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NOTE FROM THE AUSTRIAN DELEGATION

FOSTERING MUTUAL TRUST FOR CONTROLS AT THE EXTERNAL BORDERS

1. INTRODUCTION

The effective policing of the external borders according to uniform principles is a cornerstone of the entire Schengen system. Although each Contracting State is first and foremost responsible for controls at its own external borders, ultimately all Contracting States share responsibility within the framework of a uniform system of agreements based on mutual control and reciprocal trust.

The idea of collective responsibility for a common security area explicitly finds expression in the decision of 22 December 1994 implementing the Schengen Convention, in the Joint Declaration on the Austrian Accession Agreement and in the instruments expanding Schengen to the Nordic States, all of which identically make the implementation of the Schengen Convention in an individual country conditional upon a decision of the Executive Committee - and thus conditional on a collective assessment - for which all Member States are also collectively accountable in a spirit of solidarity. This concept is also expressly stated in respect of border control duties in Article 7 of the Schengen Convention which stipulates that "the Contracting Parties shall assist each other and maintain constant, close cooperation".

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Of course, this cooperation requires more than just consultation and decisions on legal provisions in collectively representative fora, more than just reports on the situation at the borders and selective inspections for individual Member States. It requires all countries to involve each other in practical responsibilities, to build up mutual trust and to take part in developing the control systems in each individual country.

The purpose behind the Schengen idea is to develop together a global system borne by all in a spirit of solidarity and which forges such close ties that - as laid down in the implementing decision of 1994 - it can never be dissolved. Since all Contracting States are interdependent, they are not just individually bound to fulfil their obligations towards the other States but are also bound to work together, in a spirit of cooperation and solidarity, with a view to achieving the objectives of the Convention and to participate, wherever possible, in steps towards the implementation of the Convention by and in other States as well as in optimizing the overall system.

2. COOPERATION

- As this cooperative approach has scarcely been put into practice as yet, particularly during deliberations as to optimizing controls at the external borders;

- as the impending expansion of the circle of States implementing the Convention has generated a whole new situation which could be met with new approaches;

- as the main burden of controls at the particularly sensitive eastern and southern borders will essentially fall to just three Contracting States in the future;

- as the international growth in crime linked to the smuggling of illegal immigrants, drugs trafficking and trafficking in stolen vehicles calls for a more dynamic development in Schengen practices;

Austria proposes that the following initiatives be considered.

These initiatives all centre around existing forms of cooperation which are legally enshrined in the Schengen Convention and involve forms of collaboration which increase in intensity step by step. This cooperation may, however, be designed in such a way that the extent of sovereign rights granted to bodies of other Member States may be varied in line with the respective national legal context or in such a way that the surrender of sovereign rights may be avoided altogether, without in any way jeopardizing the final goal.

They build on ideas which were also touched on when the Contracting States came together to determine the operative powers of Europol or in the final declaration of the European Council in Dublin in December 1996.

These proposals culminate in pragmatic examples and are geared towards the real, existing needs of (border) police activities. The range of proposals may also be realized little by little, testing the waters with individual steps before taking any further-reaching decisions. These suggestions may be put into practice by all Contracting Parties together or by only a few Contracting Parties along a particular stretch of the external border.

2.1 Observer and advisory groups

With a view to developing the current system of expert visits to the external borders on the basis of the decision of the Executive Committee of 27 June 1996 (SCH/Com-ex (96) 10), groups of people with practical experience of border controls would be

set up. These groups should be composed of representatives from all Member States, if possible. Their task would be to collaborate in controls at the external borders, in the capacity of observer or advisor, either at major and sensitive border crossing points to be selected collectively, or along selected sensitive stretches of the border between the official border crossing points for a given period of time. The duration of the assignments should not be cut too short, but they should ideally last from two weeks to three months.

Their work could consist in attending internal meetings and briefings as well as participating in the operational and organizational planning, contributing their experience gained when setting up controls at their own borders. Their work could also feasibly involve induction courses and further vocational training within the control authorities, taking into account specialist areas such as training for passport controls at airports, refresher courses in the light of contemporary trends in the falsification of documents or training for new generations of technical surveillance equipment.

In the light of the current state of preparations for implementing the Schengen Convention, it would be wise to begin by including sections of the Austrian, Italian and Greek external borders in the project.

The legal foundation for this initiative may be found in Articles 7, 8 and 47 of the Schengen Convention, whilst either a system of bilateral agreements between all Member States or an appropriate decision of the Executive Committee could settle the practical arrangements. The latter of these two options seems preferable for two reasons: firstly, it does not necessarily involve the members of the observer and advisory group exercising sovereign rights, and secondly, the costs of sending and deploying the group in the field are so minimal that they could be distributed simply, in accordance with tried and tested methods, between the state sending the group and the host state.

2.2 Special operations

A further-reaching step would be to launch regular and systematic joint special operations involving border control officials from all or several Member States in, for instance, targeted checks on suspected routes used for smuggling drugs, stolen vehicles or illegal immigrants. The pilot project planned for April to June 1997 could be taken as a promising point of departure.

A manpower of some 20 to 100 officers would seem suitable for an initiative of this kind. These officers would also - only within the limits of the law of the host country - participate in actual border control activities. The operation should nevertheless be equally as effective when direct coercive measures are executed only by the bodies of the State on whose territory the operation is being carried out. The duration of the operation would have to be commensurate with the objectives of each particular task, but should not exceed three months.

In the context of special operations of this kind, thought should be given to calling in experts with experience of relevance to the project, to contribute background information from their country of origin, to maintain constant contact to their authorities at home and who also have their own authority's interest in the success of the operation at heart. These special operations could also be useful components in training courses or an appropriate testing ground for cooperation on a larger scale with bodies from various different States.

Articles 7, 47 and 125 of the Schengen Convention provide the legal foundation for these operations, with particular emphasis on that part of Article 47 which states that liaison officers should not just play an advisory and supportive role but should also be able to represent directly the interests of one or more Contracting Parties. In this

context, it would seem quite reasonable for all participants to be able to exercise sovereign rights, although this is not essential for success. It would therefore suffice for the host State to create the necessary legal conditions at the national level. An international agreement, though not necessary, would be preferable to a mere Executive Committee decision so as to give this initiative the necessary impetus. In view of the fact that every participating Contracting State is, a priori, interested in this type of operation, the recommended principle for costing would be for the State sending the officers to bear the costs of the assignment.

2.3 Technical cooperation

The Schengen States have made substantial investments in equipment for their border control authorities in the course of setting up controls at their external borders. Some of this equipment may only be usefully applied in the direct vicinity of the borders and is of no use for other police purposes - not even for setting up a "safety net" in the vicinity of the borders - (for instance, night vision equipment, docuboxes, aircraft, jeeps, barriers and so on).

Since the external border shifts as each new State implements the Schengen Convention, it would seem reasonable to identify which technical equipment is no longer needed and to find the most simple way of transferring it to the new partners taking over responsibility for controls at the external borders.

From the legal point of view, this form of cooperation is mentioned in Article 44 of the Schengen Convention, which provides expressly for equipment to be exchanged. This form of cooperation could take place under private contracts which could freely regulate all arrangements and costs. To facilitate the conclusion of contracts of this kind

between Contracting States, the Executive Committee could lay down a general framework, as the points agreed upon in advance could be integrated as *lex contractus*.

2.4 Institutional involvement

The final and most intensive stage in cooperation is the institutional involvement of border control authorities of one or more Member States in the external border controls of another State. This would only be worthwhile if more staff could be assigned for longer.

This does not just involve operational assignments at the external border - although the idea of a uniform Schengen border police is a fascinating one - but also involves institutional forms of cooperation in preparation for these assignments. A joint Schengen school for training management staff and further training in special subjects is conceivable, as is a joint research, development and technology centre which, with pooled resources, could in the end develop and produce more efficiently and cost-effectively the equipment and apparatus which every European country needs to run a modern, state-of-the-art border police force.

Of course, prerequisites for a step of this kind would be to create the appropriate legal foundations in the country hosting the operations or headquarters, to create a joint clearing agency, to lay down statutes for the joint institutions and detailed regulations governing the distribution of the costs of staffing and running the institutions. In principle, this step ties in with the purpose of Article 47 of the Schengen Convention, although the question arises as to whether a multilateral agreement between all Contracting States laying down uniform regulations for this new procedure would be more expedient. This could be done with reference to the Europol conventions for guidance, which likewise pursues the goal of deploying police forces from various States in analysis and communications duties at joint headquarters as well as in operative duties throughout the territory of the convention.

3. IMPLEMENTATION

The intention of Austria's proposal is, on the basis of the policy debate held in the informal circle of the Ministers on 17 December 1996 in Luxembourg, to initiate a discussion on principle in the Central Group. This should mainly focus on three questions which are of significance for all the proposals and where reservations are obviously most likely to arise. These are:

- whether and, if so, to what extent each initiative necessarily involves the executive powers of the authorities of one Contracting State being extended to another Contracting State;
- whether the existing legal foundations provide a framework for these initiatives or whether new regulations should be laid down where necessary or appropriate; .
- whether implementing these proposals would have a financial impact.

The next step would be to take initiatives along the lines of 2.1 to 2.4 in the competent working groups - especially the Sub-Group on Frontiers and Working Group I on Police Cooperation - bearing in mind that the observer groups project should begin as soon as possible, directly following on from the completed pilot projects.

As this concept has an inherent driving force of its own, it is not necessary to begin work on all proposals at once. The fundamentally positive reception this idea was given in the circle of the Ministers may, however, be understood as a political mandate to add a new dimension to the importance of mutual trust.