EUROPEAN UNION
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LIMITE

SCHENGEN 1

OUTCOME OF PROCEEDINGS

of : Working Group on the Schengen Acquis

on : 8 December 1997

The delegations continued discussing the breakdown of the Schengen acquis and started with the second reading of the 1990 Schengen Convention. The basis for discussion were documents **SCHENGEN 1** (11480/97, dated 17 October 1997), **SCHENGEN 4** (12075/97, dated 7 November 1997) and **SCHENGEN 7** (12720/97, dated 25 November 1997).

The British, Irish, German, Finish, and Danish delegations still have general scrutiny reservations for all proposals submitted by the Presidency.

In the opinion of the Spanish delegation set out in document SCHENGEN 7, whenever there is no legal bases in the 1st or in the 3rd pillar, Article 14 TEC or the *Protocol integrating the Schengen acquis into the framework of the European Union* (Schengen Protocol) as a part of the 3rd pillar could serve as a legal basis. Concerning this proposal the Presidency asked the Spanish delegation which particular articles in the Schengen Protocol could serve as a legal basis.

Below is an article by article summary of the main arguments given. Provisions of the Schengen acquis which should not be included in the breakdown exercise because they have been replaced by Community provisions or by other instruments applicable between all the Member States, are given in square brackets.

Article 1

Presidency proposal:

- - (The definitions follow the legal basis of rules to which they relate)

Proposals made by delegations:

The Spanish delegation argued in favour of the Schengen Protocol as part of the 3rd pillar as a legal basis. Also modifications of the definitions would have to based upon the Schengen Protocol.

The Presidency and the French delegation argued that the definitions can be assigned to the different legal bases in which they are used (e.g. "internal borders" in Article 2 (1) of the 1990 Schengen Convention).

At the request of the Presidency the Legal Service of the Council gave as its opinion that a legal basis can only be the provision of a treaty. With regard to Article 14 TEC, only Article 14 (3) TEC can be used as a legal basis. The Legal Service reminded the delegations that the decisions taken by the Schengen Acquis Working Group can be checked by the Court of Justice (Article 2 (1) of the Schengen Protocol).

The Spanish delegation wanted to have also a reference to the 1985 Schengen Agreement. The Presidency stated that the provisions of the 1985 Schengen Agreement are either out of date or have become obsolete following the signing of the 1990 Schengen Convention. The Presidency concluded that only the Spanish delegation wanted to discuss the 1985 Schengen Agreement more in detail. The French delegation was neither in favour nor against breaking down the 1985 Schengen Agreement.

At the proposal of the German delegation the two hyphens in the Presidency's proposal were deleted.

Art. 2 (1), (2), (3)

Presidency proposal: **Art. 62 (1) TEC (Art. 64 TEC)**

Proposals made by delegations:

The Spanish delegation proposed as a legal basis for
Article 2 (1): Article 62 (1) TEC with a reference to Article 14 TEC;
Article 2 (2) and (3): Third Pillar pursuant to Article 64 (1) TEC.

The French, Finish, Dutch, Portuguese and Danish delegations and the delegation of the Commission preferred to have only Art. 62 (1) TEC as a legal basis.

The Swedish and German delegations also wanted to have a reference to Art. 64 TEC. The German delegation proposed to discuss the legal basis for each paragraph of Article 2 separately. The Austrian proposed that only with regard to Article 2 (2) a reference should also be made to Article 64 TEC.

The Council Legal Service and the delegation of the Commission were of the opinion that Article 64 (1) TEC cannot be regarded as a legal basis They argued that Article 64 (2) TEC is dealing with a different issue.

Article 2 (4)

The Spanish delegation proposed as a legal basis for Article 2 (4) the common customs policy plus the relevant part of the 3rd pillar with regard to the questions examined in detail in document SCHENGEN 7. The Presidency and the French delegation were of the opinion that there is no need to find a legal basis for Article 2 (4). The British delegation questioned whether Article 2, in particular Article 2 (4), also applies to customs controls and wanted to reflect on this issue. The delegation of the Commission was of the opinion that Article 2 covers only checks on persons, but not standard customs checks.

Art. 3, 4 (1) (2), 5, 6, 8

Presidency Proposal: **Art. 62 (2) (a) TEC**

Proposals made by delegations:

Art. 3

With regard to Article 3 (2) the Finish delegation asked for a reference also to Article 30 TEU. The delegation of the Commission stated that Article 3 (2) undertakes to introduce penalties not saying what kind of penalties and therefore a reference to the 3rd pillar is not needed.

Art. 4

The Spanish delegation proposed as a legal basis Article 62 (2) (a) TEC and the 3rd pillar. The French and Dutch delegations agreed with the Spanish delegation that Article 4 (3) has not become void, but thought that the legal basis should also be Art. 62 (2) (a) TEC. The British delegation has not taken a final view on Article 4 (3). The German delegation made a scrutiny reservation whether Art. 4 (3) and (4) fall under Art. 29 ff. TEU. With regard to Article 4 (1) the delegation of the Commission pointed out that all provisions concerning hand baggage checks have been replaced by Community law. The Spanish delegation argued that hand luggage checks can also be necessary for security reasons. The Legal Service of the Council argued that if the provisions on luggage checks have not become void, the legal basis should be the existing Article 100a TEC.

Art. 5

The Swedish and Portuguese delegations made scrutiny reservations, because in their opinion Art. 5 (1) (e) falls outside the scope of Article 62 (2) (a) TEC. For the Spanish proposals on Art. 5 see SCHENGEN 7.

Art. 6

With the exception of the Spanish delegation (see SCHENGEN 7) the delegations agreed on the Presidency proposal.

Art. 7

Presidency proposal: **Art. 66 TEC**

With the exception of the Spanish delegation, asking also for a legal basis in the 3rd pillar, the delegations agreed on the proposal made by the Presidency.

Art. 8

The Spanish delegation wanted the requirement of unanimity for adopting decisions explicitly mentioned.

Some delegations questioned whether there is a difference between "checking" borders and the "surveillance" of borders and whether Article 66 (2) (a) TEC is the proper legal basis with regard to the surveillance of borders.

The Council Legal Service stated that the surveillance of borders can also be seen as a measure to prevent illegal immigration. Therefore Article 63 (3) (b) TEC could be seen as a legal basis.

Art. 9 - 17

Presidency proposal: **Art. 62 (2) (b) TEC**

Proposals made by delegations:

For the Spanish proposals see SCHENGEN 7. The Spanish and Greek delegations will point out the appropriate legal basis within the 3rd pillar in the next meeting.

Art. 18

Presidency proposal: **Art. 62 (2), 63 (3) TEC**

Proposals made by delegations:

The Spanish delegation will point out the appropriate legal basis within the 3rd pillar in the next meeting. The French and Austrian delegations wanted Art. 63 (3) TEC to be the only legal basis. The French delegation made a scrutiny reservation regarding Article 62 (2) TEC.

Art. 19-24

Presidency proposal: **Art. 62 (3) TEC**

Proposals made by delegations:

For the Spanish proposals see SCHENGEN 7.

The Austrian delegation kept its position that with regard to compensation for any financial imbalances resulting from compulsory expulsion Art. 24 is not fully covered by Art. 62 (3) TEC or any other provision of the TEC or TEU.

The delegations accepted that for Art. 23 and 24 the legal basis will be Art. 63 (3) (b) TEC. The delegations also agreed that Art. 19 (2) has become void, only the British delegation made a scrutiny reservation on this point.

Art. 25

Presidency proposal: **Art. 62 (3), 63 (3) (a) TEC**
The delegations agreed again on the proposal made by the Presidency.

Art. 26, 27 (1)

Presidency proposal: **Art. 63 (3) (b) TEC**

Proposals made by delegations:

In the opinion of the Austrian, Swedish, Finish and Danish delegations the legal basis for Art. 27 (1) and (2) should be Art. 63 (3) (b) TEC. Insofar, however penal law is concerned, the legal basis should be **Art. 31 TEU**. The Austrian delegation maintained its position that the right to seek asylum could be affected and therefore Art. 26 SIA partly corresponds with **Art. 63 (1) TEC** .

[Art. 28 - 38]

Presidency proposal: **[63 (1) (a) TEC]**

The delegations agreed on the proposal made by the Presidency.

Art. 39

Presidency proposal: **Art. 30 (1) TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 40 to 43

Presidency proposal: **Art. 32 TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 44 to 47

Presidency proposal: **Art. 30 (1) TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 48 - 53

Presidency proposal: **Art. 31 (a) TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 54-58

Presidency proposal: **Art. 31 (d) TEU**

The delegations agreed to regard **Article 31 TEU** as a whole as the legal basis.

Art. 59, 61 to 66 (Art. 60 is obsolete)

Presidency proposal: **Art. 31 (b) TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 67 - 69 SIA

Presidency proposal: **Art. 31 (a) TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 70 SIA

Presidency proposal: **Art. 34 (1) TEU**

The delegations agreed on the proposal made by the Presidency. The Austrian delegation pointed again to the risk of institutionalizing the working group mentioned in Art. 70 SIA and proposed a reference not only to Art. 34 (1) TEU, but also to **Art. 207 TEC** and **Art. 41 TEU**. The German and Dutch delegations supported the Austrian proposal.

Art. 71

Presidency proposal: **Art. 30, 31 TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 72

Presidency proposal: **Art. 31 (c) TEU**

The British delegation proposed to add Art. 31 (e) TEU. The Swedish, Danish and German delegations made a scrutiny reservation on this proposal.

Art. 73

Presidency proposal: **Art. 30 (1) TEU**

The French delegation proposed Art. 30 (1) **(a)** TEU to be the only legal basis and made a scrutiny reservation.

[Art. 74]

Presidency proposal: **[Art. 95 TEU]**

The French delegation made a scrutiny reservation. In the opinion of the Spanish delegation Article 74 should remain.

Art. 75, 76

Presidency proposal: **Art. 95** TEC

For the Spanish delegation, with regard to Article 76 (2), (3) and (4) Article 95 TEC plus the 3rd pillar should be the legal basis.

[Art. 77 to 91]

Presidency proposal: **[Art. 95 TEU]**

In the opinion of the Spanish delegation Art. 77 to 91 should remain. The Dutch, Belgian and German delegations made scrutiny reservations on these articles. The Portuguese and Belgian delegations asked the Council Legal Service for its opinion inhowfar these provisions go along with the Council directive of 18 June 1991 on control of the acquisition and possession of weapons (91/477/EEC).[1]

Art. 92- 94

Presidency proposal: **Art. 62, 63, 66 TEC; Art. 30, 31 TEU**

Proposals made by delegations:

The German, French, Swedish, British, Spanish, Austrian, Italian and Portuguese delegations wanted to **delete Art. 62, 63, 66 TEC** as a legal basis.

Art. 95

Presidency proposal: Art. 31 TEU

The delegations agreed on the proposal made by the Presidency.

1 O.J. 1991, No. L 256/51.

Art. 96

Presidency proposal: Art. 66, 63 (3) TEC

The German delegation wanted also to have a reference to Art. 62 (2) (b) TEC. The French delegation proposed Article 31 TEU to be the only legal basis. Several Member States argued that the SIS is and should stay one unit with a common legal basis in the 3rd pillar. The Dutch and British delegations agreed with the Presidency proposal.

Art. 97

Presidency proposal: **Art. 30, 31 TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 98

Presidency proposal: **Art. 31 TEU**

The delegations agreed on the proposal made by the Presidency.

Art. 99

Presidency proposal: **Art. 30 TEU**

The delegations agreed on the proposal made by the Presidency.

Art.100

Presidency proposal: **Art. 31 TEU**

The delegations agreed on the proposal made by the Presidency.

The Presidency urged the delegations to examine this file closely before the next meeting in order to lift their reservations and to make specific proposals.