**10063/14**

**COM (2014) 292**

**EXPLANATORY MEMORANDUM (EM) ON REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

**Fifth bi-annual report on the functioning of the Schengen area (1 November 2013 – 30 April 2014)**

Submitted by the Home Office on \_\_\_\_\_\_\_\_\_\_\_\_\_\_ June 2014

**SUBJECT MATTER**

1. The European Commission presents biannual reports to the European Parliament and to the Council on the functioning of Schengen cooperation and the application of the Schengen *acquis*. These reports are intended to form the basis for political and strategic discussion at the Justice and Home Affairs (JHA) Council’s Mixed Committee.
2. Although the UK does not participate in the border and visa aspects of the Schengen *acquis*, we are able to participate in these Council discussions. Our principal interest is the impact on our borders of illegal migration transiting the Schengen area and our participation in Frontex operations.

**SCRUTINY HISTORY**

1. The fourth biannual report on the functioning of the Schengen area (16933/1/13) cleared scrutiny in the House of Lords on 7 January 2014 and the House of Commons on 22 January 2014.

**MINISTERIAL RESPONSIBILITY**

1. The Home Secretary has overall responsibility for migration and asylum policy in the United Kingdom.

**INTEREST OF THE DEVOLVED ADMINISTRATIONS**

1. The Devolved Administrations have been consulted in the preparation of this EM. Although immigration policy is a reserved matter under the UK’s devolution settlements, the Devolved Administrations have an interest in the elements of the Schengen *acquis* in which the UK does participate.

**LEGAL AND PROCEDURAL ISSUES**

1. Legal basis
2. Not applicable.

ii) European Parliament procedure

1. Not applicable.

iii) Voting procedure in the Council

1. Not applicable.

iv) Impact on United Kingdom Law

9. Not applicable.

v) Application to Gibraltar

10. Not applicable.

vi) Fundamental Rights Analysis

11. No fundamental rights issues arise from this report.

**APPLICATION TO THE EUROPEAN ECONOMIC AREA**

1. Schengen Regulations apply to Norway, Iceland, Switzerland and Liechtenstein under individual Agreements concluded with the European Union.

**SUBSIDIARITY**

1. Not applicable. The objective of the report is to provide information.

**POLICY IMPLICATIONS**

**Situation at the Schengen external borders**

1. The Commission reports that there were 25,936 detections of illegal border crossings from November 2013 to February 2014, an increase of 96% on the same period in the previous year and one of the highest numbers ever recorded for that time of year. Much of this increase can be accounted for by a fourfold rise in illegal immigration along the Central Mediterranean route, where there were 9,175 detections. However, there were also increases in the Eastern Mediterranean and the Western Balkans. The main nationalities detected in 2013 were Syrians (25,546), Eritreans (11,298), Afghans (9,494) and Albanians (9,021).
2. It is reported that the Commission’s Communication on the work of the Task Force Mediterranean was published on 4 December 2013. The Communication presents various actions to be undertaken to preserve the integrity of the EU’s external borders in the Mediterranean, including steps for reinforced border surveillance.
3. The Commission also reports that it is planning to trigger the mechanism for early warning, preparedness and crisis management under Article 33 of the Dublin III Regulation by issuing Recommendations to Bulgaria and Italy to support them in preparing to cope with the migratory pressures they are prone to facing.
4. The Government remains concerned about the increasing illegal immigration into the EU, particularly via the Mediterranean, and continues to play an active role in EU efforts to address this issue. While the report itself offers no explanation for the substantial rise in illegal border crossings, the Government believes that the ongoing crisis in Syria is a major factor in this increase.

**Situation within the Schengen area**

1. The report notes that there were 109,712 detections of illegal stay from November 2013 to February 2014, an increase of 9% on the same period in the previous year. The highest numbers of detections were recorded in Germany, Sweden and France.
2. The Commission reports that Frontex’s risk analysis on intra EU/Schengen migratory movements confirms that the majority of illegal migrants continue their journeys to other EU/Schengen countries after crossing the external borders. The risk analysis also highlights distinct patterns of secondary movements based on the nationalities of migrants.
3. Secondary migratory movements in the EU/Schengen area continue to have a significant impact on UK borders and the Government welcomes efforts to better understand and tackle these movements.

1. The Commission also reports that, contrary to the Eurodac Regulation, illegal migrants are not always fingerprinted when encountered, noting that migrants may want to avoid the possibility of later being returned to the Member State of first entry in line with the Dublin Regulation.
2. The Government is concerned that the fingerprints of migrants encountered in the EU/Schengen area are not always being recorded on the Eurodac system. This means that there is an evidential gap in the database, undermining proper implementation of the Dublin Regulation. The Government fully agrees with the Commission that it should be made clear to migrants that it is a legal obligation to provide fingerprints and that refusal to do so could lead to any asylum application being considered under an accelerated procedure and an increased likelihood of detention as refusal might indicate a risk of absconding. The Government would welcome more detailed evidence of the reported non-compliance, not only by migrants, but also, if necessary, by Member States, with a view to further action being taken to address this issue at all levels.

**Application of the Schengen Acquis**

1. Article 23 of the Schengen Borders Code (SBC) allows Schengen Member States to reintroduce border controls at their internal borders where there is a serious threat to public policy or internal security. The Commission notes that two Member States, Poland and the Netherlands, reintroduced internal border controls during the period from 1 November 2013 to 30 April 2014. In both cases this was for a short period coinciding with international political conferences taking place in these Member States.
2. The provisions of the SBC do not apply to the UK.

**Maintaining the absence of internal border control**

1. The Commission reports on a number of investigations into possible violations of Articles 21 and 22 of the SBC, which relate to the carrying out of police checks and ensuring fluid traffic flow in the vicinity of the internal borders.
2. The Commission further reports that it has asked the Czech Republic to amend its legislation to ensure that carriers are not obliged to carry out systematic checks on persons travelling on intra-Schengen flights.
3. The provisions of the SBC do not apply to the UK.

**Development of European Border Surveillance System (Eurosur)**

1. It is reported that Eurosur became operational in 19 Schengen Member States on 2 December 2013, with the remaining 11 States to follow in 2014. Eurosur incorporates new surveillance technologies and a new system of National Coordination Centres to enable the exchange of real-time data between Member States via an electronic network with Frontex at its hub. The new system provides an enhanced intelligence picture and improves the ability of Member States to respond swiftly to emerging threats and emergencies.
2. The report further notes that Frontex has started cooperating with the European Maritime Safety Agency (EMSA) and the EU Satellite Centre to improve surveillance capabilities.
3. The UK cannot formally participate in Eurosur as it is a ‘Schengen-building’ measure. However, the Government sees it as in important tool for practical cooperation between Member States that will help to save lives at sea as well as bolstering the European response to illegal immigration and cross-border criminality. The UK negotiated an amendment to the Eurosur Regulation which permits cooperation and the exchange of information through bilateral or multilateral agreements between the UK and neighbouring Member States within Eurosur. Spain has subsequently brought a case before the European Court of Justice to challenge the legality of this provision.

**Alleged violations of other parts of the Schengen acquis**

1. The Commission reports that it has started an inquiry into alleged ill-treatment of migrants and ‘push-back’ practices at Greece’s external border. The Commission is also investigating alleged ‘push back’ practices in Bulgaria.
2. The Government recognises the need for these allegations to be investigated.
3. The Commission notes that it will consider the possible implications on Switzerland’s participation in the Schengen area when it receives Swiss proposals on implementing the outcome of February’s referendum, in which the Swiss voted in favour of quantitative limits to immigration from EU Member States.
4. The Government understands Swiss concerns about free movement and respects their democratic view. There are three years provided for negotiation of the implementation of the outcome of the referendum and it is right that the EU considers the implications for its relationship with Switzerland when the Swiss proposals are brought forward. The Government has a particular interest in the potential impact on the 40,000 UK nationals in Switzerland.
5. Having received a significant number of complaints, the Commission reports that it has issued recommendations to Spain and the UK to address the traffic situation and tobacco smuggling at the Spanish border with Gibraltar. The Commission will continue to monitor the situation at the border.
6. The Government welcomes the fact that the Commission has put Spain on notice and has made recommendations to the Spanish government to improve functioning of the border which, if implemented, would reduce delays. The Government fully expects Spain to act on the Commission’s recommendations.

*Transposition of the Return Directive (2008/115/EC) into national legislation*

1. It is reported that, with the exception of Iceland, all states bound by the Return Directive have transposed the Directive into national law. The Commission also reports that it presented its first application report on the Return Directive on 27 March 2014. The application report found that the Directive had contributed to the promotion of respect of fundamental rights and more efficient return procedures.
2. The UK did not opt in to Return Directive.

*Implementation of the Regulation on Local Border Traffic (EC No 1931/2006)*

1. The Commission reports its continued monitoring of the local border traffic regime, which enables border residents to cross the external border more easily on the basis of bilateral agreements between Schengen states and bordering third countries.
2. This regulation does not apply to the UK.

**Weaknesses identified in the framework of the Schengen evaluation mechanism**

1. The Commission reports that evaluations were carried out on police co-operation in Switzerland and SIS/Sirene in Estonia, Latvia, Lithuania, Hungary and Poland during the reporting period. The Commission notes that, in general, satisfactory progress has been made on the implementation of SIS II. It is also reported that preparations continue with regard to the new Schengen Evaluation Mechanism, under which the first evaluations are expected in 2015.
2. The Schengen evaluations carried out in this period raised no issues of concern for the Government. We are satisfied with the progress made in the operation of the central SISII as a basis for UK connection in the last quarter of 2014. The UK is taking an active part in discussions on the implementation of the new Schengen Evaluation Mechanism, which are at an early stage. We will update the Committees separately on practical arrangements once information is available

**Lifting of control at internal borders with Bulgaria and Romania**

1. The report notes that the Council has still not decided to lift the controls at the internal borders with these countries. The Commission fully supports Bulgaria’s and Romania’s accession to the Schengen area.
2. The Government agrees that the technical criteria for Romania and Bulgaria’s accession have been met. The UK does not have a vote on any decision to lift air and sea borders between Schengen States as we do not participate in the border elements of the Schengen *acquis*.

**Use of the Schengen Information System**

1. The Commission continues to monitor the implementation of SIS II. It is reported that many Member States are yet to fully implement its features into their systems. The Commission also cites issues around the timely deletion of alerts which are no longer relevant and the failure of some Member States to systematically attach the European Arrest Warrant to alerts for arrest. Nonetheless, the Commission is in general positive about SIS II implementation, and notes that it is working with Member States to fully exploit the possibilities offered by new features in the system.
2. The UK is an active member of the European Agency for the operational management of large scale IT systems in the area of freedom, security and justice (eu-LISA), which has full responsibility for the management of SIS/SISII, although the Commission is still involved alongside Member States. eu-LISA delivers training in the technical use of SISII. The UK SISII Programme continues to work closely with eu-LISA to ensure the successful integration of the UK in the last quarter of 2014. The Government also welcomes consideration on how cooperation can be enhanced and how both SIS and the SIRENE bureau can be fully utilised across Member States.

**Use of the Visa Information System**

1. The Visa Information System (VIS) is a system for exchange of information on short-stay Schengen visas. Since the last biannual report VIS has become operational in Central Asia and South-East Asia. The report notes that the VIS is functioning well and by 1 October 2013 had processed 4.8 million visa applications. However, there remains a concern around the non-optimal quality of some biometric and alphanumeric data.
2. The UK does not participate in VIS but the Government views the system positively as it helps prevent abuse of Schengen visas.

**Visa policy and readmission agreements**

*Amendment of Regulation 539/2001 introducing a new suspension mechanism and a revised reciprocity mechanism*

1. The Commission reports that an amendment to Regulation 539/2001, which sets out Schengen visa requirements for nationals of non-EU countries, was adopted on 11 December 2013 and entered into force on 9 January 2014.
2. The new suspension mechanism allows for the suspension of visa-free access to the Schengen area in third countries where the visa-free regime has led to a substantial increase in illegal migration or unfounded asylum applications from nationals of that country. It is envisaged that the mechanism could be used as a last resort, following an agreed procedure involving Member States, the Commission and the European Parliament.
3. Although the UK does not participate in the border and visa elements of the Schengen *acquis*, the Schengen visa-free regime in the Western Balkans has led to increased illegal immigration to the UK. The Government therefore welcomes the introduction of the suspension mechanism.
4. The revised reciprocity mechanism applies to a situation where a Schengen visa exempt country introduces or maintains a visa requirement for one or more Member States. The new mechanism confers on the Commission the power to suspend the visa-free regime for certain categories of nationals from the country concerned. However, the Commission has lodged an application for an annulment of this power on the basis that it is not in compliance with Articles 290 and 291 of the TFEU.
5. The UK does not participate in the visa element of the Schengen *acquis* and is therefore not affected by the revised reciprocity mechanism.

*Post-visa liberalisation monitoring mechanism for Western Balkan countries*

1. The Commission reports that the total number of asylum applications in the Schengen area from the visa-exempted Western Balkan countries increased by 12.5% in 2013, and accounted for 12% of the total number of applications recorded there during the year. Serbian nationals submitted by far the largest number of applications, although the proportion of claims from Albanian nationals increased significantly. Less than 2% of asylum applications from nationals of Western Balkan countries resulted in a positive decision.
2. The UK continues to be affected by the systematic abuse of our migration and asylum system by Albanian nationals following Schengen visa liberalisation, and the Government is working bilaterally and through the EU to combat such abuse. The Government is of the view that robust safeguards must be in place with regard to future Schengen visa liberalisation.

*Readmission and visa facilitation agreements and visa liberalisation*

The Commission reports that the EU readmission agreement with Turkey was signed on 16 December 2013. A Schengen visa liberalisation dialogue was launched simultaneously. It is also reported that readmission and facilitation agreements with Cape Verde are awaiting ratification, while agreements with Armenia came into force on 1 January. Negotiations were launched with Belarus in January and are scheduled to be re-launched with Morocco in June.

The report notes that the citizens of the Republic of Moldova were granted visa-free access to the Schengen area from 28 April. In February, agreement was reached to lift Schengen visa requirements for nationals of Colombia, Peru and the United Arab Emirates as well as 16 small Caribbean, and Pacific islands. However, the Commission has to present an assessment of Colombia’s and Peru’s fulfilment of the relevant criteria before seeking authorisation to begin formal negotiations.

UK participation in EURAs is decided on a case-by-case basis. To date the UK has opted in to fourteen active agreements, including the readmission agreement with Turkey.

The UK does not participate in the visas element of the Schengen *acquis* and is therefore not directly affected by the reported developments with regard to Schengen visa facilitation agreements and visa liberalisation. However, given the impact of Schengen visa liberalisation in the Western Balkans on UK borders, the Government continues to make clear the need for proper safeguards to be incorporated into Schengen visa facilitation and liberalisation agreements.

**IMPACT ASSESSMENT**

1. An impact assessment is not required.

**FINANCIAL IMPLICATIONS**

1. There are no financial implications associated with this Commission report.

**CONSULTATION**

1. External consultation has not been required beyond consultation with Devolved Administrations.

**TIMETABLE**

1. A discussion on the fifth biannual report took place at JHA Council on 5 June 2014, during which the Commission reminded Member States of their promise to share information on secondary movements and Bulgaria and Romania asked Ministers to reconsider their accession to the Schengen area.

**James Brokenshire MP**

**Minister of State for Immigration and Security**

**HOME OFFICE**