here. Indeed, we understand that in more than one Member State, party to the Schengen system, the ratification bill itself for the Amsterdam Treaty includes a blanket acceptance of the Council's allocation process. It is also clear from the Explanatory Note of the Home Office, that the European Parliament is only getting a look at this process through the grace and favour of the FCO.

In view of the importance of what is at issue in this process, and in the light of what appears to be a fairly casual attitude adopted by some national parliaments in other Member States, we would strongly recommend further and more detailed study by the House of Lords Select Committee on the European Communities of the incorporation of the Schengen Acquis.

This Association is very interested in this subject and would welcome the opportunity to make further submissions as and when required during your Lordships' continuing consideration of the European Council's proposals.

2.6.98
EHG