

EDITORIAL COMMENTS

Schengen: The pros and cons

On 26 March 1995, the area of free circulation set up by the Schengen Agreement of 14 June 1985 and the Implementing Convention of 19 June 1990 entered into force. Seven countries have implemented Schengen: Belgium, France, Germany, Luxembourg, The Netherlands, Portugal and Spain. The Convention did not enter into force for the other parties to Schengen, Italy and Greece, which have implementation problems both as regards their immigration controls and procedures, and the establishment of data protection legislation which would comply with the requirements of the Implementing Convention. It is understood that Austria intends to accede shortly to the Convention, though entry into force for Austria may be delayed.

Of the other Member States, the United Kingdom and Ireland have shown no interest in adhering to Schengen, the former presumably because of its long-stated opposition to the abolition of internal frontier controls, and the latter presumably because of the common travel area which it shares with the United Kingdom. Denmark, Sweden and Finland have the still unresolved problem of how to reconcile adherence to Schengen with the existence of the Nordic travel area.

The problems and defects of the Schengen Convention have been dealt with extensively elsewhere,¹ and it is not intended to re-examine them here. The positive aspect of Schengen is that, for the seven coun-

1. See e.g. Schutte, "Schengen, its meaning for the free movement of persons in Europe", 28 CML Rev., 549.

tries in respect of which it has entered into force, the promise of the free circulation of persons within an area without internal frontiers, as required by Article 7A of the EC Treaty, has been realized. The Commission has thus been justified in its oft-repeated assertion that Schengen is a laboratory experiment to see what can be achieved in the area of the free circulation of persons.

Schengen is now a concrete example of the two-speed Europe. It is outside the Union framework but it is within the Union orbit in the sense that all of its members are members of the Union and the Implementing Convention makes specific reference to the aim of the EEC Treaty in creating an area without internal frontiers; Article 134 of the Convention provides that "[T]he provisions of this Convention shall apply only in so far as they are compatible with Community law". The aim of Schengen, an area with free circulation of persons, is the aim of Article 7A of the Treaty, but it is a goal which has been achieved by only 7 out of 15 Member States.

Is this a threat to the Community order? Strictly speaking no, though potential problems are discussed below. Article 134 provides for the priority of Community law, and the different issues which have been identified by commentators as likely to run counter to Community competence, such as firearms etc. have been solved in favour of the Community competence. When the Community draft visa regulation is adopted on the basis of Article 100C of the EC Treaty, presumably the Schengen States will comply accordingly. On the other hand, some issues covered by Schengen come under Title VI of the Treaty on European Union (TEU), the Third Pillar, such as border controls and drugs. Here, however, it should be recalled that Article K7 TEU allows for the establishment or development of closer cooperation between two or more Member States insofar as such cooperation does not conflict with or impede that provided for in Title VI, TEU. This provision would therefore allow for the continued existence of the Irish-British common travel area, and Schengen, but would not appear to cover the Nordic travel area, where non-Member States are also involved. In the case of conflict between Schengen and Title VI, TEU, one would have to show that cooperation under Schengen conflicts with or impedes the work done under the Third Pillar. Presumably, if such conflicts were to arise,

the Schengen States would concede in favour of the work done at Union level. Eventually, as the Third Pillar becomes really operative and takes binding action in the areas which fall under it, which duplicate the Schengen rules, one could presume that the latter would become non-operative. But this is not required by the Schengen Convention, nor by Article K7. In order for a Schengen rule to become inoperative, it must conflict with or impede a Third Pillar instrument. If there is no such conflict or impediment, the norms adopted under the Third Pillar and those adopted within the Schengen context could have a dual, twin-track existence. It is not necessarily a given that Schengen will progressively become less important to the point of eventually becoming inoperative as the Union expands its activities under the Third Pillar.

The existence of the twin-speed Europe is also no surprise. We are already accustomed to the fact that supranational law in the Community/Union context may not be of uniform application throughout the fifteen Member States, whether it be through the application of the differing concepts of the twin-speed Europe, variable geometry or Europe "à la carte". The Social Protocol and Agreement in the TEU effectively provide for a two-speed Europe in social matters. *A fortiori*, a Europe of variable geometry is implicitly provided for in the TEU, which provides that EMU may proceed with the participation of only those Member States which fulfil the convergence criteria. Europe "à la carte" is also present in the TEU, insofar as the United Kingdom is given the right to opt for the third stage of EMU. Thus, Schengen cannot be criticized on these grounds.

However, what is striking about Schengen is how little it gives in return for so much. The aim of the free circulation area essentially translates into not being required to present a valid travel document when moving within the Schengen territory. The traveller has then the right to move freely within that territory without undergoing further such controls. However, in most, if not all, of these countries, there is an obligation to prove one's identity. Thus, the traveller in Schengen in any event needs to carry a valid identity document. The advantage of Schengen is that that document does not have to be produced at internal frontier controls, as there are none. The advantage offered, it is submitted, is more psychological than real. Travellers within Schengen (in-

cluding nationals of Member States of the Union who are not Schengen States and third country nationals) can move freely, and experience the perception of a frontier-free Europe.

However, the psychological effects of the abolition of border controls should not be under-estimated. Though not quantifiable, they may contribute to an individual's perception of a frontier-free Europe, and the realization of one of the central aims of European integration. If this is so, then this is a very considerable benefit.

Apart from the fact that for the moment this perception may be only partial or illusory (airlines within Schengen are still requiring the production of travel documents), it is well-known that the internal frontier controls which Schengen has abolished are being replaced by more frequent internal non-frontier controls, increased police cooperation, exchange of personal data and more restrictive rules on the presentation of requests for asylum. This is the price one pays for the privilege of not having to present one's travel document at an internal frontier control. However, it is argued that such controls would be inevitable in any event. Moreover, there is a strong case to made for them, as they may be more effective than ordinary border controls in many cases. This raises the issue of the effectiveness of border controls: the United Kingdom and Ireland, being islands, have always considered border controls to be highly effective, and hence have relatively few internal controls over the movement of persons in these countries. The other Member States, on the other hand, have often questioned the effectiveness of border controls, and have traditionally supplemented them by internal controls.

There are also other prices to be paid. First, conversion of airports within the Schengen States to comply with the new arrangements, by separating passengers from intra-Schengen flights from other passengers is costly and will take time to achieve. The same will also presumably apply to other travel hubs such as railway stations and ports. Second, the perception of the frontier-free Europe which may be experienced by intra-Schengen travellers may be off-set by the requirement that all (Community nationals as well as third country nationals) individuals entering Schengen from a non-Schengen state, thus *including Member States of the Union*, will be required to pass through regu-

lar frontier controls, which, in the case of Schengen, are *external* frontier controls. To be sure, thereafter, once travelling within Schengen, they too benefit from the area of free circulation. Third, the practical problems are enormous. How does one deal with passengers from a Schengen State who transit in a non-Schengen State while proceeding to their destination in a Schengen State? Such passengers will be effectively subject to two regimes, rendering the advantage of the Schengen scheme at least partly nugatory, while still having to pay the price of the compensating measures for the abolition of internal border controls within the Schengen States.

One very serious point from the point of view of the Community is that Schengen external frontier controls on travellers from outside the Schengen territory may include stricter controls on Community nationals. This effect has already been seen since 26 March 1995 in respect of controls between France and Italy. Is this a violation of Article 7A of the Treaty?² To what extent does it comply with the case law of the European Court of Justice in *Commission v. Belgium*³ to the effect that controls may not be systematic, arbitrary or unnecessarily restrictive, and in *Commission v. The Netherlands*⁴ where the Court held that controls essentially must be limited to identity checks in the case of Community nationals? Is it permissible that Member States of the Union should treat some Community nationals differently from others as regards frontier controls, the only objective justification being the fact that they have either departed from or passed through a State which is not a Schengen State? The Benelux is not a model here as that is expressly preserved by the EEC Treaty.

Inevitably, the question which comes to mind is whether the Schengen free circulation area is worth all this; is the game worth the candle? Is the dispensation from the requirement to show a travel document to an immigration officer, but which is factually necessary to prove one's identity and perhaps to board a plane, so important as to justify the ex-

2. The problem was raised six years ago by Professor Giorgio Gaja in a prescient article, "Le 'due velocità' in tema di circolazione delle persone", 72 *Rivista di Diritto Internazionale* (1989), 639–640.

3. Case 321/87, [1989] ECR 997.

4. Case C-68/89, [1991] ECR I-2069.

pense, the different regimes and the possible conflicts with, if not the letter, at least the spirit of Community law? Proponents of free movement and free circulation will answer affirmatively, as they see Schengen as the precursor to the full implementation of Article 7A of the EC Treaty and the realization of the internal market in persons. Others may not be so sure. Insofar as Schengen is largely the model upon which the Union is basing its own efforts in this area, such as the draft Convention on the crossing of the external frontiers of the Member States, the draft visa regulation, resolutions on asylum and the institution of a European Information System, it seems likely that the Union framework for free circulation could share the defects of Schengen. If the Union does not modify certain aspects of the Schengen model, these defects will be perpetuated.

That controls are necessary is beyond doubt. The growth of international organized crime, the problem of drugs and terrorists, and other issues such as illegal immigration, are reasons for compensatory measures to replace internal border controls at least. However, the abolition of internal border controls should not lead to the establishment of a system which is potentially more intrusive on the rights of the individual than internal border controls ever were, with new threats to privacy and the rights of asylum-seekers and others; nor should it lack effective parliamentary and judicial control at national or supranational levels. The fundamental problem may be the equation of goods with persons which is made in Article 7A of the EC Treaty. Whereas the abolition of internal border controls on goods is clearly necessary in order to achieve the internal market in goods, it has not been convincingly shown that this is the case for persons, where the benefits of the abolition of internal border controls may not genuinely counter-balance the necessary compensatory measures and the lack of effective parliamentary and judicial control. One hopes that these problems may be overcome in time.