

EC/Switzerland agreement: agreement on the Schengen acquis

2004/0199(CNS) - 22/10/2004 - Legislative proposal

PURPOSE : to conclude the agreement between the European Union and Switzerland with a view to its implementation, application and development of the Schengen Acquis.

PROPOSED ACT : Council Decision (Conclusion of an Agreement).

CONTENT : negotiations between the European Community and the Swiss Confederation on Seven Agreements were concluded in June 1999. All those Agreements entered simultaneously into force on 1 June 2002 (please refer to AVC/1999/0103 to 1999/0109). Attached to the agreements, the Swiss Confederation made a declaration on migration and asylum policy declaring its intention to participate in the EU system for coordinating asylum policies and proposing that negotiations be entered into for the conclusion of a convention parallel to the Dublin Convention.

Following the authorization given to the Commission on 17 June 2002, negotiations were held with the Swiss Confederation on its association with the implementation, application and development of the Schengen Acquis as well as with the legislation establishing Eurodac and the legislation on the State responsible for examining requests for asylum (which has been adopted subsequently and which will be referred to as "Dublin" Regulation). According to the negotiating directives, the agreements follow the model of the agreements with Norway and Iceland - concerning the latter's association with the implementation, application and development of the Schengen acquis and concerning the criteria and

mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway - adapted to the specific constitutional requirements of Switzerland (refer to CNS/2004/0200).

Lastly, it is considered that the texts are in accordance with the negotiating directives adopted by the Council on 17 June 2002. The sole exception to the principle of full acceptance of the current and future Schengen acquis is the derogation granted to Switzerland in respect of the acceptance of future acquis related to requests for search and seizure in respect of offences in the field of direct taxation, which if committed in Switzerland, would not be punishable under Swiss law with a custodial penalty. This derogation was necessary in order to conclude an Agreement with Switzerland in the field of savings taxation, which in turn was necessary for the entry into force of Council directive 2003/48/EC of 3.6.2000 on taxation of savings income in the form of interest payments. COREPER approved this derogation on 17.5.2004 as part of an overall compromise with Switzerland in a wide range of sectors, which was agreed upon in the EU/Switzerland summit on 19.5.2004.

The following points are highlighted in order to show the differences with or adaptations to the corresponding Agreements concluded with Norway and Iceland:

- A single act for different procedures : as the Commission has clearly indicated in its declaration made at the time of the adoption of the directives for negotiation for the agreement on the Schengen acquis, it is regrettable that these directives foresaw a single agreement, including elements from the first as well as from the third pillar. These elements from different pillars are of a fundamentally different nature (the elements from the first pillar are of a Community law nature, including supremacy and possible direct effect, whereas the elements from the third pillar are not), they are subject to different procedures with respect to approval and conclusion (e.g. the third pillar elements are not subject to an opinion of

Parliament) and are subject to the ECJ's jurisdiction to different degrees. In order to take account of these differences, the Commission proposes to adopt the Agreement on the Schengen acquis, by two separate acts, one based on the Community Treaty and the other on the Union Treaty, each decision indicating by a reference to Council Decision 1999/436/EC which parts of the Schengen acquis, covered by the Agreement, fall within the Community Treaty and which within the Treaty on European Union. This will particularly assist the Court as to the extent of its jurisdiction.

- Transition period : Switzerland is granted a two year period for acceptance and implementation of future acquis into its internal legal order in case a referendum is requested. If possible, Switzerland has to apply the development of the acquis on a provisional basis. If Switzerland cannot apply the content of the development on a provisional basis, EU and EC may take proportional and necessary measures against Switzerland in order to ensure the efficient functioning of the Schengen cooperation.

This safeguard clause makes it possible for EU and EC to accept an eventual two year delay for the implementation of future acquis by Switzerland.

- Derogation : Switzerland accepts the Schengen acquis and its development in its entirety. The only exception to this general principle is laid down in Article 7 (5) on the future development of the Schengen acquis and concerns a possible future act or measure relating to a request or order for search and seizure made for the purposes of investigating or prosecuting offences in the field of direct taxation, which, if committed in Switzerland, would not be punishable under Swiss law with a custodial penalty.

As regards indirect taxation, as far as indirect taxation is concerned, no derogation has been granted as regards both current and future acquis. Switzerland will grant full judicial cooperation under Article 51 of the Schengen Convention concerning cases of indirect tax evasion;

- Participation of the costs : the calculation of the percentage determining the annual contribution of Switzerland to the administrative costs is based on the relevant Norwegian and Icelandic contributions, in relation to the GDP of these three countries;

- Bilateral agreements : according to Denmark's special position with regard to acts adopted pursuant to Title IV of the Treaty establishing the European Community, Denmark needs to conclude a separate Agreement with Switzerland in order to create rights and obligations with Switzerland in relation to the Schengen acquis adopted pursuant to Title IV. In addition, Norway and Iceland also need to conclude an agreement with Switzerland in order to create rights and obligations between all associated partners applying the Schengen acquis.

An Article allows Liechtenstein to join the present Agreement. This provision avoids the conclusion of a separate Agreement with Liechtenstein and thus the creation of a third Mixed Committee once Liechtenstein would be associated with the Schengen acquis. Liechtenstein can take part in the present organisational structure;

- Preconditions : the Schengen acquis can only be implemented by Switzerland after the Council decides that all preconditions for that implementation have been fulfilled by Switzerland and that controls at its external borders are effective;

- Simultaneous implementation of the agreements : it is provided to create a link between the implementation and the termination of the Schengen agreement, on the one hand, and, on the other hand, the implementation of and the termination of the agreement on the mechanisms for determining the state responsible for examining a request for asylum lodged in one of the Member States;

- Comitology : a Mixed Committee will be established in order to address all Council items relevant for the implementation, application and development of the Schengen acquis and the Dublin/EURODAC acquis.

It should be noted that several declarations have been made which state in particular that:

1) the EU/EC does not exercise external competences on behalf of Switzerland. When negotiations with third countries have an impact on the Schengen acquis (e.g. negotiations on visa waiver agreements) EU/EC will invite third countries to conclude similar agreements with the three associated countries (Switzerland, Norway and Iceland).

2) Switzerland commits itself to speed up as much as possible the different procedures where a referendum is asked. Lastly, like Norway and Iceland, Switzerland will also participate as observer in the work of the Committees assisting the Commission in the exercise of its executive powers. Measures are also provided which aim to associate Switzerland with the principal provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data to be an integral part of the Schengen acquis.