

EXPLANATORY MEMORANDUM (EM) ON EUROPEAN UNION DOCUMENTS

Commission Recommendation on proportionate police checks and police cooperation in the Schengen area

Submitted by the Home Office on 13 July 2017

SUBJECT MATTER

1. On 11 May 2017, the Schengen States considered the Commission proposal 8709/17 and agreed that five Schengen States - Austria, Germany, Denmark, Sweden and Norway – can apply Article 29 of the Schengen Borders Code (SBC) and maintain raised internal borders controls at specific sections of their internal borders for a further six months, but as a final measure.
2. The Commission notes that further efforts are still needed in order to ensure the full operation of the European Border and Coast Guard Agency and the implementation of the EU-Turkey Statement, including monitoring the situation in Greece and along the Western Balkans route. However, they stress that the said Schengen States should make every effort to find other ways to address the threats instead of using raised internal borders, and they should ensure their borders are lowered within the six months.
3. The Commission therefore addresses this Recommendation to all Member States bound by the border control elements of the Schengen Borders Code (i.e. Schengen States) and calls on them to apply this best practice to their domestic policing within the next six months in order to ensure the overall security of the Schengen area and aid the lowering of the said Article 29 raised internal borders.
4. This Recommendation explains how existing domestic policing and cross border police cooperation, linked to current Schengen border policing and appropriate tools under the SBC, can be better used to address the threats from uncontrolled migration flows. This builds on the 2012 Guidelines on policing best practice at Schengen internal borders and captures lessons learned over the last three years; including relevant case law on police checks, the findings of Schengen evaluation visits, and new possibilities resulting from technological developments.
5. The Commission considers that police checks in border areas under domestic policing powers are distinct from border policing under the SBC. Therefore, even when Schengen internal borders are lowered, national police can and should continue to conduct checks (i.e. spot checks and targeted operations). In turn, Schengen States are obliged by European Court of Justice (ECJ) rulings in 2012 to ensure that police checks do not amount to measures equivalent to border controls which may undermine Citizen's free movement rights. Member States should have specific domestic provisions and the necessary frameworks already in place to help make clear such activity is not Schengen border control.

6. To help Schengen States ensure that police checks can take place in border areas in line with these criteria, the Commission presents best practices that do not represent measures equivalent to border controls but that do still meet the threats.
7. The Commission cites numerous times on which a number of Member States have made use of such intensified police checks in border areas (e.g. Austria, Belgium, Czech Republic, Germany, Denmark, Netherlands, France, Italy, Slovenia, and Switzerland) and how these policing best practice activities have been in line with the European Court of Justice rulings.
8. The best practice recommended by the Commission includes intensifying police checks across the entire territory, including in border areas; carrying out police checks at transport hubs, including in border areas; adapting police checks in border areas in light of continuous risk analysis; and making use of modern technologies to monitor vehicles and traffic flows e.g. number plate recognition technology. In terms of cross-border policing best practice, Schengen States should re-assess the tools used e.g. better coordination of joint operations on trains, cross-border surveillance and pursuits, joint cooperation centres, targeted recruitment to create dedicated police teams for work in border areas. They should also remove legal and operational barriers to cross border police cooperation, and develop and implement joint threat analysis and cross-border information exchanges, including coordinated police checks at Schengen internal borders. Technical investments should be reassessed e.g. for surveillance and detection at borders.
9. The Commission also recommends that temporary raised internal borders, under Chapter II of Title III of SBC i.e. Article 23 of the SBC, may still be necessary in the future but only once all other methods – including stepping up police checks - have been made to address threats.
10. In order to address secondary movements across the Schengen area, the Commission also calls on Member States to take on board as soon as possible the recent work to enhance returns. Therefore, when a person without permission to enter their territory is found, they should ensure that they are taken back by another Member State or ensure there is swift return of third-country nationals, either through their bilateral return and readmission arrangements or through the EU Returns Directive (Directive 2008/115/EC).

SCRUTINY HISTORY

11. 5465/17 was the subject of Home Office EM dated 7 February 2017. The proposal cleared the Commons as Not Important Cleared in Report 33, 16/17 on 1 March 2017 and at the EUC Chair's sift on 21 February (sift 1649). An EM on 8709/17 is being submitted separately.

MINISTERIAL RESPONSIBILITY

12. The Home Secretary has overall responsibility for immigration policy in the United Kingdom. The Home Secretary has responsibility for policy on policing and the fight against crime (except in Scotland and Northern Ireland).

INTEREST OF THE DEVOLVED ADMINISTRATIONS

13. The Scottish Cabinet Secretary for Justice has responsibility in Scotland, and the Minister for the Department of Justice has responsibility in Northern Ireland for devolved JHA matters.
14. The Devolved Administrations do have an interest in those elements of the Schengen *acquis* in which the UK does participate. The Devolved Administrations have therefore been consulted in the preparation of this EM.
15. The Department of Justice for Northern Ireland in particular has noted the UK's interest in these developments and that the Government will continue to follow discussions closely and assess any impacts that follow. They do not have specific comments in respect of this EM but seek to continue to be kept informed of developments.

LEGAL AND PROCEDURAL ISSUES

i) Legal basis

16. Article 292 TFEU. Addressed to all Member States bound by Title III of Regulation (EU) 2016/399 (Schengen Borders Code).

ii) European Parliament procedure

17. Not applicable.

iii) Voting procedure in the Council

18. QMV.

iv) Impact on United Kingdom Law

19. Not applicable.

v) Application to Gibraltar

20. Not applicable.

vi) Fundamental Rights Analysis

21. This best practice should be implemented in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter').

APPLICATION TO THE EUROPEAN ECONOMIC AREA

22. The Schengen *acquis* and measures building upon it apply to Norway, Iceland, Switzerland and Liechtenstein under individual Agreements concluded with the European Union.

SUBSIDIARITY

23. Not applicable.

POLICY IMPLICATIONS

24. The Government notes that the Commission's objective for this Recommendation is to return to the normal functioning of the Schengen area within six months. In effect, they are encouraging those Schengen States that currently have raised internal borders under Article 29 SBC to focus instead on the use of policing and border force actions across internal borders to deliver increased internal security. They have therefore specifically addressed this Recommendation to those Member States that are party to Title III SBC - the staffing and resourcing of Schengen border control and cooperation between Schengen States i.e. full members of the Schengen area (Schengen States).
25. The Commission also wants to ensure that the Schengen States apply the full Schengen *acquis* in line with EU law, especially with regard to Title III of the SBC. Title III includes coordinated cross border operations between Schengen States working through the European Border and Coast Guard (EBCG).
26. The UK does not participate in the border control elements of the Schengen *acquis*, and therefore is not party to Title III SBC or the EBCG. However, the Government notes that a number of the policing best practices cited in this Recommendation draw on elements of the complimentary policing aspects of the Schengen *acquis* in which the UK does participate – albeit framed as part of the implementation of Title III SBC. This includes Article 40 of the Schengen Convention on cross-border surveillance.
27. We support work by our European partners to strengthen the Schengen area, including improved coordinated actions at Schengen internal borders. We also encourage their work to increase cooperation and information sharing between policing and border force authorities and agencies at a national level, as well as increased cooperation and information sharing between Member States across the Schengen area.
28. We note that the best practices listed in this Recommendation mirror our approach to collaborative cross border security with European partners, such as France, the Netherlands and Belgium. This includes the use of information sharing and new technologies to counter organised crime and terrorism at our national borders. This collaborative approach also applies to work between the UK and the Republic of Ireland. Although neither party participate in the borders elements of the Schengen *acquis*, we operate the Common Travel Area (CTA) which includes in particular collaborative work between the Republic of Ireland and Northern Ireland.
29. We therefore have an interest in these developments and, even though the UK is not bound to implement these Schengen area best practices, we will follow these discussions closely and assess any impacts on our bilateral arrangements and operations with European partners. In turn, we have and will continue to share our best practice with our European partners.

IMPACT ASSESSMENT

30. An impact assessment is not required.

FINANCIAL IMPLICATIONS

31. There are no direct financial implications for the UK.

CONSULTATION

32. External consultation will not be required beyond consultation with Devolved Administrations, once purdah has ended.

TIMETABLE

33. The Commission presented this Recommendation on police checks to Member States at SCIFA on 30 May 2017. This is still under discussion between Schengen States.



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