Fordham International Law Journal

Volume 34, *Issue* 5 2011 *Article* 8

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Abstract

This Essay seeks to expose the complexity of the relationship between the United Kingdom (and Ireland, but the main focus will be the UK) and the European Union that resulted from the concessions made to the UK when the treaties of Amsterdam and Lisbon were negotiated: a right not to participate in the adoption and application of EU legislative measures in the field of Justice and Home Affairs ("JHA"), and the right to decide on a case-by-case basis to opt into such measures, following procedures reminiscent of the sophisticated rules of cricket. These concessions were made to allow the UK to preserve in particular the right to maintain controls on persons at all its borders and to conduct its own immigration policies. Its discretion to opt in or opt out has been somewhat restricted when it concerns measures belonging to or developing the "Schengen acquis." But that has not stopped the UK from displaying its interest in participating in some parts of the Schengen acquis, so far mainly covering aspects of cross-border cooperation in areas of law enforcement and criminal justice.This Essay presents the views of an optimist as to the possible prospects of a further UK participation-in the longer run-in other parts of the Schengen acquis, such as the EU's external border policy, common visa policy or expulsion policy, or the rules on free movement rights for legally residing third-country nationals.

UK v. EU: A CONTINUOUS TEST MATCH

Julian J.E. Schutte *

Cricket explained to a foreign visitor:
"You have two sides, one out in the field and one in. Each man that's in the side that's in goes out, and when he's out he comes in and the next man goes in until he's out. When they are all out the side that's out comes in and the side that's been in goes out and tries to get those coming in out. Sometimes you get men still in and not out.

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When a man goes out to go in, the men who are out try to get him out, and when he is out he goes in and the next man in goes out and goes in. There are two men called umpires who stay all out all the time, and they decide when the men who are in are out. When both sides have been in and both sides have been out, including those who are not out, that is the end of the game."[1]

INTRODUCTION

One of the most important achievements of the Treaty of Amsterdam was the integration of a body of law, commonly referred to as "the Schengen *acquis*," into the framework of the European Union ("EU" or "Union").[2]

This body of law[3] constituted the realization of an objective of European integration that was of paramount importance: the free movement of persons within the area comprising the territories, in Europe, of all the Member States of the European Community ("Community"), without being submitted to border controls. This objective, one of the four fundamental freedoms to be ensured in order to construct the internal market and let it function,[4] could not be realized at that time, due to a

1. *An Englishman Knocked for Six by Ireland's Win? That's Cricket,* IRISH TIMES (Dublin), Mar. 5, 2011, at Weekend 4 (quoting a famous description of cricket that originally appeared on a British tea towel).

2. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam]; Treaty of Amsterdam, Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, 1997 O.J. C 340/93 [hereinafter Schengen Protocol].

3. For a complete compilation of the Schengen *acquis* at the time of its integration into the European Union ("EU" or "Union"), see The Schengen *Acquis,* 2000 O.J. L 239/1.

4. With the Single European Act of 1986, the four freedoms were introduced in Article 8A of the Treaty Establishing the European Economic Community ("EEC Treaty"): "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." The deadline for realizing the establishment of the internal market was set for December 31, 1992. Single European Act, 1987 O.J. L 169/1 (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]). With the successive treaty amendments, Article 8A EEC became Article 7a EC, Article 14 EC and, at present, Article 26 TFEU. *See* EEC Treaty, *supra,* art. 8A; Consolidated Version of the Treaty Establishing the European Community art. 14, 2006 O.J. C 321 E/37 [hereinafter EC Treaty]; Treaty of Amsterdam, *supra* note 2, 1997 O.J. C 340/1, at 86; Consolidated

fundamental difference of view between the Member States as to its implications for the existing regimes of checks on persons when crossing borders between Member States.

If free movement of nationals of Member States, of "citizens of the Union," was a generally acceptable concept, different views emerged regarding the consequences of their rights of free movement for third-country nationals. Most Member States argued that since free movement of EU citizens implied the right not to be controlled at internal borders,[5] there was no other option than to completely abolish these controls not only for EU-citizens but also for third-country nationals.

Ireland and the United Kingdom argued differently: since the free movement rights were limited to EU citizens, border controls in relation to third-country nationals had to be retained.[6] In fact, they saw no other option than to retain internal border controls for all persons in order to ascertain whether persons presenting themselves at the border are indeed EU citizens, in which case no further checks would be necessary, or third-country nationals subject to specific entry conditions.[7]

This Essay seeks to expose the complexity of the relationship between the United Kingdom (and Ireland, but the main focus will be the UK) and the European Union that resulted from the concessions made to the UK when the treaties of Amsterdam and Lisbon were negotiated: a right not to participate in the adoption and application of EU legislative measures in the field of Justice and Home Affairs ("JHA"), and the right to decide on a case-by-case basis to opt into such measures, following procedures reminiscent of the sophisticated rules of cricket. These concessions were made to allow the UK to preserve in particular the right to maintain controls on persons at all its borders and to conduct its own immigration policies. Its discretion to opt in or

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Version of the Treaty on the Functioning of the European Union art. 26, 2010 O.J. C 83/47, at 58 [hereinafter TFEU].

5. "Internal borders" are crossed whenever someone moves from one Member State to another, irrespective of the means of transport used, without passing through the territory of a state which is not part of the Schengen area. *See* Schengen *Acquis*, *supra* note 3, art. 1, 2000 O.J. L 239, at 19.

6. Protocol on the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland art. 1, 1997 O.J. C 340/97.

7. *Id.* art. 2.

opt out has been somewhat restricted when it concerns measures belonging to or developing the "Schengen *acquis*." But that has not stopped the UK from displaying its interest in participating in some parts of the Schengen *acquis*, so far mainly covering aspects of cross-border cooperation in areas of law enforcement and criminal justice.

This Essay presents the views of an optimist as to the possible prospects of a further UK participation—in the longer run—in other parts of the Schengen *acquis*, such as the EU's external border policy, common visa policy or expulsion policy, or the rules on free movement rights for legally residing third-country nationals.

I. *HISTORY AND BACKGROUND OF THE SCHENGEN* ACQUIS

The history of "Schengen" is well known. Since, due to this unsolvable dispute, the Community was not able to advance, a number of Member States began alleviating checks on persons at their common borders and embarked on negotiations with a view to establishing a common system of abolition of checks at common internal borders and a common regime for exercising controls at their external borders. France and Germany took the lead in 1984,[8] and the Benelux countries, which had already decided in 1960 to abolish controls on persons at their common borders,[9] joined immediately.

In 1985, these five Member States defined their short-term actions and long-term intentions in the Schengen Agreement of 14 June.[10] Negotiations started forthwith, with a view toward

8. This initiative was launched immediately after the meeting of the European Council in Fontainebleau on June 25–26, 1984, which called for putting in hand without delay a study of measures which could be taken in any case before the middle of 1985, including "the abolition of police and customs formalities for people and goods crossing intra-Community frontiers." Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, pmbl., art. 1, 2000 O.J. L 239/13, at 13.

9. Convention on the Transfer of Controls of Persons to the External Borders of the Benelux Territory arts. 2, 3, Apr. 11, 1960, 374 U.N.T.S. 3.

10. The symbolic location of this tiny village, at the place where the territories of France, Germany, and the Benelux meet, was chosen, not only for the signature of the 1985 agreement but also for that of its implementing convention in 1990. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the

establishing detailed, binding rules governing the suppression of border checks at their common borders and all the necessary "flanking" or "compensatory" measures to be taken in consequence thereof. After four-and-a-half years of negotiations and half a year waiting to see what the fall of the Berlin Wall would bring, the Convention Implementing the Schengen Agreement was signed on June 19, 1990.[11] The convention consisted of 142 articles, a Final Act, and a number of declarations. The right of free movement was expressed in Article 2(1) in sixteen words: "Internal borders may be crossed at any point without any checks on persons being carried out."[12] The rest of the convention and all the implementing and other decisions that would be adopted subsequently through the institutional framework set up by the convention[13] consist of "flanking" measures required to enable this right to function. These flanking measures concerned such matters as: (1) common rules for the organization of controls and surveillance at the external borders;[14] (2) the creation of a common visa policy with the introduction of a uniform visa, valid for the entire "Schengen territory," a harmonized list of countries whose nationals need visas and of countries whose nationals do not,[15] and a first endeavour to organize consular cooperation in visa

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French Republic on the Gradual Abolition of Checks at their Common Borders, 2000 O.J. L 239/19 [hereinafter Implementing Convention].

11. *Id.*

12. *Id.* art. 2(1), at 20.

13. The convention created (or rather confirmed the existence of) an Executive Committee at the ministerial level, which met regularly and to which several High Level Groups, managing the work of numerous working groups, reported. In order to avoid a complete duplication of the model and working structures of the EC "Council," the Schengen "Executive Committee" decided to meet at the level, not of ministers, but of state secretaries (junior ministers). *See id.* arts. 131–33, at 52.

14. *See id.* art. 6, at 21.

15. A full harmonization of these lists was only achieved after the integration of the *acquis* into the framework of the Union. For some years the Schengen states have operated three lists: a "white," a "black," and a "grey" list, the latter containing a factual description of third states in respect of whose nationals some Schengen states retained an obligation to have a visa when entering their country, and other Schengen states did not. *See* Decision of the Executive Committee on the Abolition of the Grey List of States Whose Nationals Are Subject to the Visa Requirement by Certain Schengen States, 2000 O.J. L 239/206 (abolishing the grey list).

matters;[16] (3) the free-movement rights of legally residing third-country nationals based on their residence permits;[17] (4) a shared responsibility for the removal of third-country nationals who do not fulfil the conditions for legal stay;[18] (5) uniform rules on common-carrier liability when bringing inadmissible third-country nationals to or across the external border;[19] (6) a system aimed at sharing responsibility for dealing with asylum applications;[20] (7) provisions on cross-border police cooperation, including cross-border hot pursuit and cross-border surveillance;[21] (8) rules supplementing existing arrangements on mutual legal assistance in criminal matters, extradition and the transfer of the enforcement of criminal judgments;[22] (9) harmonized provisions on the cross-border application of the *ne bis in idem* principle;[23] (10) provisions on common action against illicit trafficking in narcotic drugs and common rules on control

16. *See generally* Decision of the Executive Committee of 28 April 1999 on the Definitive Versions of the Common Manual and the Common Consular Instructions, 2000 O.J. L 239/317.

17. *See* Implementing Convention, *supra* note 10, arts. 19–21, 2000 O.J. L 239, at 23–24.

18. *See id.* arts. 22–24, at 24.

19. *See id.* arts. 26–27, at 25.

20. *See id.* arts. 28–38, at 25–28. This system, at present known as the "Dublin system," was originally conceived as a matter related to the abolition of checks at internal borders and the construction of a single area in which, on the one hand, asylum seekers cannot seek asylum in every Member State belonging to that area, but on the other hand, have the guarantee that there will always be a Member State responsible for dealing with their applications. However, it had been decided already in 1995 to make this system the object of a legal instrument applicable to all the Member States including the UK and Ireland, first as a "third pillar" convention, signed in Dublin (hence the reference), *see* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. C 254/1, and later, under the Amsterdam Treaty, as a Regulation, replacing the convention (but not the reference to "Dublin"). Council Regulation 343/2003/EC Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. L 50/1. A link between the Schengen *acquis* and the "Dublin system" has been retained for the states that became associated with the Schengen *acquis* (Iceland, Norway, Liechtenstein, and Switzerland). Their association with "Schengen" was made conditional on their simultaneous association with the "Dublin" *acquis*. *See The Schengen Area and Cooperation*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (last updated Aug. 3, 2009).

21. *See* Implementing Convention, *supra* note 10, arts. 39–47, 2000 O.J. L 239, at 28–34.

22. *See id.* arts. 48–53, 59–69, at 34–35, 36–38.

23. *See id.* arts. 54–58, at 35–36.

of firearms and ammunition;[24] (11) the setting up of a common information system, the Schengen Information System ("SIS"), which would store alerts on persons who either should not be allowed to enter the Schengen territory or should be removed when found within the territory, persons to arrest with a view to their extradition, persons whose whereabouts should be reported, and alerts on various categories of stolen or missing objects (cars, firearms, identity documents, banknotes, etc.);[25] (12) a complete set of rules on data protection related to the functioning of the SIS, as well as rules on data protection for other forms of exchange of personal data pursuant to the convention;[26] (13) some marginal provisions on transport and movement of goods;[27] and (14) an institutional framework for allowing common implementing measures to be taken by the Executive Committee, consisting of representatives of the contracting parties at the ministerial level, whose decisions were prepared by a large number of committees and working and experts groups, assisted by a special "Schengen secretariat" hosted by the secretariat of the Benelux Economic Union.[28]

The convention entered into force in 1995 after the fulfilment of the constitutional requirements in the five contracting states and after the SIS was developed and operational.[29] In the meantime, other EC Member States had indicated their wish to accede to the convention. To that end, accession protocols were negotiated and signed with Italy, with Portugal and Spain, with Greece and Austria and with Denmark, Sweden and Finland.[30]

The Executive Committee, enlarged with members from the acceding states, started adopting a wide range of decisions in most of the areas covered by the convention.

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24. *See id.* arts. 70–91, at 38–42.

25. *See id.* arts. 90, 95, at 42–43.

26. *See id.* arts. 101–18, 126–30, at 45–48, 50–52.

27. *See id.* arts. 120–25, at 49–50.

28. *See id.* arts. 131–33, at 52.

29. *See* Decision of the Executive Committee of 22 December 1994 on Bringing into Force the Convention Implementing the Schengen Agreement of 19 June 1990, 2000 O.J. L 239/130, at 131.

30. *See generally* Schengen *acquis*, *supra* note 3, 2000 O.J. L 239, at 63–123 (agreements of the accession of states).

II. *THE INTEGRATION OF THE SCHENGEN* ACQUIS *INTO THE EU FRAMEWORK*

The negotiations for amendments to the Treaty Establishing the European Community and the Treaty on European Union ("TEU") as established by the Treaty of Maastricht started in 1995 and led to the signature in 1997 of the Treaty of Amsterdam.[31] The Treaty of Amsterdam entered into force on May 1, 1999. It brought important innovations in the field of Justice and Home Affairs. First, several areas that were previously within the scope of the "third pillar" became matters of competence of the Community ("first pillar"). This was in particular the case of the organization of controls on persons at external borders, the free movement rights of third-country nationals, the policy on short term visas, asylum, legal and illegal immigration, private international law, and judicial cooperation in civil matters. Police cooperation and judicial cooperation in criminal matters remained within the EU's competence under the "third pillar."[32]

Second, for three Member States, protocols were introduced, allowing them not to participate in the Community's action in the JHA fields for which competence had been transferred to the Community.[33] For Denmark, this exclusion was categorical; for the UK and Ireland it was not: they had the right to decide on a case-by-case basis whether they wanted to participate in the Council of the European Union's ("Council") adoption of binding acts in these areas or in such acts after their adoption ("opt in").[34]

Third, a separate protocol regulated the integration of the Schengen *acquis* into the EU framework by allowing the Member States that had so far been involved in the creation, development, and application of that *acquis* outside the EU, to continue to do so within the legal framework of the EU as a matter of "closer cooperation," a concept that had also been introduced by the

31. Treaty of Amsterdam, *supra* note 2, 1997 O.J. C 340.

32. *Id.* art 1(11), at 16.

33. Treaty of Amsterdam, Protocol on the Position of Denmark, 1997 O.J. C 340/101 [hereinafter Denmark Position Protocol]; Treaty of Amsterdam, Protocol on the Position of the United Kingdom and Ireland, 1997 O.J. C 340/99 [hereinafter UK and Ireland Position Protocol].

34. UK and Ireland Position Protocol, *supra* note 33, arts. 1–8, 1997 O.J. C 340, at 100.

Treaty of Amsterdam.[35] In order to allow for a fast and smooth transition, this protocol created a number of specific legal bases for the adoption of measures, such as a comprehensive definition of the acts constituting the Schengen *acquis*,[36] the determination of the legal bases of those acts corresponding to the relevant provisions of the EU and EC treaties as amended by the Treaty of Amsterdam (rather than their re-adoption), with a view to the eventual modification of those acts,[37] the conclusion of an association agreement with Iceland and Norway,[38] and the integration of the secretariat of the Schengen cooperation into the administrative structures of the EU.[39]

Thus, the abolition of checks at internal borders and the putting into effect of the entire Schengen *acquis*, which had already been realized before May 1, 1999 for France, Germany, the Benelux states, Italy, Spain, Portugal, and Austria, has been decided after that date by the EU for Greece, the three Nordic Member States plus Norway and Iceland, and, after their accession to the Union, for nine out of ten of the Member States that acceded in 2004. Such a decision is expected in 2011 for the Member States that acceded to the EU in 2007.

Denmark, which had been allowed by the Protocol on the Position of Denmark, to remain excluded from the Community's legislation in the field of Justice and Home Affairs, but which is committed to participating in the Schengen *acquis* after its integration into the EU framework, has accepted the obligation of implementing acts of the Community developing the Schengen *acquis* "as an obligation under international law."[40]

III. *THE SPECIAL POSITION OF THE UNITED KINGDOM AND IRELAND UNDER THE TREATY OF AMSTERDAM*

The protocol on the integration of the Schengen *acquis* into the EU framework resolved the issue that had kept the UK and

35. Schengen Protocol, *supra* note 2, 1997 O.J. C 340.

36. Council Decision No. 1999/435/EC, 1999 O.J. L 176/1, ¶¶ 1–4.

37. Council Decision No. 1999/436/EC, 1999 O.J. L 176/17, ¶ 3.

38. Agreement Signed on 18 May 1999 with the Republic of Iceland and the Kingdom of Norway Concerning the Latter's Association with the Implementation, Application and Development of the Schengen *Acquis*, 1999 O.J. L 176/36; *see also* Council Decision No. 1999/437/EC, O.J. L 176/31.

39. Council Decision No. 1999/307/EC (*Schengen Secretariat*), 1999 O.J. L 119/49.

40. Denmark Position Protocol, *supra* note 33, art. 5, 1997 O.J. C 340, at 102.

Ireland divided from the other Member States. It excluded the UK and Ireland *ab initio* from the Schengen cooperation and recognized that these two Member States could continue to exercise border checks on persons, be they EU citizens or third-country nationals wishing to enter their territories while coming directly from another Member State.[41] However, in conformity with the underlying philosophy of closer cooperation, the protocol had a specific provision on the position of the UK and Ireland to allow them to take part in "some or all" of the provisions of the Schengen *acquis* and in proposals and initiatives to build upon that *acquis*.[42] The procedures for authorizing such an "opt in" were, however, different from those set out in the Protocol on the Position of the United Kingdom and Ireland and also different from the general treaty provisions on closer cooperation. And Article 7 of the Protocol on the Position of the United Kingdom and Ireland makes it clear that the opt-in provisions of the Schengen Protocol prevail.[43]

According to Article 4 of the Schengen Protocol, the Council shall decide on a request from the UK or Ireland with the unanimity of its members participating in the reinforced Schengen cooperation and of the representative of the government of the requesting state.[44] This procedure applies to requests to take part in provisions of the Schengen *acquis* in which the requesting state (UK or Ireland) does not yet participate.

Although Article 5 of the Schengen Protocol is admittedly perhaps not the clearest article of the treaty, it states first that acts of the Schengen *acquis* adopted before its integration into the framework of the Union can only be modified or be further developed through acts of the Union (or Community), to be adopted in accordance with the procedures set out in the EC Treaty and the TEU.[45] With respect to the UK and Ireland, Article 5 addresses only their participation in modifications or developments of the parts of the Schengen *acquis* in which those states take part by virtue of a decision of the Council under

41. Schengen Integration Protocol, *supra* note 2, art. 4, 1997 O.J. C 340, at 95.
42. *Id.* pmbl., art. 7, at 93, 94.
43. UK and Ireland Position Protocol, *supra* note 33, art. 7, 1997 O.J. C 340, at 100.
44. *Id.* art. 4, at 95.
45. *Id.* art. 5, at 94.

Article 4 of the protocol. This interpretation has been confirmed by the Court of Justice of the European Union ("Court of Justice").[46]

Immediately after the entry into force of the Treaty of Amsterdam the government of the UK presented in two separate letters a request under Article 4 of the Schengen Protocol to participate in some of the provisions of the Schengen *acquis*. The Council decided on the request in its Decision of May 29, 2000, in which it authorized the UK, after having emphasized in the recitals the importance of preserving the coherence of the various parts constituting the Schengen *acquis*, to participate in the following parts of the *acquis*: (1) most of the provisions on police cooperation, with the exception, for instance, of cross-border hot pursuit; (2) the provisions on mutual legal assistance in criminal matters, extradition, and transfer of the enforcement of criminal judgments; (3) the provisions on *ne bis in idem*; (4) the provisions on narcotic drugs; (5) the provisions on data protection applicable to the exchange of data pursuant to the above provisions; (6) the provisions on measures against commercial carriers transporting third-country nationals whose entry is refused and on measures against facilitating, for financial gain, the illegal entry and stay of immigrants; and (7) the provisions on the SIS, with the exception of those which are related to alerts regarding third-country nationals for the purposes of refusing entry to the territory of the Member States.[47]

This decision confirmed the logic of the solution that the Schengen Protocol found regarding the diverging views of the UK and Ireland on the implications of the right of free movement of persons: the UK and Ireland can, at their request, participate in measures that have been designed for the other Member States as measures flanking, compensating, and counter-

46. United Kingdom of Great Britain & Northern Ireland v. Council, Case C-77/05, [2007] E.C.R. I-11,495, ¶ 68 [hereinafter U.K. v. Council I] ("[T]he interpretation of the second subparagraph of Article 5(1) of the Schengen Proposal (sic) put forward by the United Kingdom cannot be accepted and that provision must be understood as applicable only to proposals and initiatives to build upon an area of the Schengen acquis which the United Kingdom and/or Ireland have been authorised to take part in pursuant to Article 4 of that protocol."); United Kingdom of Great Britain and Northern Ireland v. Council, Case C-137/05, [2007] E.C.R. I-11,593, ¶ 50 [hereinafter U.K. v. Council II].

47. Council Decision No. 2000/365/EC (*UK and Schengen* acquis) art. 1, 2000 O.J. L 131/43, at 45.

balancing the suppression of checks on persons when crossing their common borders, without being required to abolish frontier controls as such.

Whereas the test for binding Iceland and Norway (and, since 2007, Switzerland, which became likewise associated with the implementation, application, and development of the Schengen *acquis*)[48] to the measures of the Union that develop the Schengen *acquis* requires the demonstration that such measures are inextricably linked to, and indeed necessary as a consequence of, the abolition of checks at internal borders,[49] no such test can be relied on when deciding on requests from the UK and Ireland to take part in certain areas of the Schengen *acquis*. Indeed, their entitlement to retain controls at their frontiers, also in respect of citizens of Member States and their dependants has been explicitly enacted in the Protocol on the Application of Certain Aspects of Article 14 (ex Article 7a) Treaty Establishing the European Community (now Article 26 TFEU) to the UK and Ireland.[50]

In 2004, the Council decided to put into effect for the UK the provisions of the Schengen *acquis* covered by its Decision of May 29, 2000, except for the provisions related to the SIS.[51] With respect to the latter, the UK preferred to await the creation of the successor of the SIS, SIS II, in order to directly join the new system.[52] Unfortunately, SIS II has been the victim of significant delays, and it is not expected to be operational before the first quarter of 2013.[53]

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48. *C.f.* Agreement between the European Union, the European Communities and the Swiss Confederation on the Swiss Confederation's Association with the Implementation, Application and Development of the Schengen Acquis, 2008 O.J. L 53/52.

49. *C.f.* Council of the European Union, How to Decide whether a Particular Subject Matter Is "Schengen Related" and Has to Be Dealt with through "Mixed Committee" Procedures? Council Doc. No. 12164/99, ¶ 8 (Oct. 22, 1999).

50. 1997 O.J. C 340/97; Protocol on the Application of Certain Aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland, 2010 O.J. C 83/293.

51. Council Decision No. 2004/926/EC (*UK and Schengen*), 2004 O.J. L 395/70, ¶ 2.

52. *Id.* ¶ 3; *see Q&A: Schengen Agreement*, BBC NEWS (Dec. 15, 2008), http://news.bbc.co.uk/2/hi/europe/4738063.stm.

53. European Commission, Report on the Global Schedule and Budge for the Entry into Operation of the Second Generation Schengen Information System (SIS II), SEC(2010) 1138 Final (Sept. 2010).

In 2001 Ireland made a request similar to that of the UK under Article 4 of the Schengen Protocol. The Council acted on that request through its Decision of February 28, 2002.[54] None of the provisions for which the Council authorized Ireland to take part has been put into effect for Ireland as of yet.

Another provision of the Council's Decision deals with proposals and initiatives developing the parts of the Schengen *acquis* in which the UK has been authorized to participate and reads as follows:

> From the date of adoption of this Decision the United Kingdom of Great Britain and Northern Ireland shall be deemed irrevocably to have notified the President of the Council under Article 5 of the Schengen Protocol that it wishes to take part in all proposals and initiatives which build upon the Schengen acquis referred to in Article 1. Such participation shall cover the territories referred to in Article 5(1) and (2) respectively, to the extent that the proposals and initiatives build upon the provisions of the Schengen acquis to which those territories become bound.[55]

The Council's concern to preserve the integrity of the Schengen *acquis* and of the parts of it in which the Council had authorized the UK to participate led the Council to take the precaution of specifying that this integrity would not be affected by unilateral decisions of the UK not to take part in further developments, with the risk of rendering Schengen cooperation in these areas inoperable.

IV. *THE SPECIAL POSITION OF THE UNITED KINGDOM AND IRELAND RESTATED UNDER THE TREATY OF LISBON*

Although this provision was obviously a price that the UK had to pay for being authorized to partially take part in the Schengen *acquis*, it took the opportunity of the next modification of the Treaties, particularly the negotiations that lead to the Lisbon Treaty, to try to undo the effects of Article 8(2) and allow the UK to have a free choice of opting in or staying out of measures that develop the parts of the Schengen *acquis* by which it was bound.

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54. Council Decision No. 2002/192/EC, 2002 O.J. L 64/20.

55. Council Decision No. 2000/365/EC, art. 8(2), 2000 O.J. L 131/43.

The UK did not attempt to modify the relationship between Articles 4 and 5 of the protocol, in effect allowing the UK to opt into measures that built upon parts of the Schengen *acquis* in which the UK had not been authorized to take part. Such an interpretation of Article 5 of the protocol had been unequivocally rejected by the Court of Justice in 2007 when it upheld the decisions of the Council to refuse the participation of the UK in the Council's adoption of the Regulation establishing the Agency for the Management of the Union's External Borders ("FRONTEX") and of the Regulation Introducing Biometric Data in Passports of EU Citizens.[56] These regulations constituted developments of the Schengen *acquis* in the field of the organization of controls at external borders, a part of that *acquis* in which the UK had not previously requested and been authorized to take part.

More recently, the Court again rejected an application by the UK for annulment of a Framework Decision regulating the access of law enforcement authorities of the Member States to data stored in the Visa Information System ("VIS").[57] The UK had not participated in the Council's adoption of this Framework Decision since the Council considered it a measure that built upon the Schengen *acquis* in the area of visa policy. Notwithstanding the argument that the Framework Decision was based on "third pillar provisions" on police cooperation, the Court shared the reasoning of the Council and made the UK's right to participate in the Framework Decision dependent on a prior authorization by the Council, pursuant to Article 4 of the Schengen Protocol, to participate in the Union's visa policy and, consequently, in the VIS.[58]

Most recently, the UK has decided to follow that route in order to be able to participate in the adoption of the proposed regulation that would create an agency for the management of several EU information systems, e.g., the VIS, the SIS (in fact SIS II as soon as it becomes operational), and Eurodac.[59] To the extent that the agency is to be made responsible for managing

56. *See generally* UK v. Council II, Case C-137/05, [2007] E.C.R. I-11,593; U.K. v. Council I, Case C-77/05, [2007] E.C.R. I-11,459.

57. United Kingdom of Great Britain & Northern Ireland v. Council, Case C-482/08, [2010] E.C.R. I___ (delivered Oct. 26, 2010) (not yet reported).

58. *Id.* ¶¶ 2–4.

59. Council Decision No. 2010/779/EU, 2010 O.J. L 333/58.

the VIS and the entire SIS, its enacting legislation will constitute a development of the Schengen *acquis*, covering matters in which the UK has not been authorized to take part (the VIS and part of the SIS). Consequently, the UK has made a request to the Council pursuant to Article 4 of the Schengen Protocol to be authorized to take part, for those parts, in the adoption of the regulation establishing the agency; its participation for the other parts follows from Article 8(2) of Council Decision 2000/365/EC (for the "law enforcement" part of SIS) and from an opt-in in respect of the Eurodac aspects, which do not belong to the Schengen *acquis*. The Council decided to grant the UK's request.[60]

The last-minute negotiations leading to the Treaty of Lisbon have introduced considerable modifications to Article 5 of the Schengen Protocol, now five paragraphs instead of two. The text reads as follows:

> *Article 5*
>
> 1. Proposals and initiatives to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties.
>
> In this context, where either Ireland or the United Kingdom has not notified the Council in writing within a reasonable period that it wishes to take part, the authorisation referred to in Article 329 of the Treaty on the Functioning of the European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.
>
> 2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within 3 months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for adopting the measure building upon the Schengen acquis shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or

60. *Id.*

until the notification is withdrawn at any moment during that procedure.

3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission. That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.

4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by a qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.

5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen acquis shall be terminated. If the said measure is subsequently adopted[,] any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date of this adoption. When taking its decision, the

> Commission shall respect the criteria referred to in paragraph 3.[61]

This text goes together with not less than four declarations annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon, which read as follows:

> **44. Declaration on Article 5 of the Protocol on the Schengen acquis integrated into the framework of the European Union**
>
> The Conference notes that where a Member State has made a notification under Article 5(2) of the Protocol on the Schengen acquis integrated into the framework of the European Union that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen *acquis*.
>
> **45. Declaration on Article 5(2) of the Protocol on the Schengen *acquis* integrated into the framework of the European Union**
>
> The Conference declares that whenever the United Kingdom or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen *acquis* in which it participates, the Council will have a full discussion on the possible implications of the non-participation of that Member State in that measure. The discussion within the Council should be conducted in the light of the indications given by the Commission concerning the relationship between the proposal and the Schengen *acquis*.
>
> **46. Declaration on Article 5(3) of the Protocol on the Schengen *acquis* integrated into the framework of the European Union**
>
> The Conference recalls that if the Council does not take a decision after a first substantive discussion of the matter, the Commission may present an amended proposal for a further substantive re-examination by the Council within the deadline of 4 months.

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61. Consolidated Versions of the TFEU & TEU, Protocol (No. 19) on the Schengen *Acquis* Integrated into the Framework of the European Union, 2010 O.J. C 83/290.

47. Declaration on Article 5(3), (4) and (5) of the Protocol on the Schengen *acquis* integrated into the framework of the European Union

> The Conference notes that the conditions to be determined in the decision referred to in paragraphs 3, 4 or 5 of Article 5 of the Protocol on the Schengen *acquis* integrated into the framework of the European Union may determine that the Member State concerned shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in some or all of the *acquis* referred to in any decision taken by the Council pursuant to Article 4 of the said Protocol.[62]

Here is a summary of the operation of these provisions explained to a foreign visitor: First the UK is out, but it can request to be in, and when authorized, it is in. For proposals building on where it is in, it is deemed to be in, but it may notify its wish to be out, in which case it is out unless it withdraws its notification, in which case it is in. If it notifies its wish to be out, it is out of the whole game if that is so decided by the other players. But the other players should discuss the matter seriously and try to keep it in, so that it can remain in while it is out. If they do not know what to do, another team of players may be brought in. If that team cannot decide whether it is in or out, it shall be out, unless it withdraws its wish to be out, in which case it is in again. But when it is definitively out, it shall pay a round of beer to all the other players. How's that?[63] It is clear that one has to know the rules of cricket[64] in order to understand how these procedures would work.

V. *FOUR SCENARIOS FOR A POSSIBLE WIDER UK PARTICIPATION IN THE SCHENGEN* ACQUIS

The UK has repeatedly indicated its interest in participating in measures developing the Schengen *acquis* without being

62. Declaration Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, Dec. 13, 2007, 2008 O.J. C 115/335, at 352.

63. "An appeal 'How's That?' covers all ways of being out." MARYLEBONE CRICKET CLUB, THE LAWS OF CRICKET 61 (2003), *available at* http://www.lords.org/data/files/laws_of_cricket_2003-8685.pdf.

64. "There is a widely held and quite erroneous belief that cricket is just another game." *See* CRICKETING: CULTURES IN CONFLICT: WORLD CUP 198 (Boria Majumdar & J.A. Mangan eds., 2004) (quoting the Duke of Edinburgh).

willing to accept the underlying *acquis*. In fact, this was the case with the FRONTEX agency, to whose activities it wished to contribute in the same way as the other Member States rather than having an observer status in its management board. It was also the case with the measures introducing biometric data in EU-citizen passports, which were based on the EC Treaty's provisions on the organization of controls on persons at external borders. Likewise, the UK was interested in letting its law enforcement authorities have direct access to data held in the VIS while being prepared to let the law enforcement authorities of the other Member States have direct access to the UK's visa database.

It is also interested in participating in the establishment of the agency responsible for the management and technical development of EU information technology ("IT") systems in the field of Justice and Home Affairs, while realizing that this agency would become responsible for the management of some IT systems that were set up as developments of parts of the Schengen *acquis* in which the UK does not take part. And it has found its way to be allowed to do so.

One may expect that in the foreseeable future, other common IT systems that will be considered as developments of the Schengen *acquis* will be set up, such as an entry/exit system (EES) for third-country nationals when entering the EU for short stays of up to three months, a registered travellers program (RTP) for allowing groups of frequent travellers from third countries to enter the EU, subject to appropriate pre-screening, using simplified border checks at automated gates, and a European system of travel authorization (ESTA) for third-country nationals who are not subject to visa requirements.[65] Clearly, such systems would serve the Union's objectives in the field of external border management and controls and could become accessible to the UK only, if it took part in the Union's policy in that area.

There are temptations galore, which begs the question whether there are areas of the Schengen *acquis* in which the UK might be able to participate, other than those in which it already takes part, without giving up the right of retaining checks on all

65. *See* European Commission, Communication from the Commission to the European Parliament and the Council: Information Management in the Area of Freedom, Security and Justice, COM (2010) 385 Final (July 2010), at 20–21.

persons at its borders who want to enter the territory of the UK from another Member State (other than Ireland), a right guaranteed in the Protocol on the Application of Article 26 TFEU to the United Kingdom and Ireland.[66]

The remainder of this Essay will be dedicated to an analysis of this question and of the consequences of different possible answers. For reasons of simplicity it focuses on the UK, but the analysis should be understood as covering Ireland as well. The existence of a "common travel area" comprising these two Member States will make it impossible in practice for the one to participate in any of those areas of the Schengen *acquis* without the other doing the same.[67]

The Schengen member states, and indeed the treaties, have accepted that the UK and Ireland can participate in measures that have been and are considered to be measures "flanking" or "compensating" the core asset of the Schengen *acquis*, i.e. the suppression of checks on persons when crossing internal borders, without ever being obliged to accept this core asset itself. The UK and Ireland are thus in a unique position, since no other Member State and no state acceding to the Union has the right to claim the same treatment. Indeed, Article 7 of the Schengen Protocol states: "For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission."[68] But the special position of the UK and Ireland in relation to the Schengen *acquis* would allow for further Council decisions rendering parts of that *acquis* applicable to them other than those already covered by the Council Decisions of 2000 and 2010 (for the UK) and 2002 (for Ireland).

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66. *See* sources cited *supra* note 50.

67. *See* Paiaras Mac Éinrí, *The Implications for Ireland and the UK Arising from the Development of Recent EU Policy on Migration*, *in* MIGRATION POLICY IN IRELAND (2002), *available at* http://migration.ucc.ie/schengencta.htm. This would be different if ideas floated from time to time to bring an end to the common travel area would materialize. *See Passport Checks Clause Defeated*, BBC NEWS (Apr. 1, 2009), http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7977911.stm.

68. Consolidated Versions of the TFEU & TEU, Protocol (No. 19) on the Schengen *Acquis* Integrated into the Framework of the European Union, 2010 O.J. C 83, at 290; Schengen Protocol, *supra* note 2, art. 8, 1997 O.J. C. 340, at 96.

And here one could consider four scenarios.

A. *First Scenario: External Borders Policy*

One scenario might be that the UK decides to take part in the provisions of the Schengen *acquis* on external borders, i.e., the rules governing the way in which controls are to be exercised on persons entering the UK from a non-Schengen state and when leaving from the UK to a non-Schengen state. This would imply that the UK would exercise controls not only for itself but also for the Schengen states, and that the Schengen states would exercise controls at their external borders not only for the states constituting the Schengen area but also for the UK.

It would require that the UK participates fully in the SIS, i.e., that it has access to alerts entered by the Schengen states on persons whose entry to the Schengen area has to be refused and that it can, if it deems it appropriate, enter alerts in the SIS on persons whose entry in the UK and the Schengen area should be refused. Certain details would have to be worked out, such as the recognition, by the Schengen states, of a valid UK visa for transit purposes, in the same manner as the UK already recognizes Schengen visas for purposes of transit through the UK.

The provisions of the "external borders" Schengen *acquis* to be made applicable in order to let the UK participate in the external border regime can probably remain limited to Council Regulation (EC) 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("FRONTEX Regulation"),[69] Regulation (EC) 562/2006 of the European Parliament and the Council Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders ("Schengen Borders Code"),[70] and Regulation (EC) 863/2007 of the European Parliament and the Council Establishing a Mechanism for the Creation of Rapid Border Intervention Teams ("RABITs") and amending the FRONTEX

69. Council Regulation 2007/2004/EC Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union 2004 O.J. L 349/1 [hereinafter FRONTEX Regulation].

70. European Parliament and Council Regulation 562/2006/EC Establishing a Community Code on the Rules Governing the Movement of Persons across Borders, 2006 O.J. L 105/1 [hereinafter Schengen Borders Code].

Regulation as Regards that Mechanism and Regulating the Tasks and Powers of Guest Officers.[71] Moreover, the UK could be entitled to participate in, and draw from, the Union's "External Border Fund," which was set up by Decision 574/2007/EC of the European Parliament and the Council.[72] With respect to the "Schengen Borders Code," exception would have to be made for the provisions dealing with "internal borders" (Article 1(1) and Title III). And some further editorial adjustments would have to be agreed upon, which could probably be addressed in an authorizing Council decision pursuant to Article 4 of the Schengen Protocol.

It is clear that according to this scenario, the UK would be entitled to have access to, and become a user of, the SIS in full. To that end, the provisions governing the development, establishment and functioning of SIS II, from which the UK has thus far been excluded, would have to be made applicable to it. Moreover, it would also become fully involved in the activities of the FRONTEX agency by having a member in its Management Board (rather than an observer as is presently the case) and would fully participate in further legislative developments concerning that agency. It would also be able to participate in the legislation of the Union on security standards for passports of EU citizens.

It cannot be argued that becoming bound by the Schengen *acquis* rules on external border controls would require the UK to lower the level of controls it is presently exercising at its borders on the basis of its national laws. The Schengen standards are very high indeed in this respect. But they are based and will remain based on the principle that the exercise of external border controls is primarily a responsibility of the Member States, to be carried out by the services of the Member States concerned, combining the need to protect the security interests of the controlling Member State with that of protecting the security collective interests of the other Member States. It is true that this aspect of taking care of the interests of others may preclude a

71. European Parliament and Council Regulation 863/2007/EC Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation No. 2007/2004 as Regards that Mechanism and Regulating the Tasks and Powers of Guest Officers, 2007 O.J. L 199/30.

72. Parliament and Council Decision No. 574/2007/EC (*External Borders Fund*), 2007 O.J. L 144/22.

Member State from unilaterally deciding to relax controls at its external border. And if it would be a particular concern of the UK to retain the right to take such unilateral decisions, then the Schengen states should find comfort in the fact that the checks at internal borders between them and the UK will not have been abolished and that they remain therefore able to protect their own, collective security interests.

B. *Second Scenario: Visa Policy*

A second scenario, which may or may not be combined with the first, might be that the UK decides to take part in the provisions of the Schengen *acquis* that establish a common visa policy. In this area, the legislation is composed of four clusters: First, the legislation determining the lists of third states whose nationals must have a visa in order to enter the Schengen area and those whose nationals are exempted from such obligation (Regulation 539/2001 and its subsequent modifications).[73] Second, the legislation introducing the uniform "Schengen" visas and their technical specifications.[74] Third, the complete set of

73. *See generally* Council Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from that Requirement, 2001 O.J. L 81/1 [hereinafter Third-Country National Visas]. Subsequent amendments are found in Council Regulation 2414/2001/EC Amending Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders of Member States and Those Whose Nationals Are Exempt from that Requirement, 2001 O.J. L 327/1; Council Regulation 453/2003/EC Amending Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from that Requirement, 2003 O.J. L 69/10; Council Regulation 851/2005/EC Amending Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from that Requirement as Regards the Reciprocity Mechanism, 2005 O.J. L 141/3; Council Regulation 1932/2006/EC Amending Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from that Requirement, 2006 O.J. L 405/23; and Council Regulation 1244/2009/EC Amending Regulation 539/2001/EC Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from that Requirement, 2009 O.J. L 336/1.

74. *See* Council Regulation 1683/95/EC Laying Down a Uniform Format for Visas, 1995 O.J. L 164/1; Council Regulation 334/2002/EC Amending Regulation 1683/95/EC Laying Down a Uniform Format for Visas, 2002 O.J. L 53/2; Council Regulation 856/2008/EC Amending Regulation 1683/95/EC Laying Down a Uniform Format for Visas as Regards the Numbering of Visas, 2008 O.J. L 235/1.

rules codified in the Community Visa Code setting out the procedures and conditions for issuing short-term visas.[75] Finally the legislation creating VIS and describing its functioning.[76]

The possible participation of the UK in provisions of the Schengen *acquis* in the area of visa policy does not necessarily have to cover all these four clusters. One could imagine a participation in the cluster concerning the lists of countries whose nationals need visas and those whose nationals do not, without participating in any of the other clusters. This, for instance, would make sense in the context of a participation in the provisions of the Schengen *acquis* on controls at external borders. It would certainly be helpful for those who have to exercise these controls not to be obliged to work with different lists, depending on the declared destination of the persons who seek entry into the Schengen area.

It is true that there are still some differences between the lists of the EU and those of the UK, but these differences seem to have become less and less significant over the years. Indeed the lists are to a very large extent identical. The main differences are that (1) the UK (still) requires visas from nationals of certain Western Balkan states, which the Union has recently decided to move to the visa-free list and, (2) the EU requires Schengen states to submit nationals from a number of small or thinly populated, rather exotic countries, nearly all of which belong to the Commonwealth of Nations, to the visa obligation, whereas the UK does not.[77] This may be a substantial number of states, but the size of their population is very modest indeed and none

75. European Parliament and Council Regulation 810/2009/EC Establishing a Community Code on Visas (Community Code), 2009 O.J. L 243/1.

76. European Parliament and Council Regulation 767/2008/EC Concerning the Visa Information System (VIS) and the Exchange of Data between Member States on Short-Stay Visas (VIS Regulation), 2008 O.J. L 218/60.

77. This concerns nationals from Belize, Botswana, Dominica, Grenada, Kiribati, the Marshall Islands Micronesia, Montserrat, Namibia, Nauru, Palau, Papua New Guinea, Saint Lucia, Saint Vincent and the Grenadines, Samoa, the Solomon Islands, Tonga, Trinidad and Tobago, Tuvalu, and Vanuatu. *Compare List of Countries Requiring a Schengen Visa*, GREEK EMBASSY, http://www.greekembassy.org/embassy/content/en/Article.aspx?office=11&folder=79&article=20404 (last visited Mar. 9, 2011), *with Visa Requirements for the United Kingdom*, U.K. BORDER AGENCY HOME OFFICE, http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendix (last visited Mar. 9, 2011).

of them poses a particular immigration or security risk to the Schengen states.

Joining this visa cluster would imply joining the provisions and policies of the Union on visa reciprocity, which limit of course the scope of unilateral action by individual Member States.[78] Joining only this part of the Schengen visa *acquis* would not require, and therefore not entail, the UK's access to the VIS. That would be different if the UK would take part in the other visa clusters. This should not be dismissed out of hand as entirely unrealistic. One should realize that taking part in the provisions of the Schengen *acquis* on the establishment of the uniform visa, applicable to the entire territory of all participating Member States, and in the Community Visa Code, which applies to the issuing of uniform Schengen visas, would not exclude the right of the UK to continue issuing national visas, applicable to its territory only (and possibly that of Ireland), having a longer term of validity (up to six months, as is presently the case for UK short-term visas) and against a higher fee than Schengen visas. Thus whether a Schengen visa or a national UK visa would be issued would basically depend on the travel intentions of the individual visa applicant at a UK consulate.

Participating in the provisions on the uniform short-term Schengen visas and the Community Visa Code makes participation in the cluster governing the VIS a matter of course. It is true that data may only be entered into the VIS if they are related to applications for Schengen visas, i.e., short-term visas with a maximum validity of up to three months, and that no data related to applications for national visas may be entered. However, there is nothing in the existing regulation that precludes the possibility for visa-issuing authorities to consult the VIS when processing applications for national, territorially limited visas.

Moreover, there would no longer be any legal obstacle for the competent authorities of the UK to have direct access to data held in the VIS for purposes other than issuing visas and controlling the identity of visa holders when presenting themselves at an external border. This would include law enforcement authorities and authorities responsible for dealing

78. *See* Council Regulation 851/2005/EC, *supra* note 73, art. 1, at 4.

with asylum application. It seems that on balance, therefore, there would be many advantages for the UK in participating in the entire visa area of the Schengen *acquis*.

C. *Third Scenario: Expulsion Policy*

A third scenario would focus on the provisions of the Schengen *acquis* on expulsion. The Schengen Convention of 1990 contained some sketchy provisions on this subject in its Articles 23 and 24, but these have in the meantime been replaced by the "Returns Directive."[79] This directive has a hybrid character in that it applies to the return both of third-country nationals who do not or no longer fulfil the conditions for entry set out in Article 5 of the Schengen Borders Code and of third-country nationals who do not or no longer fulfil "other" conditions for entry, stay, or residence in the Member State where they are present. This means that the directive belongs to the Schengen *acquis* only to the extent that it covers the first group of third-country nationals. This appears clearly in the recitals addressing the respective positions of the Schengen associated states (Iceland, Liechtenstein, Norway, and Switzerland) and of the UK and Ireland.

The relevant recital on the position of the UK reads as follows:

> To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4

79. *See* Directive 2008/115/EC of the European Parliament and Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. L 348/98 [hereinafter Returns Directive]; Implementing Convention, *supra* note 10, art. 23–24, 2000 O.J. L 239, at 24.

> of the said Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.[80]

The decision of the UK not to opt into the directive for its "non-Schengen related" aspects has of course greatly facilitated the task of the EU legislator, which would otherwise have been forced to bring about an artificial "splitting" of the original proposal into two separate acts, one fully developing the Schengen *acquis*, in which the UK would not take part, and one not "Schengen related," in which it would.[81]

This would have clearly brought to light the fact that one of the objects of the directive, the introduction of the possibility, or in some cases, the obligation of imposing entry bans in respect of third-country nationals against whom return decisions have been taken[82]—irrespective of whether they do not, or no longer, fulfil conditions under the Schengen Borders Code, or under national law only—can only be effectively enforced by entering alerts on these persons in the SIS for purposes of refusing their entry. Recital (18) sets this out clearly:

> Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).[83]

And it is precisely Regulation 1987/2006 that deals with the operation of the SIS for purposes of immigration controls and by which the UK is at present not bound.[84] Without being able to enter alerts in the SIS on persons for purposes of refusing entry nor to have access to such alerts entered by other Member States,

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80. *See* Returns Directive, *supra* note 79, 2008 O.J. L 348/98, ¶ 26 (footnote omitted).

81. *See* SELECT COMMITTEE ON EUROPEAN UNION, WRITTEN EVIDENCE, Memorandum by Brendan Donnelly, 2007–08, H.L. 62-II, ¶ 6 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62wed07.htm.

82. *See* Returns Directive, *supra* note 79, art. 11, 2008 O.J. L 348, at 103–04.

83. *See id.* ¶ 18 (footnote omitted).

84. European Parliament and Council Regulation 1987/2006/EC on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II), 2006 O.J. L 381/4.

it would not make much sense for the UK to take part in the directive.

However, that would become different if, as suggested under the first scenario, the UK would take part in the external borders *acquis* and, as a result, in the SIS in its entirety. It could then be in a position, at least from a point of view of practical implementation, to take part also in the Returns Directive. However, participation in that directive should cover its entire scope, including its application to third-country nationals who do not or no longer fulfil the conditions of national law for entry, stay, or residence in the UK. Thus, an authorization by the Council in response to a UK request under Article 4 of the Schengen Protocol should go together with a UK "opt in" under Article 4 of the Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security, and Justice.

If the participation in the operation of the SIS in its entirety would be a prerequisite for UK participation in the Returns Directive, the reverse is not necessarily true. If the UK, for reasons of its own, would prefer not to become bound by the Returns Directive, this should not be an obstacle to its full participation in the external border *acquis* and the SIS. Obviously, the latter participation implies that the UK would be able to give effect to alerts in the SIS that have been entered for purposes of refusing the entry of the persons concerned when they present themselves at an external border control post, and, indeed, to have them removed when they are found within UK territory. But it might be accepted that the UK does so on the basis of the provisions of its national laws rather than the Returns Directive.

D. *Fourth Scenario: Free Movement Rights for Third-Country Nationals*

The fourth and last scenario would be of particular interest to "the citizen"—not the EU citizens but citizens of third countries who legally reside in a Member State. With the abolition of checks on persons at internal borders the Schengen *acquis* has also introduced a right of free movement for legally residing or staying third-country nationals. This right is not as far reaching as that which Community law already had created for

nationals of the Member States, first for workers and service providers and their family members, later for other categories like students, pensioners, and eventually for all citizens of the Union, but it grants a right to move freely within the territories of the Member States for an uninterrupted period for up to three months.

For holders of a Schengen visa, this right is inherent in having been granted such visa. For visitors who do not need visas, this right has been established in Article 20 of the Implementing Convention; and for third-country nationals legally residing in a Member State this right has been enacted in Article 21 of the same convention. As far as the latter category is concerned, whether or not they have the nationality of a state whose nationals need a visa in order to enter the Schengen area, it suffices that they hold a valid residence permit issued by the Member State of residence and a valid passport. No visas are necessary for them to travel within the Schengen area and indeed to return to the Schengen area if they have made a journey elsewhere.

Article 21 of the Implementing Convention has been amended recently by Regulation 265/2010 to oblige Members States to issue residence permits to third-country nationals who entered their country with a national long-stay visa, at the latest after a year.[85] In the meantime, the holders of long-stay visas can freely move on that basis within the Schengen area on the same terms as holders of residence permits.

At present the UK does not participate in this element of the Schengen *acquis*. Third-country nationals legally residing in one of the Schengen states need a visa when they want to visit the UK if they are nationals of a country whose nationals would otherwise need visas for entry to the UK. And vice versa, third-country nationals legally residing in the UK need a Schengen visa in order to visit any Member State or Schengen-associated state. This is a situation that seems hard to justify, generates incomprehension and irritation, and could be easily remedied, if the UK and the Schengen states had the political will to do so.

85. European Parliament and Council Regulation 265/2010/EU Amending the Convention Implementing the Schengen Agreement and Regulation 562/2006/EC as Regards Movement of Persons with a Long-Stay Visa art. 1, 2010 O.J. L 85/1, at 2.

Of course accepting residence permits instead of visas requires agreed, high standards for their production, including the application of biometric data (which exist and are agreed by the Council for all Member States, including the UK).[86] Moreover, there should be an obligation for issuing Member States to take holders back even if the permits expired after having entered the territory of another Member State. But all this is self-evident and applies at present within the Schengen area.

CONCLUSION

If all four of these scenarios were realized, the UK would be part of the entire Schengen *acquis* with the exception of its single fundamental objective, which is spelled out in Article 1(1) of the Schengen Borders Code: "This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union."[87] It would have accepted all "compensatory" measures but not the keystone these measures are designed to counterweigh. That, however, is a perspective for the very long run.

Even if the first three scenarios would be three bridges too far for the moment,[88] i.e., even if the UK would not join the

86. *C.f.* Council Regulation 380/2008/EC Amending Regulation 1030/2002/EC Laying Down a Uniform Format for Residence Permits for Third-Country Nationals 2008 O.J. L 115/1, ¶¶ 2, 3, 5, 7; Council Regulation 1030/2002/EC Laying Down a Uniform Format for Residence Permits for Third-Country Nationals, 2002 O.J. L 157/1.

87. Schengen Borders Code, *supra* note 70, art. 1(1), at 3.

88. Recently, the government of the UK has presented a "European Union Bill," which would ensure that in the future the Parliament and the British people have their say on any proposed transfer of powers to the European Union. It would require that any proposed, future EU treaty that seeks to transfer areas of power or competence from the UK to the European Union would be subject to a referendum and that the use of "ratchet" clauses or "passerelles" provided by the existing Treaties, which allow the rules of the EU to be modified or expand without the need of a formal treaty change, would require an act of Parliament before the government could agree to its use. At the time of writing this article it is not clear whether the announced legislation would affect the way in which the UK could operate its opt-in rights under both the Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, and the Schengen Protocol. Of course, accepting to become bound by Union law would imply a transfer of powers, previously exercised by the UK on its own behalf, to the Union, but the possibility of such a transfer has already been foreseen since the Amsterdam Treaty. Moreover, it would be hard to consider opt-in rights as "ratchet" clauses or "*passerelles*" because they do not imply a modification or expansion of the rules, powers, or competences of the EU as provided by the present Treaties. But it is of course up to the British legislator to define the terms and modalities of the procedures

Schengen *acquis* on the management of controls at external borders (while retaining border controls on travellers arriving from Schengen states), would not join the Schengen *acquis* in any of its visa parts, and would not join in the Returns Directive, it could and should make an effort to join the provisions on free movement of legally residing third-country nationals (again, while fully retaining border controls on such persons arriving from Schengen states). Similarly, the Schengen states could and should make an effort to make it possible for third-country nationals legally residing in the UK to come and cross the English Channel (by train, by plane, or train and car) for a short visit to "the continent," on the basis of their British residence permit and a valid passport of their nationality, without being required to obtain a Schengen visa. And of course, they will be subject to border checks when arriving (and even when leaving), and their passport will be stamped. And some of them may be refused entry (because there is an alert on them in the SIS or in a national list of alerts). But for most, it would be just a blessing.

An important obstacle, or nuisance, to visiting family, coming to do business, enjoying a holiday, or just attending a football or even a cricket match would be eliminated. And people will be grateful to "Europe." How is that?

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which govern the UK's participation in the EU's policies in the area of freedom, security and justice. *See* European Union Bill, 2011, H.C. Bill [139] cl. 2–4, 6.