



September 2008

Schengen/Dublin: The development of provisions

Schengen co-operation facilitates travel at the internal borders whilst ensuring security by means of extensive compensatory measures such as: tighter border controls at Schengen's external borders; strengthening cross-border police co-operation; facilitating mutual assistance in criminal matters; standardising visa policy; and introducing measures to combat firearms and drugs trafficking. The purpose of the Dublin Agreement is to co-ordinate responsibility for asylum procedures throughout Europe. To meet these new challenges and to continue improving security, co-operation is to be further enhanced within a clearly defined framework. Further EU provisions only contribute to the development of the Schengen/Dublin acquis if they are directly linked to lifting border controls at the internal borders and to the above-mentioned compensatory measures.

Although Switzerland has a right to the decision-shaping of Schengen/Dublin provisions, it has no formal right to decision-making. Switzerland retains the sovereign right to accept or reject any new Schengen/Dublin provisions or measures decided by the European Union. Acceptance of new provisions or laws takes the form of an Exchange of Notes, which constitutes an agreement under international law. According to the Swiss constitution, the agreement must be approved either by the Federal Council or Parliament (depending on the content of the agreement). Decisions by Parliament are generally subject to an optional referendum, which guarantees Switzerland's system of direct democracy. If Switzerland rejects any new provisions or laws, the Association Agreement can be suspended or terminated.

Since signing the Schengen Association Agreement on 26 October 2004, the EU has informed Switzerland of 68 new legally relevant acts and measures (status August 2008), all pertaining to Schengen (there have been no development of provisions with regard to the Dublin acquis). Around half of these developments do not entail any new obligations for Switzerland and therefore only require Switzerland to take note of them. Legal developments requiring the approval of Parliament, however, currently concern ten areas: the biometric passport; the biometric identity card for foreign nationals; the Schengen Borders Code; the border protection agency FRONTEX and the RABIT pool ensuring border security; the Schengen Information System (SIS); the Framework Decision on the Exchange of Information between Law Enforcement Agencies (the "Swedish Initiative"); the European External Borders Fund; arms legislation; the Visa Information System (VIS); and repatriation procedures.

Procedure for accepting provisions

Since signing the Schengen Association Agreement in October 2004, Swiss experts have participated in the European Commission's committees and the mixed committees of the Council of the European Union, allowing them to be actively involved in the work on developing the Schengen provisions. Although the Swiss experts do not have a right to participate in formal *decision-making*, they are allowed to participate in *decision-shaping*. This is important because the passing a decision on a new provision generally takes place by consensus.

Switzerland is informed on the passing of a provision by means of a written notification and has 30 days from the date the legal act is passed to comment on acceptance. Depending on the content of the legal act or measures, Switzerland either takes note of it or – if it entails new rights or obligations – accepts it by means of an *Exchange of Notes*, which constitutes an agreement under international law and must be approved according to constitutional provisions either by the Federal Council or by Par-

liament (for example, if the Exchange of Notes contains important binding legal rules). If this is the case, the Exchange of Notes takes place subject to parliamentary approval which, in turn, can be subject to an optional referendum. If an optional referendum does take place, Switzerland has two years to accept and implement the provision(s).

If Switzerland rejects a new legal act, the contracting parties try to seek a workable solution in order to continue co-operation. The appropriate procedure is set down in the Association Agreement. If by accepting a new legal act Switzerland is forced to compromise central pillars of its political system such as direct democracy, federalism or neutrality, an additional consultation mechanism allows for a dialogue at the highest ministerial level to find alternative solutions. If no agreement can be reached, both association agreements will be terminated.

Significant developments of provisions

Legal developments requiring the approval of Parliament:

Biometric passports and travel documents for foreigners

Both in Switzerland and in the EU plans are underway to introduce biometric passports and travel documents for foreigners; electronically stored data enhances the security of travel documents and renders their improper use more difficult by establishing a more reliable link between document and lawful holder. Moreover, the introduction of biometric passports ensures freedom of movement for Swiss nationals throughout the world (providing such documents are issued worldwide). At present, digital passports already make up half of all the world's passports. Switzerland has issued such passports since 4 September 2006 as part of a pilot project that will last a maximum of five years.

The EU's legal basis on biometrics is contained in the Council Regulation (EC) No. 2252/2004 of 13 December 2004, which represents a development of the Schengen acquis provisions. The Regulation determines which biometric features have to be included in passports and travel documents (facial image and from 28 June 2009 fingerprints) and lays down the minimum security requirements. It does not, however, regulate the technical details. This is the task of the European Commission, which issued technical specifications on 28 February 2005 and 28 June 2006 for storing facial images and fingerprints. Switzerland has accepted these specifications.

Status: Approval by Parliament on 13 June 2008.

Biometric permits for foreigners

The Schengen aquis sets requirements for the standard design of permits for foreign nationals. The regulation from 2002, which contained the old standards, was revised in April 2008 and requires that residence permits for foreigners now be issued in credit-card form and contain one biometric facial image and two fingerprints. The new permits, which require an amendment to current legislation, should come into circulation in mid 2010.

Status: The explanatory report for the consultation procedure is currently being drafted
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Schengen Borders Code

The Schengen Borders Code consolidates in a new EU Regulation all provisions on the border control of persons previously contained in various legal acts. The Borders Code defines the following:

- the requirements for entering the Schengen area (for example, valid travel document, no refusal of entry via SIS alert);
- the minimum amount of controls at the external borders (establishing a person's identity by means of the travel document, consultation of the SIS database);
- conditions for the temporary reintroduction of systematic internal border control (for example, UEFA EURO 2008, large-scale political events such as WEF).

In addition, the Borders Code provides that a person who is refused entry at an external border (in Switzerland these are the airports serving destinations outside of the Schengen area) shall receive a reasoned decision and have the right of appeal. Proceedings are not suspensory if the person appeals against the decision.

Status: Approval by Parliament on 13 June 2008.

FRONTEX / RABIT

The European border protection agency FRONTEX (with its seat in Warsaw) is a special agency for enhancing operational co-operation between member states in the field of management of external borders. It assists member states in the training of national border guards (including the establishment of common training standards), carries out risk analyses, promotes the control and surveillance activities of member states on the external borders, and co-ordinates joint operations. FRONTEX also provides member states with the necessary support in organising joint return operations. Once it has accepted the FRONTEX Regulation, Switzerland will take part in the agency's operations. This necessitates an additional agreement with the EU, defining the type and scope of Switzerland's participation in FRONTEX operations (especially its financial contributions and its voting rights on the management board). The costs of Switzerland's participation are expected to be around CHF 2.3 million annually.

In July 2007 the EU also passed a regulation on the formation of rapid border intervention teams (RABIT) for the purpose of border protection. These intervention teams will be temporarily deployed on application by a member state in extraordinary instances of sudden influxes of illegal migrants. FRONTEX will co-ordinate the composition, training and stationing of the rapid intervention teams at the border. The requesting member state will head the operation and carry the responsibility for leadership. The regulation defines that member states create a national expert pool of RABITs and have them trained by FRONTEX. Deploying border guard officers for concrete operations is not mandatory, however.

Status: Dispatch to Parliament on 13 February 2008. Approval on 18 June 2008 of negotiation mandate for an additional agreement with the EU on Switzerland's participation in FRONTEX.
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Schengen Information System (SIS)

The centrepiece of Schengen co-operation is Switzerland's participation in the European search database, the Schengen Information System (SIS). The Federal Council decided on 16 May 2007 that, due to the delays in introducing SIS II, Switzerland should participate in the temporary SIS-one4all system and afterwards join SIS II. Switzerland therefore has to incorporate the development of provisions with regard to both SIS I and SIS II into its legal system. By adapting the legal basis of SIS I, access to the data has been extended to Europol, Eurojust and the road traffic licensing departments. SIS II contains not only innovations that improve the quality and application of the database as well as data protection. It also provides a better means of identifying a person by including data such as fingerprints and facial images, and linkage between alerts.

Status: Approval by Parliament on 13 June 2008.

Exchange of police information (Swedish Initiative)

Schengen aims to help combat cross-border organised crime by facilitating the exchange of police information. The Swedish Initiative is intended as a practical tool to expedite the exchange of police information and especially to improve the availability of the required information within a useful time-frame. This does not impose any further obligations on Switzerland with regard to mutual assistance in criminal matters. The exchange of information is based on current data processing legislation (exception is the obligation of spontaneous transmission of information). Information is exchanged according to the provisions of national law and allocated competence. However, the framework decision defines the formal and procedural requirements for exchanging information by stipulating time requirements and determining points of contact.

The provision on the spontaneous exchange of information seeks to facilitate the information flow. The framework decision makes spontaneous information exchange without a request mandatory if the information could be useful for the prevention and prosecution of criminal offences. The framework decision also contains the principle of treating requests for information from national agencies and Schengen member states equally.

Status: Consultation procedure until 20 August 2008.
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European External Borders Fund

The European External Borders Fund is a solidarity mechanism that provides financial assistance to member states who endure for the benefit of protecting external borders a lasting heavy financial burden due to the length of their land or sea frontiers or their geographical location. The Fund is intended to run for the period 2007-2013 and aims at implementing the following four objectives:

- *Efficient organisation of controls* at external borders by, for example, establishing new infrastructure such as border posts, helicopter landing pads or traffic lanes for vehicles waiting for customs clearance;
- *Efficient management of flows* of persons at external borders to ensure a high level of protection at and easy crossing of external borders;
- *Uniform implementation of EU legislation*, e.g. through gradual introduction of standard training and uniform skills of border protection officers;
- *Enhancing the activity of consular services* in third countries, including reinforcement of the operational capacity of consular offices for processing visa applications.

The EU has to negotiate an additional agreement with the associated Schengen member states, defining payments and additional rules necessary for participation in the Fund. Switzerland is expected to have to contribute an average of CHF 10-13 million annually. In return, Switzerland will be able to submit requests for assistance for around CHF 2-3 million annually for combating illegal migration at its external borders: that is to say, for projects at its airports or in the field of visa policy at Swiss diplomatic missions.

Status: The explanatory report for the consultation procedure is being drafted, the additional agreement is currently under negotiation.
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Directive on Firearms

The directive on firearms is part of the Schengen acquis and was accepted by Switzerland as part of the Schengen Association Agreement. The directive provides for the movement of certain types of firearms; on the one hand it facilitates the transfer of weapons to another member state by persons with a firearms pass, and on the other hand it defines certain safety requirements such as controls on acquisition and possession of firearms. The directive has been revised and supplemented with more detailed provisions on the compulsory marking of firearms and ammunition, the traceability of new firearms coming into circulation, the rules for acquisition as well as procedures for the border control of firearms.

Switzerland already fulfils most of these requirements. The new EU directive therefore only requires a slight modification of Switzerland's firearms' legislation, for example in the following areas:

- Compulsory marking of ammunition (smallest packaging unit);
- Obligation of the authorities to keep firearms' records for 20 years after transfer (for example, if an arms dealer ceases his activities);
- Obligation of the Federal Customs Administration to control the export of firearms with a dispatch note;
- Modification of criminal provisions on trading non-marked or unlawfully imported firearms and confiscation of such objects;
- Obligation of the cantons to register the acquisition of firearms in an electronic database.

Status: The explanatory report for the consultation procedure is being drafted.

Visa Information System (VIS)

The EU regulation on the Visa Information System (VIS) defines the purpose and functionality of the database describes the actions of the visa authorities and contains provisions on data protection. The regulation is linked to the decision of the Council of the European Union dated 8 June 2004 on the structure of the system.

The Visa Information System (VIS) is a central database containing certain information on each Schengen visa application. The database aims to improve the implementation of the common visa policy, consular co-operation and consultation between central consular authorities. In particular, VIS will help to combat so-called visa shopping more effectively by revealing whether an applicant has already submitted a visa application at another embassy. Likewise, the database will facilitate identification of the lawful holder of a visa, thereby helping to fight fraud. In addition, data can also be used on a justified case-by-case basis for preventing, discovering and investigating terrorist acts and other serious criminal offences. In such cases, the data request is made indirectly, that is to say via one or several specially established national access points, which then clarify if the request is justified and only transmit the necessary data.

Switzerland already operates a national database containing various information on visa applications, such as the name, nationality, travel document details, duration of stay and purpose of the applicant's visit. Important new features of VIS include the storage of additional biometric data (facial image and fingerprints) and the possibility of data exchange between member states. VIS is likely to come into operation in the Schengen member states in summer 2009.

Status: The explanatory report for the consultation procedure is being draft.

Repatriation procedure

The objective of the EU's directive on return is to harmonise standards and procedures in the member states for repatriating third party nationals who stay in the member states illegally. The directive contains provisions on terminating illegal stay (a 30-day deadline for leaving the member state voluntarily), on procedural safeguards (a mandatory written return order with the right of appeal) and on arrest pending deportation (detention limited to a maximum of 18 months), whilst taking due consideration of the protection and welfare of the person concerned (the welfare of the child, family connections and the state of health of the person concerned). Included in the return order is generally an entry ban.

The purpose of harmonising procedures is to facilitate European co-operation (e.g., by organising and carrying out collective flights and to minimise the risk that individual countries become the victim of high migration flows due to more favourable conditions).

Switzerland already fulfils the greater part of the return directive. The current Foreign Nationals Act FNA has to be modified therefore only in 2 areas:

- To shorten the maximum length of detention from currently 24 months to 18 months in future (Art. 79 FNA), whereby this applies to a combined number of arrests. On the other hand, the existing maximum duration of individual types of arrest (preparatory detention, deportation arrest and coercive detention) remains unchanged. Up to 1 January 2007, the maximum length of detention in Switzerland was only 12 months.
- Informal expulsion from Switzerland on account of illegal stay is no longer possible. Every case of expulsion (not just on request) has to be accompanied by a written order with the right of appeal.

Status: Political agreement on the directive within the EU in June 2008

Further information

A complete list of provisions is available on: www.europa.admin.ch

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