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REPORT

on the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic with a view to the adoption by the Council of a Decision amending Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders
(11896/2001 – C5-0563/2001 – 2001/0828(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Christian Ulrik von Boetticher

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 12 November 2001 the Council consulted Parliament, pursuant to Article 39(1) of the EC Treaty on the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic with a view to the adoption by the Council of a Decision amending Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (11896/2001 – 2001/0828(CNS)).

At the sitting of 15 November 2001 the President of Parliament announced that she had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0563/2001).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Christian Ulrik von Boetticher rapporteur at its meeting of 21 November 2001.

The committee considered the initiative and the draft report at its meetings of 10 December 2001, 19 February 2002 and 19 March 2002.

At the last meeting it adopted the draft legislative resolution by 27 votes to 4, with 4 abstentions.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; and Robert J.E. Evans, Lousewies van der Laan and Giacomo Santini, vice-chairmen; Christian Ulrik von Boetticher, rapporteur; Maria Berger (for Carmen Cerdeira Mortero), Hans Blokland (for Ole Krarup, pursuant to Rule 153(2)), Mario Borghezio, Mogens N.J. Camre (for Niall Andrews), Marco Cappato (for Maurizio Turco), Michael Cashman, Charlotte Cederschiöld, Carlos Coelho, Giuseppe Di Lello Finuoli, Jorge Salvador Hernández Mollar, Pierre Jonckheer, Margot Keßler, Timothy Kirkhope, Eva Klamt, Baroness Sarah Ludford, Lucio Manisco (for Fodé Sylla), Luís Marinho (for Martin Schulz), Hartmut Nassauer, Arie M. Oostlander (for Gérard M.J. Deprez), Elena Ornella Paciotti, Hubert Pirker, Martine Roure, Heide Rühle, Olle Schmidt (for William Francis Newton Dunn), Ilka Schröder, Patsy Sörensen, The Earl of Stockton (for Bernd Posselt), Joke Swiebel, Anna Terrón i Cusí and Christos Zacharakis (for Thierry Cornillet).

The report was tabled on 20 March 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic with a view to the adoption by the Council of a Decision amending Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (11896/2001 – C5-0563/2001 – 2001/0828(CNS))

The initiative is amended as follows:

Text proposed by the Kingdom of Belgium, the Kingdom of Spain and the French Republic¹

Amendments by Parliament

Amendment 1

ARTICLE 1, PARAGRAPH 1A (new)
Article 40, paragraph 1, sentence 3a (new)

The Contracting Party which has taken over surveillance shall continue it at the same intensity as the Contracting Party previously conducting the surveillance would have done. If it is unable to do so, the Contracting Party originally conducting the surveillance shall be entitled to continue that surveillance itself.

Justification

This is to prevent situations in which surveillance is downgraded if the Contracting Party to be entrusted with surveillance does not have adequate technical, human or financial resources.

Amendment 2

ARTICLE 1, PARAGRAPH 1B (new)
Article 40, paragraph 2, introductory words

2. Where, for particularly urgent reasons, prior authorisation cannot be requested

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¹ OJ C 285, 11.10.2001, p. 3.

from the other Contracting Party, the officers carrying out the surveillance shall be authorised to continue beyond the border the surveillance of **a** person presumed to have committed criminal offences listed in paragraph 7, provided that the following conditions are met:

from the other Contracting Party, the officers carrying out the surveillance shall be authorised to continue beyond the border the surveillance of **the** person **mentioned in paragraph 1** presumed to have committed criminal offences listed in paragraph 7, provided that the following conditions are met:

Justification

To make clear that even in urgent cases the broader category of persons may be kept under surveillance.

Amendment 3

ARTICLE 1, PARAGRAPH 1C (new)
Article 40, paragraph 3, subparagraph (e)

(e) Entry into private homes and places not accessible to the public shall be prohibited.

(e) Entry into private homes and places not accessible to the public shall be prohibited.

Entry into office, company and business premises accessible to the public during their respective opening hours shall however be permissible.

Justification

To give legal backing to current practice.

Amendment 4

ARTICLE 1, PARAGRAPH 1D (new)
Article 40, paragraph 3, subparagraph (f)

(f) The officers carrying out the surveillance may **neither** challenge **nor** arrest the person under surveillance.

(f) The officers carrying out the surveillance may **only** challenge **or provisionally** arrest the person under surveillance **if that person commits an extraditable criminal offence or is about**

to do so and officers of the country in whose territory the surveillance is being carried out are unable to make the challenge or arrest.

Justification

In the event of an extraditable criminal act it cannot matter which police force takes the direct action to detect and arrest the perpetrator. Consequently, where an extraditable offence is committed, the seriousness of the offence should provide an exception from the rule that officers carrying out surveillance on foreign territory may neither make challenges nor arrests.

Amendment 5
ARTICLE 1, PARAGRAPH 2
Article 40, paragraph 7, new indents

- acts of terrorism as defined in the proposal for a Council framework decision on the fight against terrorism.

Justification

Terrorist offences as defined in the Council framework decision on combating terrorism¹ must justify cross-border surveillance.

¹ OJ C 332 E, 27.11.2001, p. 300.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic with a view to the adoption by the Council of a Decision amending Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders (11896/2001 – C5-0563/2001 – 2001/0828(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic (11896/2001¹),
 - having been consulted by the Council pursuant to Article 39(1) of the EU-Treaty (C5-0563/2001),
 - having regard to Rules 67 and 106 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0078/2002),
1. Approves the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic as amended;
 2. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 3. Asks to be consulted again if the Council intends to amend the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic substantially;
 4. Instructs its President to forward its position to the Council, the Commission and the governments of the Kingdom of Belgium, the Kingdom of Spain and the French Republic.

¹ OJ C 285, 11.10.2001, p. 3.

EXPLANATORY STATEMENT

Background

Pursuant to Article 40(1) of the Convention implementing the Schengen Agreement of 14 June 1995 (SIC) officers of one contracting party who as part of a criminal investigation are keeping under surveillance in their country a person suspected of participation in an extraditable or criminal offence are authorised to continue their surveillance in the territory of another contracting party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance.

On its request, the surveillance will be entrusted to officers of the contracting party in whose territory it is to be continued. In particularly urgent circumstances surveillance may continue without prior notification provided that it is immediately notified to the competent authorities of the contracting party in question and a request for assistance is submitted, also immediately. Surveillance must however cease once the host contracting party so requests or if cross-border surveillance has not been authorised five hours after the border was crossed.

Cross-border surveillance is also restricted by eight provisions listed in Article 40(3) of the SIC. The contracting party may for example ask the officers to relinquish their service weapons before crossing the border; in addition, officers carrying out the surveillance must at all times be able to prove that they are acting in an official capacity, and carry the document certifying that authorisation has been granted by the contracting party. They may neither challenge nor arrest the person under surveillance. Cross-border surveillance is permissible only in cases involving an offence listed in Article 40(7) of the SIC.

Initiative by Belgium, Spain and France

This initiative is designed first to extend the category of persons who may be kept under surveillance (for example to life partners and friends of the suspect).

Secondly the list of offences contained in Article 40(7) of the SIC is extended. Organised fraud, smuggling illegal immigrants, laundering the proceeds of organised crime and illicit trafficking in nuclear and radioactive substances are added.

Opinion

The rapporteur basically agrees with the initiative's objectives but does not feel they go far enough. To make surveillance more effective and easier to carry out the rapporteur believes that further amendments are needed. He has therefore looked at Article 40 as a whole rather than confining himself to paragraphs 1 and 7 as amended in the initiative.

Broadening the category of persons who may be kept under surveillance will certainly make investigations substantially easier, but this should also apply to urgent cases mentioned in paragraph 2 or Article 40 would be inconsistent.

In the new circumstances following 11 September 2001 the list of offences should be extended to include terrorist offences and offences endangering the public as defined in the Council framework decision on combating terrorism, so that cross-border surveillance may be

allowed in such cases.

The rapporteur also considers that the aim of facilitating cross-border surveillance in the event of terrorist offences and offences representing a danger to the public is being pursued on the wrong basis. Better cross-border surveillance of all types of offences must be facilitated, not simply by including these offences in the Article 7 list but by more effective and easier surveillance. This can however only be achieved by further amendments.

Cross-border surveillance, like hot pursuit pursuant to Article 42 of the SIC is an instrument - which calls for improvement - to maintain public order and safety which, with the removal of border checks and the impending accession of the countries of Central and Eastern Europe, will require heightened attention.

The scope offered by Articles 40 and 41 of the SIC is restricted by over-lengthy procedures, disproportionate restrictions by the contracting party in whose territory the surveillance is to be continued and inadequate investigations conducted by the contracting party taking them over.

Practice has shown that investigations are being interrupted or fail after being handed over for these reasons. Unfortunately, Member States only rarely produce reports on the implementation of these measures.

The German Federal Ministry of the Interior publishes one of these reports every year. In the last two years the following persistent obstacles to cross-border surveillance have been mentioned:

One neighbouring Member State continues frequently to insist on the handover of surveillance at the border. Problems arise because, by virtue of restrictive national provisions on working hours, after a certain period of surveillance the surveillance units halt the surveillance and/or do not resume it the following day because of manpower shortages. This regularly results in gaps in surveillance as the German surveillance units are only able to pick up the target after the border has been recrossed, or were unable to do so as they were unable to pinpoint the border crossing.

Another Member State, after the authorities had insisted on taking over surveillance on its territory, authorised German surveillance units to participate in the surveillance with only two vehicles and transit of the other vehicles without special rights. In some cases the surveillance group consists of only one vehicle and one surveillance officer. One Member State requires requests for assistance to be accompanied by comprehensive details stating the type and number of service weapons being carried and repeatedly refuses to allow them to be carried on the grounds that the detail was insufficient or indicated that the officers were disproportionately heavily armed.

Cases of hot pursuit starting in the Federal Republic rose from 48 in 1997 to 89 in 1998 and 95 in 1999, and to 129 in 2000. With the inclusion of further offences in the list set out in Article 40(7) of the SIC, the figures can be expected to rise even further.

Entry into private homes and places not accessible to the public must continue to be prohibited, but to provide legal backing for current practice, entry to office, company and

business premises accessible to the public during their respective opening hours should be expressly permitted.

A right of arrest, at present absolutely prohibited, has to be granted to officers keeping surveillance in another state's territory in cases where the person under surveillance commits or is about to commit an extraditable offence. This should apply only where officers of the country in whose territory the surveillance is being carried out are unable to take such action themselves. Where an extraditable offence has taken place it surely cannot be important which national police force takes the direct action to challenge and arrest the perpetrator.

Finally we should point out that inconsistencies will arise in the Schengen Agreement if Article 41 of the SIC is not amended at the same time.

MINORITY OPINION

Tabled by Ilka Schröder

on the initiative by the Kingdom of Belgium, the Kingdom of Spain and the French Republic with a view to the adoption by the Council of a Decision amending Article 40(1) and (7) of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders
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This initiative is a further step in a series of European so-called security measures and is set to expand police powers. The amendment to the Schengen Agreement aims to ensure that foreign police forces also have more powers in cases of cross-border surveillance: in future, surveillance is to be carried out not only on suspects but also on their life partners and friends, and the list of offences is to be extended to include fraud, people smuggling, money laundering, 'organised crime' and illicit trafficking in nuclear substances.

The initiative is thus geared to the European governments' intention primarily to implement repressive security measures instead of guaranteeing people's rights and freedoms, and it provides a further example of the mistaken belief that security can be achieved through more police measures. Instead of acknowledging that a minimum level of crime is to be found in any open and democratic society, the fight against crime is promoted to the main task of the state. The result is that individual rights fall by the wayside, and at the same time the justice system increasingly abandons fundamental principles such as the assumption of innocence and becomes a system whose sole purpose is to mete out punishment and satisfy the desire for revenge. The initiative thus contributes to a development leading directly from a national competitive state based on neoliberal principles to a police-based, authoritarian security state. It may not represent a big step, but it certainly represents a small step in a medley of European actions.