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Subject: COMMUNICATION FROM THE COMMISSION TO THE COUNCIL ON NEGOTIATIONS WITH SWITZERLAND Recommendation for a COUNCIL DECISION Authorising the Commission to open negotiations for the adoption of an agreement between the Community, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the EC Treaty and taking the necessary measures to ensure cohesion with the negotiations to be conducted for the adoption of an agreement between the European Union, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the Treaty on European Union

Recommendation for a COUNCIL DECISION authorising the Commission to open negotiations for the conclusion of an agreement between the Community, Iceland and Norway on the one hand, and the Swiss Confederation on the other, concerning the criteria and mechanisms for establishing the State responsible for examining requests for asylum lodged in a Member State, Iceland, Norway or Switzerland

Recommendation for a COUNCIL DECISION authorising the Commission to open negotiations with the Swiss Confederation with a view to concluding a Free Trade Agreement on Services

Recommendation for a COUNCIL DECISION authorising the Commission to open negotiations with the Swiss Confederation with a view to concluding a bilateral Agreement in the Audiovisual field

Delegations will find attached the partially declassified version of the above-mentioned document.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9.4.2002
 SEC(2002) 379 final
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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

ON NEGOTIATIONS WITH SWITZERLAND

Recommendation for a
 COUNCIL DECISION

Authorising the Commission to open negotiations for the adoption of an agreement between the Community, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the EC Treaty

and

taking the necessary measures to ensure cohesion with the negotiations to be conducted for the adoption of an agreement between the European Union, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the Treaty on European Union

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(presented by the Commission)

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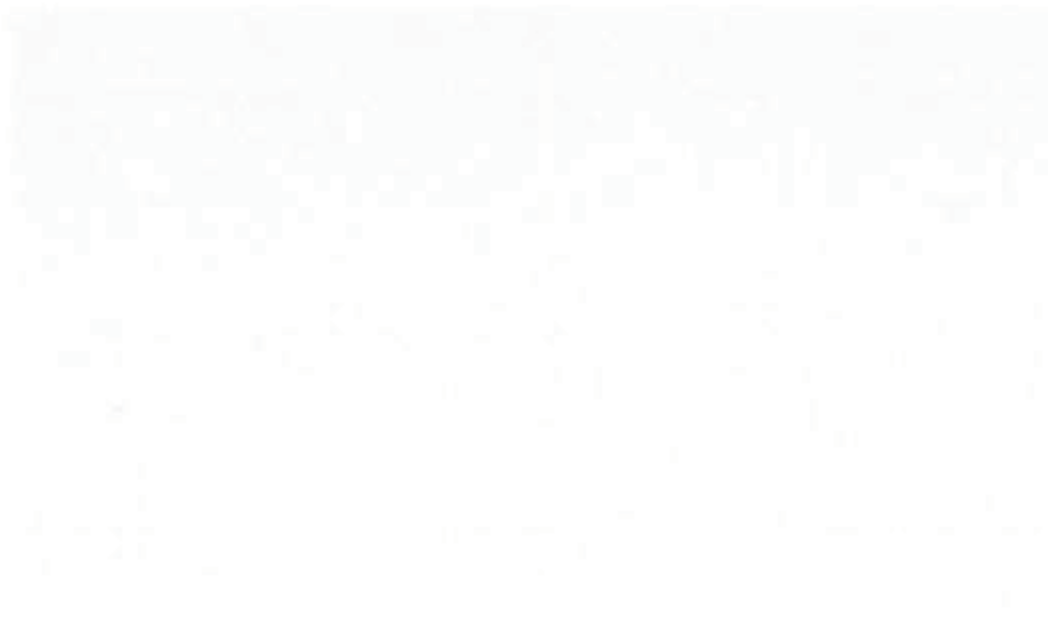
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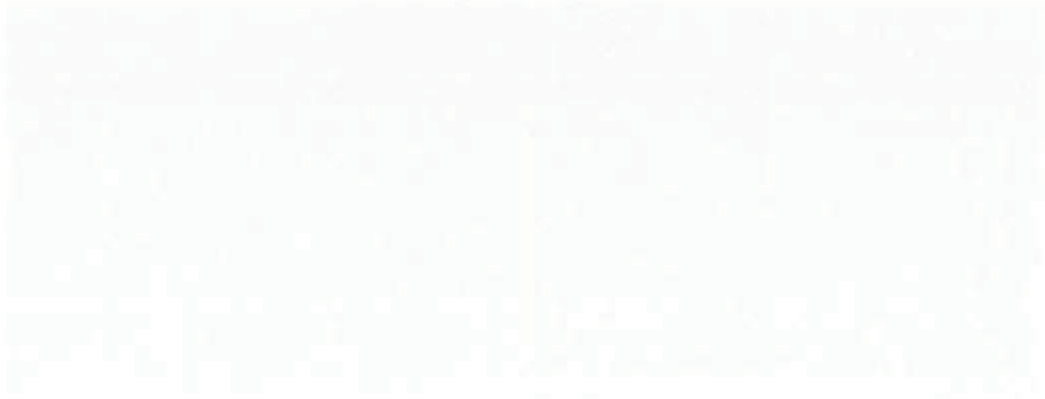
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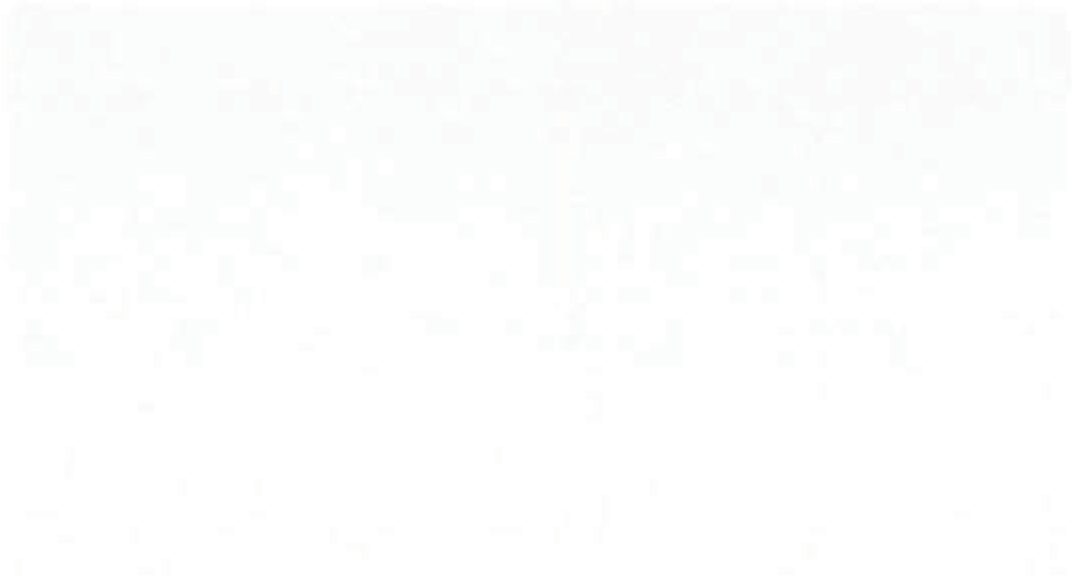
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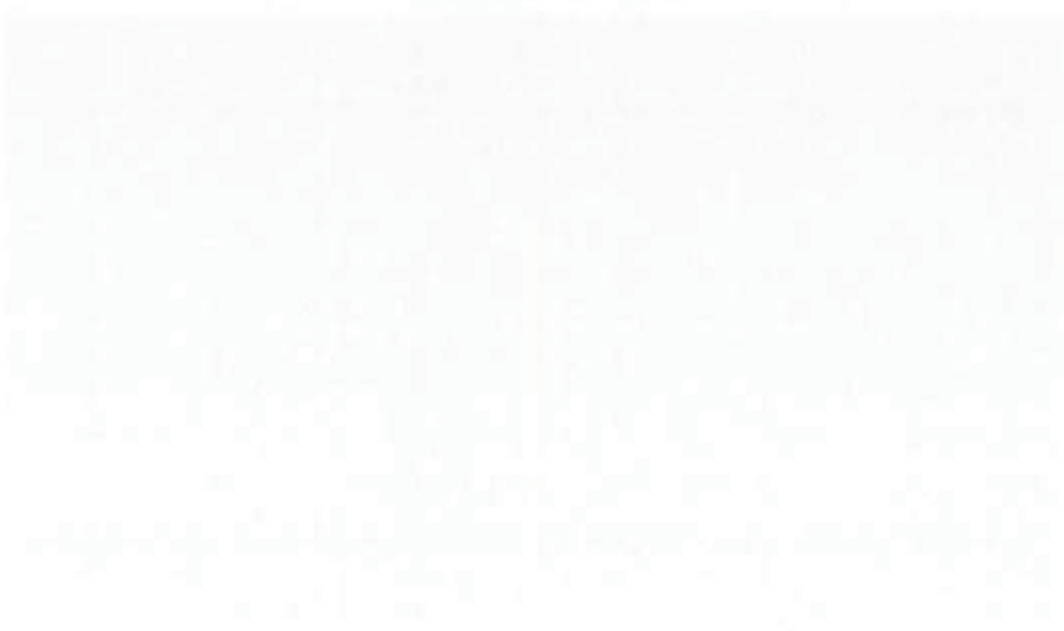
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COMMISSION OF THE EUROPEAN COMMUNITIES

Recommendation for a

COUNCIL DECISION

**Authorising the Commission to open negotiations for the adoption of an agreement between the Community, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the
EC Treaty**

and

taking the necessary measures to ensure cohesion with the negotiations to be conducted for the adoption of an agreement between the European Union, Iceland and Norway on the one hand, and Switzerland on the other, to associate the latter with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the Treaty on European Union

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EXPLANATORY MEMORANDUM

I. Introduction

1. Within the framework of the second package of sectoral agreements to be concluded between the European Community and Switzerland, the latter has made it known that it wishes to be associated with implementation of the Schengen *acquis* and its further development, in the same way as Iceland and Norway.¹

Iceland and Norway are associated with implementation of the Schengen *acquis* and its further development pursuant to Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

The Commission is submitting this recommendation for a Council Decision in response *inter alia* to the request made by the Coreper of 27 February 2002.

One of the purposes of this recommendation is to authorize the Commission to open negotiations with Switzerland for an agreement associating it with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the EC Treaty. The recommendation also concerns measures to ensure the necessary cohesion with the negotiations to be conducted with a view to concluding an agreement with Switzerland associating it with implementation of the Schengen *acquis* and its further development, as regards the components of the Schengen *acquis* covered by the Treaty on European Union

A preliminary analysis of the association of Iceland and Norway with implementation of the Schengen *acquis* and its further development will enable parameters to be determined for the negotiation of a similar agreement for Switzerland.

II. Association of Iceland and Norway with implementation of the Schengen *acquis* and its further development

(a) The intergovernmental phase of Schengen

2. On 14 June 1985 the Governments of the States of the Benelux Economic Union, Germany and France signed the Schengen Agreement on the gradual abolition of checks at their common borders.² The Agreement consisted of two parts, the first concerning measures to facilitate checks at the common borders, the second drawing up a list of accompanying measures deemed necessary to abolish checks at the common borders.

In the Convention implementing the Schengen Agreement, signed on 19 June 1990,³ the same five Member States enshrined the principle of abolition of checks at internal borders and established all the accompanying measures.

3. Since the Schengen Convention complied with the objective of the Treaty establishing the European Communities of creating an internal market comprising an area without internal

¹ Liechtenstein has also made a similar request. However, this has been rejected in the light of its position on taxation of savings.

² OJ L 239, 22.9.2000, p. 13.

³ OJ L 239, 22.9.2000, p. 19.

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frontiers,⁴ Article 140(1) stated that "Any Member State of the European Communities may become a Party to this Convention. Accession shall be the subject of an agreement between that State and the Contracting Parties."

Pursuant to the aforementioned Article 140(1), accession agreements to the Schengen Convention were signed with Italy (27 November 1990),⁵ Spain and Portugal (25 June 1991),⁶ Greece (6 November 1992)⁷ and Austria (28 April 1995).⁸

Lastly, accession agreements were signed with Denmark, Finland and Sweden on 19 December 1996.⁹ A Cooperation Agreement between all the Schengen countries and Iceland and Norway was also signed on the same day, on the basis that those two countries were unable to accede to the Schengen Convention pursuant to Article 140(1). The purpose of that cooperation agreement was to enable the Nordic countries to maintain Nordic Passport Union arrangements for the abolition of checks on persons at common borders (in so far as those arrangements did not constitute an obstacle to implementation of the Cooperation Agreement¹⁰).

4. It should be noted that the Schengen *acquis* was not subject to negotiation when countries acceded subsequently to the Convention. Countries wishing to join Schengen had to **accept the *acquis* as a whole**. Accordingly, the accession agreements do not contain any amendments to the *acquis*.

The principle that accession to Schengen should not entail renegotiation of the *acquis* was also applied to the **Cooperation Agreement with Iceland and Norway**. However, since movement of goods between the Member States and Iceland and Norway is governed by the Agreement on the European Economic Area (which does not abolish checks on goods at the common borders), **the Schengen arrangements on free movement of goods and baggage are not covered by the Cooperation Agreement**.¹¹

5. Since the Cooperation Agreement was signed, Iceland and Norway have taken part in Schengen intergovernmental discussions on the application, implementation and development of the Schengen *acquis*.

(b) Integration of the Schengen *acquis* into the framework of the European Union

6. The Schengen *acquis* was integrated into the framework of the European Union by a protocol annexed to the Amsterdam Treaty. Under Article 1 of the Protocol, the thirteen Member States concerned are authorized to establish closer cooperation among themselves within the fields covered by the Schengen *acquis*. Since 1 May 1999 this cooperation has been conducted within the legal and institutional framework of the European Union and in

⁴ See the second and third recitals of the Convention implementing the Schengen Agreement.

⁵ OJ L 239, 22.9.2000, p. 63.

⁶ OJ L 239, 22.9.2000, p. 69 and 76.

⁷ OJ L 239, 22.9.2000, p. 83.

⁸ OJ L 239, 22.9.2000, p. 90.

⁹ OJ L 239, 22.9.2000, p. 97, 106 and 115.

¹⁰ Article 4 of the Cooperation Agreement.

¹¹ See the penultimate recital (Whereas this Agreement does not apply to goods; whereas goods are covered by the EEA Agreement; whereas measures for the purpose of organising checks on hand luggage are to be found outside the framework of this Agreement) and Article 6: (Article 2(4) and Title V of the Schengen Convention [Transport and movement of goods] do not form part of this Agreement).

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accordance with the relevant provisions of the Treaty on European Union and the Treaty establishing the European Community.

Under Article 2(1) of the Protocol, the Council has adopted several measures necessary for the implementation of the Schengen *acquis* within the Union framework, including:

- Council Decision 1999/435/EC of 20 May 1999,¹² which defines the components of the Schengen *acquis* that are integrated into the framework of the European Union and determines *inter alia* which of those components have been rendered redundant by the passage of time and/or events, which are regarded as being superseded by European Union rules or which are not of a binding nature; it should be noted that, in principle, the provisions of the Schengen Convention on checks on goods and baggage have been rendered redundant by Community internal market legislation;¹³ it should also be noted that the Council Decision stipulates that Article 140(1) of the Convention should not be broken down between the first and third pillar.

- Council Decision 1999/436/EC of 20 May 1999¹⁴ determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*; that Decision broke down the components of the Schengen *acquis* between the first and third pillar.

7. Those two decisions refer to the successive agreements whereby Member States acceded to the Schengen Convention. They do not, however, mention the Cooperation Agreement with Iceland and Norway. The Protocol integrating the Schengen *acquis* into the European Union framework contains specific provisions on that subject "taking into account the need to maintain a special relationship with the Republic of Iceland and the Kingdom of Norway, both States having confirmed their intention to become bound by the [Schengen] provisions ..., on the basis of the Agreement signed in Luxembourg on 19 December 1996".¹⁵

The first sub-paragraph of Article 6 provides: "The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen *acquis* and its further development on the basis of the Agreement signed in Luxembourg on 19 December 1996. Appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council, acting by the unanimity of its Members mentioned in Article 1. Such Agreement shall include provisions on the contribution of Iceland and Norway to any financial consequences resulting from the implementation of this Protocol."

Should the United Kingdom and/or Ireland decide to take part in all or part of the Schengen *acquis*, the second sub-paragraph of Article 6 states that "a separate Agreement shall be concluded with Iceland and Norway by the Council, acting unanimously, for the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland on the one hand, and Iceland and Norway on the other, in domains of the Schengen *acquis* which apply to these States."

¹² OJ L 176, 10.7.1999, p. 1.

¹³ Annex B to Decision 1999/435/EC indicates among the articles which should not be broken down between the first and third pillars Article 2(4), Article 4 ("as far as controls on baggage are concerned), Articles 120 to 125 ("Transport and movement of goods").

¹⁴ OJ L 176, 10.7.1999, p. 1.

¹⁵ Final recital of the Protocol.

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The aforementioned Article 6 is designed to comply with and promote the object and purpose of the Cooperation Agreement of 19 December 1996, namely to preserve the existing regime between the five Nordic States under the Convention on the Abolition of Passport Controls at Intra-Nordic borders signed in Copenhagen on 12 July 1957, establishing the Nordic Passport Union.¹⁶

By Declaration No 47 annexed to the Amsterdam Treaty, "The High Contracting Parties agree to take all necessary steps so that the Agreements referred to in Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union may enter into force on the same date as the date of entry into force of the Treaty of Amsterdam."

On 18 May 1999 - following negotiations conducted by a "Commission and Presidency" joint delegation - the Council (representing thirteen Member States), Iceland and Norway concluded the Agreement concerning the latter's association with the implementation, application and development of the Schengen acquis.^{17 18} On 30 June 1999 the same contracting parties (the Council acting for the fifteen) signed the agreement for the establishment of rights and obligations between Ireland and the United Kingdom on the one hand, and Iceland and Norway on the other, in domains of the Schengen *acquis* which apply to these States.¹⁹

The substance of the agreements of 18 May and 30 June 1999 will be examined in greater detail in the following point. It should be noted that this agreement is primarily an **institutional agreement**: the Schengen *acquis* has not been (re)negotiated as to the substance.

8. Under Article 4 of the Protocol, Ireland and the United Kingdom, which, prior to the Amsterdam Treaty, were not bound by the Schengen *acquis*, "may at any time request to take part in some or all of the provisions of this *acquis*. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned."

By 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*,²⁰ the Council authorised the United Kingdom to participate in part of the Schengen *acquis*, i.e. more or less those elements relating to police cooperation and judicial cooperation in criminal matters. The Commission recently adopted a similar Decision concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.²¹ When examining the requests submitted by the United Kingdom and Ireland under Article 4 of the Protocol, **no renegotiation of the Schengen *acquis* took place**. In its opinions on the UK and Irish requests, the Commission indicated that "the Commission's view is that there are no

¹⁶ See recitals 3 and 6 of the aforementioned Agreement of 18 May 1999.

¹⁷ See Council Decision 1999/439/EC of 17 May 1999 on the conclusion of that Agreement, OJ L 176, 10.7.1999, p. 35 to which the text of the agreement, its Annexes, its Final Act, Declarations and the Exchanges of Letters annexed thereto are attached.

¹⁸ See also Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10.7.1999, p. 31.

¹⁹ See Council Decision 2000/29/EC of 28 June 1999; OJ L 15, 20.1.2000, p. 1.

²⁰ OJ L 131, 1.6.2000, p. 43.

²¹ Decision of 28 February 2002.

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circumstances under which a request to participate pursuant to Article 4 could be the occasion for such a renegotiation."²²

This possibility of only partial participation in the Schengen *acquis* offered to the United Kingdom and Ireland is an exception to the basic principle that a Member State must accept all or none of the Schengen *acquis*. This exception results from the Protocol on the application of certain aspects of Article 7a of the EC Treaty to the United Kingdom and Ireland, annexed to the Treaty on European Union and the EC Treaty, which allows checks on persons crossing the frontiers between the United Kingdom and Ireland and those Member States making up the Schengen area to be maintained.²³

9. This is confirmed by Article 8 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, which states that "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."

c) The Association Agreements of 18 May and 30 June 1999 concluded between the Council and Iceland and Norway

10. The Association Agreement of 18 May 1999 is an institutional agreement. Since Iceland's and Norway's participation may not be the occasion for a renegotiation of the Schengen *acquis*, the Agreement does not contain any amendments to that *acquis* or any derogations from it.

11. The Agreement begins by defining its material scope (Article 1), i.e.:

1° in principle the provisions of the Schengen *acquis* which are intergovernmental in origin, have been incorporated into the Union framework and have been divided between the First and Third Pillars by Decision No 1999/436 (including the Schengen Information System, which is mentioned "for the record" since no agreement had been reached on the appropriate legal basis or bases for it); these provisions are listed in Annex A to the Agreement;

2° the Community instruments which had been replaced by the Schengen *acquis*; these are listed in Annex B;

3° all future Community and Union instruments building on the Schengen *acquis* which have been subject to the procedures provided for in the Association Agreement.²⁴

²² Commission opinion on the request by the United Kingdom to take part in some of the provisions of the Schengen *acquis*, SEC(1999) 1198 final, p. 3; see also SEC(2000) 1439 final, pp. 3 and 5, concerning Ireland's request.

²³ See the Commission opinion on the request by the United Kingdom to take part in some of the provisions of the Schengen *acquis*, SEC(1999) 1198 final, p. 3.

²⁴ See the Statement by the Council and the Commission, annexed to the Association Agreement, in respect of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). This states that Directive 95/46/EC "has not been included in Annex B to the Agreement with the Republic of Iceland and the Kingdom of Norway ..., in view of the proposal of the Commission of 2 December 1998 for the Decision of the Joint Committee of the EEA to include that Directive in Annex XI to the EEA Agreement. The European Union is of the view that this Directive constitutes an integral part of the Schengen *acquis* insofar as it has replaced provisions of the 1990 Schengen Convention pursuant to Article 134 of that Convention. ..."

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The Agreement (Article 2) stipulates that these provisions shall be implemented and applied by Iceland and Norway.

12. All of the other provisions of the Agreement are institutional in nature. The principles underlying the institutional framework established by the Agreement are as follows:²⁵

- following the integration of the Schengen *acquis* into the Union framework, the **taking of decisions building on that *acquis* will be a matter for the European Union, including the European Community**; third countries may not participate in Council deliberations;
- it is necessary to properly involve all parties applying the Schengen *acquis* in discussions at all levels concerning their practical application, their implementation and the drawing-up of measures building on that *acquis*;
- it is therefore necessary to establish an **organisational structure outside the institutional framework of the European Union** so that Iceland and Norway can be involved in the process of forming decisions in this area and can take part in these activities through the intermediary of a **Mixed Committee**.

13. Article 3 therefore establishes a Mixed Committee consisting of representatives of the governments of Iceland and Norway and members of the Council of the European Union and the European Commission,²⁶ which meets at the level of Ministers, senior officials (Coreper) or experts, as circumstances require. In practice, the Mixed Committee meets by the "back-to-back meetings" system alongside the corresponding Council meeting.

The Mixed Committee addresses all matters relating to the implementation and development of the Schengen *acquis* and ensures that any concern entertained by Iceland and Norway is duly considered (Article 4(1)).²⁷ There are specific provisions concerning, *inter alia*, the right of Iceland and Norway to explain any problems they encounter to the Mixed Committee meeting at the level of Ministers (Article 4(2)). The Mixed Committee is also informed about the preparation within the Council "of any acts or measures which may be relevant" to the Association Agreement (Article 5).

Article 8 confirms that the adoption of measures building on the Schengen *acquis* is reserved to the competent institutions of the European Union (Article 8(1)) and establishes a procedure to enable Iceland and Norway to accept any such new measures while taking account of their respective constitutional requirements (Article 8(2)).²⁸ Acceptance of the content of a new measure by Iceland and Norway creates rights and obligations between Iceland and Norway, and between Iceland and Norway on the one hand, and the European Community and those of its Member States bound by those acts and measures, on the other (Article 8(3)). If a measure is not accepted (by being rejected or in the absence of a reply within the specified time limit), a "guillotine" clause applies: the agreement ceases to be applicable with respect to Iceland and

²⁵ See the recitals to the Association Agreement.

²⁶ As for the office of President of the Mixed Committee, there is, at the level of Coreper and Ministers, a six-monthly rotation between a representative of the European Union and a representative of the government of Iceland or Norway (Article 3(5)).

²⁷ Article 6 stipulates that, when drafting new legislation in a field which is covered by this Agreement, the Commission must informally seek advice from experts of Iceland and Norway in the same way as it seeks advice from experts of the Member States for drawing up its proposals.

²⁸ New measures should in principle enter into force simultaneously for the European Union and Iceland and Norway (Article 8(1)).

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Norway as the case may be, unless the Mixed Committee, after a careful examination of ways to continue the Agreement, decides otherwise within ninety days (Article 8(4)).²⁹

Articles 9 and 10 establish a mechanism for achieving as uniform an application and interpretation as possible of the Schengen *acquis* covered by the Association Agreement.

The Agreement also contains provisions on dispute settlement (Article 11), the contributions of Iceland and Norway to the administrative and operating costs linked to the application of the Agreement (Article 12), and the relationship to other agreements, such as the EEA Agreement and with any future agreements which might be concluded by the Community with Iceland and/or Norway, or on the basis of Articles 24 and 38 of the Treaty on European Union (Article 13). The Agreement also has a number of final provisions, including Article 16, which deals with the possibility of the Agreement being denounced by Iceland or Norway or by decision of the Council, acting by the unanimity of its members representing the Member States which participate in the closer cooperation authorised by the Schengen Protocol.

Finally, it should be pointed out that Article 15(4) of the Agreement incorporates the traditional mechanism for implementing the Schengen *acquis*, i.e. it must be put into effect by Iceland and Norway on a date to be fixed by the Council acting by unanimity of its Members representing the Member States which participate in the closer cooperation authorised by the Schengen Protocol, after consultations in the Mixed Committee. This date is fixed by the Council once it has satisfied itself that the preconditions for the implementation of the relevant provisions have been fulfilled by Iceland and Norway and that controls at their external borders are effective.³⁰

14. The association of Iceland and Norway in the implementation, application and development of the Schengen *acquis* by means of an agreement concluded by the Council (representing thirteen Member States) and the two states in question makes it necessary to **establish rights and obligations between Iceland and Norway, on the one hand, and Ireland and the United Kingdom, on the other to the extent that the latter two Member States participate in the Schengen *acquis* or in measures building on that *acquis*.**³¹

The creation of such rights and obligations is dealt with in the **Agreement of 30 June 1999** concluded between the Council (representing all fifteen Member States) and Iceland and Norway pursuant to Article 6(2) of the Schengen Protocol. Relations between Iceland and Norway, on the one hand, and Ireland and the United Kingdom, on the other, are governed solely by this second agreement (comprising only six articles) and by the procedures defined in the Agreement of 18 May 1999.³²

This latter agreement is **also institutional in nature**. It states, inter alia, that any draft Council decision on a request by the United Kingdom and/or Ireland to participate in aspects of the Schengen *acquis* must be the subject of consultations within the Mixed Committee (Article

²⁹ An agreement in the form of an exchange of letters between the Council of the European Union and Iceland and Norway, annexed to the Association Agreement, deals with the matter of the committees which assist the European Commission in the exercise of its executive powers.

³⁰ By its Decision 2000/777/EC of 1 December 2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway (OJ L 309, 9.12.2000, p. 24), the Council fixed the date for the entry into force of the Schengen *acquis* as 25 March 2001.

³¹ Fourth recital of the Agreement of 30 June 1999.

³² See the first recital and Article 1 of the Agreement of 30 June 1999.

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2(1) of the second agreement); the same applies to any draft Council decision fixing the date of the implementation of certain aspects of the Schengen *acquis* by Ireland and the United Kingdom (Article 2(2)).

Article 3 determines the point in time from which the rights and obligations are created between Ireland and the United Kingdom, on the one hand, and Iceland and Norway, on the other, regarding the provisions of the Schengen *acquis* listed in Annex A of the first Agreement (implemented in the meantime by Iceland and Norway) and future measures building on the Schengen *acquis*.

The final provisions include a denunciation clause under which the Agreement may be denounced by Iceland or by Norway or by a decision of the Council, acting unanimously (Article 5).

III. Switzerland's association with the implementation of Schengen and its further development

a) The purpose and content of the agreement to be negotiated

15. An analysis of Iceland's and Norway's association with the implementation and development of the Schengen *acquis* leads to the definition of a number of parameters which, according to the Commission, are necessary in view of Switzerland's possible association:

15.1. For Switzerland, it is the whole of the Schengen *acquis* in force that is to be accepted on a take-it-or-leave-it basis; partial participation is not an option;

15.2. Nor may Switzerland's possible association involve a renegotiation, amendment or derogation from the Schengen *acquis*;

15.3. The negotiations with Switzerland must therefore relate only to acceptance of the whole of this *acquis* and not to the content of its different components.

In principle, the *acquis* to be accepted is that referred to in Annexes A (intergovernmental provisions of the Schengen *acquis*) and B (the Community instruments which replaced certain elements of the Schengen *acquis*) of the Association Agreement with Iceland and Norway; it goes without saying that Switzerland will also have to accept the new Community and EU instruments which have further developed the Schengen *acquis* since the association agreement was signed with Iceland and Norway.³³

Particular attention must be given to Directive 95/46/EC on the protection of personal data; this has not been added to Annex B of the association agreement with Iceland and Norway because it applies to these two states under the EEA Agreement;³⁴ because Switzerland is not participating in the EEA, it should in principle be stipulated with regard to Switzerland that this directive is a part of the Schengen *acquis* that it is required to accept. However, in this context, there should also be an assessment of the possible relevance of Commission Decision 2000/518/EC of 26 July 2000, pursuant to Directive 95/46/EC of the European Parliament and of the Council, on the adequate protection of personal data provided in Switzerland.³⁵

³³ A list of this new *acquis* will be drawn up with a view to negotiations.

³⁴ See §11 above and footnote no. 23.

³⁵ OJ No L 215, 25.8.2000, p. 1.

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15.4. Following the model of the association with Iceland and Norway, the association with Switzerland should not concern the Schengen arrangements on goods and baggage; thus, at the borders between the Member States and Switzerland (land borders and airports), only checks on persons will be abolished; not checks on goods and baggage.

15.5. The negotiations with Switzerland will therefore concern only the organisational framework to be put in place in order to permit its association with the implementation of the Schengen *acquis* and its continuing development.

It must be said that this organisational framework – a joint committee – was created outside the EU's normal institutional framework with a view to Iceland's and Norway's association with the implementation and development of the Schengen *acquis*; the operation of this joint committee can be considered generally satisfactory.

It is inconceivable that a further organisational framework should be put in place with a view to Switzerland's association; otherwise, any discussion on the implementation of the Schengen *acquis* and any proposal intended to further develop the Schengen *acquis* would have to be addressed by three bodies: the Council itself, the joint committee with Iceland and Norway, and a body including Switzerland.

Thus, the Commission considers that Switzerland's association must be effected by incorporating it into the joint committee set up with for the association of Iceland and Norway.

15.6. The organisational framework of the joint committee must not be renegotiated; it must function in an identical manner for the three associated countries; consequently, Switzerland will, in principle, have to accept all the provisions of the association agreement with Iceland and Norway.

Only the following articles, which contain provisions specific to Iceland and Norway, will have to be negotiated with a view to the insertion of similar provisions specific to Switzerland: Article 8(2)(b) and (c): the procedure for accepting a new measure in accordance with national constitutional requirements; and Article 12(1): the annual financial contribution of each non-member State.

15.7. Article 7 of the Association Agreement with Iceland and Norway provides that "the Contracting Parties agree that an appropriate arrangement should be concluded on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in any of the Member States or in Iceland or Norway".

There is no need to retain this provision in the agreement to be concluded with Switzerland to associate it with the implementation, application and development of the Schengen *acquis*, given that the Commission is requesting at the same time authorisation to negotiate with Switzerland an agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum.

It should, however, be added that the second sentence of Article 7 of the Association Agreement links the two agreements with Iceland and Norway - the one on Schengen and the one on Dublin: the arrangement relating to asylum should be in place at the time the Schengen *acquis* is put into effect for Iceland and Norway. This indissoluble link between the implementation of the Schengen *acquis* and the Dublin *acquis* by any one State should also be

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applied to Switzerland. The recommendation for the negotiation of an agreement with Switzerland on the Dublin *acquis* contains the appropriate provisions.

16. Since rights and obligations will also have to be established between Switzerland and the UK and Ireland regarding the elements of the Schengen *acquis* in which the latter Member States are participating, Switzerland will also have to be integrated into the second Association Agreement concluded between the Council and Norway and Iceland. The arrangements of this agreement will also have to be accepted by Switzerland as they stand; no amendments are necessary.

17. It is clear that the EU and the European Community play a pivotal role in relation to the question of the possible association of Switzerland with the implementation and further development of the Schengen *acquis*. However, the EU and the Community are already bound by an Association Agreement with Iceland and Norway. Since the association of Switzerland with the implementation and further development of the Schengen *acquis* will also create rights and obligations between Switzerland and Iceland and Norway the latter two states will have to be involved in the negotiation of the new association agreement.

However, this should not involve a renegotiation of the association agreements concluded between the Council and Iceland and Norway.

18. The extension to Switzerland of the organisational framework that is already in place should also allow it to discuss directly with Iceland and Norway, within the joint committee and on an equal footing, the practical application and implementation of the Schengen *acquis* and its further development. The association of Switzerland with the implementation and development of the Schengen *acquis* will create rights and obligations between Switzerland and Iceland and Norway (thus, for example, a visa issued by Switzerland will enable its holder to enter Norwegian territory and vice versa; a person for whom an alert has been issued for the purpose of refusing entry will have to be turned back at the Swiss external border, and vice versa). Contacts and direct discussions between Schengen partners are considered necessary for the proper functioning of the Schengen *acquis*.³⁶

19. The Commission considers that the parameters set out above apply to the Schengen *acquis* as a whole, both for those of its elements which come under the first pillar and those which come under the third pillar. Thus, in order to ensure the required overall coherence, a **single negotiating authorisation** must be given with a view to a **single negotiation** of a **single organisational framework**, even if, as a result of the legal bases in the first and third pillars, several agreements have to be concluded.

b) The legal bases for the agreements to be concluded

20. The Association Agreements with Iceland and Norway were concluded by the Council pursuant to Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the European Union (after negotiations by a two-headed delegation – Presidency + Commission). Article 6 provides that Iceland and Norway “shall be associated with the implementation of the Schengen *acquis* and its further development” on the basis of the cooperation agreement of December 1996, and that “appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council ...”.

³⁶ See the 7th recital of the Association Agreement with Iceland and Norway.

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Firstly, in the light of Schengen's key objective, which is to abolish checks at internal borders, the association of Iceland and Norway in the *implementation* of the Schengen *acquis* involves their common borders with the Member States becoming internal borders in respect of the free movement of persons; secondly, following the association of Iceland and Norway in the further *development* of the Schengen *acquis*, this development, within the EU institutional framework and in accordance with the decision-making procedures provided for by the appropriate legal bases in the treaties, is affected by the association, since proposals for measures to develop the Schengen *acquis* must be submitted to the joint committee.

This extension of the area without internal frontiers to Iceland and Norway and their involvement in the EU's decision-making procedures via the intermediate stage of the joint committee are constitutional factors. That is why this extension and this involvement were specifically provided for in the treaties. An extension of the frontier-free area to one or more other non-member countries and involvement of these countries in the Union's decision-making procedures could be envisaged only if a provision in the treaties permitted an association similar to that of Iceland and Norway.

21. If it were considered that it was not necessary to amend the treaties to this end, there are other grounds supporting the insertion of Article 6 in the Schengen Protocol.

The Association Agreements concluded between the Council and Iceland and Norway followed on from the cooperation agreement concluded in 1996 between the Schengen Member States and Iceland and Norway, which was intended to preserve the *acquis* of the Nordic Passport Union. This cooperation agreement was already implemented; Iceland and Norway were participating in all the work of the Schengen intergovernmental bodies. When the Schengen *acquis* was incorporated into the EU framework, it was legally necessary to ensure their continued participation. In this sense, Article 6 of the Schengen Protocol could be considered as an *ad hoc*, transitional legal basis for the conclusion of these association agreements as necessary measures, among others, with a view to the incorporation of Schengen into the framework of the European Union. The procedure provided for in Article 6 was a *sui generis* procedure, owing to the fact that this association agreement had to be negotiated before the breakdown of the constituent elements of the Schengen *acquis* between the first and third pillars.

In this same sense, Article 2(1) of the Protocol constituted an *ad hoc*, transitional legal basis enabling the Council to take "any [internal] measure necessary for the implementation" of the integration of the Schengen *acquis* into the framework of the European Union (notably determining those elements of the Schengen *acquis* to be integrated into the EU framework and the breakdown of the constituent elements of the Schengen *acquis* between the first and third pillars). However, measures to further develop the Schengen *acquis* must be based on the appropriate legal basis or bases in the treaties (Article 5(1) and 2 of the Protocol).

According to this interpretation, Article 6 cannot serve as a legal basis for association agreements with Switzerland, and the procedure provided for therein may not be applied. However, the existence of Article 6, constituting an *ad hoc*, transitional legal basis, does not mean that there is no legal basis or bases in the treaties for the conclusion of similar agreements with another non-member country. It means only that the agreements to be concluded with Switzerland should be based on the normal and appropriate legal basis/bases in the treaties.

22. The purpose of the two agreements to be negotiated with Switzerland, the first of which covers relations with those Member States which are implementing all the Schengen *acquis*,

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while the second governs relations with the United Kingdom and Ireland (which are to implement part of the *acquis*), is to establish an organisational framework applicable both to those aspects of Schengen which are governed by the first pillar and those which fall within the scope of the third pillar. Both the EC Treaty and the EU Treaty should therefore provide the legal basis for these agreements.

However, in the Commission's view, a hybrid agreement, i.e. an agreement with two legal bases (Article 300 and other relevant articles of the EC Treaty; and Articles 24 and 38 of Title VI of the Treaty on European Union), is quite out of the question. This implies that two agreements, one based on the first pillar, the other on the third pillar, must be negotiated for each of the two agreements - with the thirteen Member States implementing the Schengen *acquis* in its entirety and with the two which implement it in part - to be concluded with a view to including Switzerland in the implementation and development of the Schengen *acquis*.³⁷

As it is essential for Switzerland to participate in the Schengen *acquis* in its entirety, measures must be taken to guarantee the simultaneous entry into force, application and denunciation of the four agreements to be concluded. It is important to rule out the possibility of a situation in which Switzerland, by rejecting - for instance - a measure developing an aspect of the Schengen *acquis* based on the Treaty establishing the European Community, would invalidate the agreements under which it is party to the Schengen *acquis* in the areas falling within the scope of the first pillar, while remaining party to those aspects of the Schengen *acquis* which are governed by the third pillar and covered by the two other association agreements.

23. Article 62(1), (2) and (3), Article 63(3) and Article 95 could provide appropriate legal bases as regards the first pillar and the areas governed by the Schengen *acquis*. These legal bases do not explicitly endow the Community with external powers. They can, however, confer such powers implicitly in instances where it is *necessary* to conclude international agreements in order to achieve the Community's objective - in this case, the establishment of an area without borders, as part of the area of freedom, security and justice.

This was necessary because Iceland and Norway were already involved in the implementation and development of the Schengen *acquis* prior to its incorporation into the Union, and because the existence of the Nordic Passport Union made cooperation with Iceland and Norway a *sine qua non* if the three Nordic member states were to be allowed to help further the Community's aim of establishing an area without internal borders.

These two factors do not apply to Switzerland.

However, the following reasoning could be applied to Switzerland, to get round the argument that extending the borderless area to include a further country or countries has constitutional implications.

In principle, the frontiers between Switzerland and the Member States adjoining it are subject to the arrangements for the monitoring and surveillance of Schengen's external borders. Switzerland, for its part, carries out checks under its national law on persons crossing those borders.

³⁷ It will thus be necessary to ascertain the scope of the agreements based on the first and third pillars respectively. This may be difficult in the case of the Schengen provisions on the SIS, which have not yet been assigned to the first or the third pillar respectively.

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These checks on both sides and, above all, the rigid application to the borders with Switzerland of the arrangements for the monitoring and surveillance of the external Schengen borders (in principle, these arrangements mean that all persons crossing the border, whether to enter or to leave, are subject to systematic checks) hinder the free movement of persons who are obliged to pass through Switzerland when travelling within the Community. These people include not only the millions of Union citizens and family members who travel through Switzerland each year (who, under the sectoral agreement, are entitled to enter Switzerland and have the right of residence there), but also third country nationals legally resident in a Schengen member country: in principle, the latter are entitled to travel within the Schengen zone without a visa, provided that they hold a residence permit issued by a member country. They may be subject to visa requirements on account of their nationality when passing through Switzerland.

The main purpose of the agreement to be concluded would thus be to make appropriate arrangements for the borders between the Schengen zone and Switzerland, bearing in mind the latter's geographical situation as an enclave within the borderless Schengen zone. The borders with Switzerland must be dealt with in such a way as to eliminate the obstacles described above to achieving the aim of freedom of movement for persons within the European Community, irrespective of nationality. In view of Switzerland's geographical position, this objective can be attained only by eliminating checks on persons at these borders, subject to conditions which will not jeopardise the development of the Union as an area of freedom, security and justice. The arrangements applicable to Schengen internal borders must be applied to the borders with Switzerland, and Switzerland must also monitor those of its external borders which it does not share with EU Member States (that is, Swiss airports used for flights to and from countries which are not part of the area without borders, and Switzerland's land borders with Liechtenstein), in accordance with the arrangements for the monitoring and surveillance of the Schengen external borders. Switzerland must also apply all the flanking measures belonging to the Schengen *acquis*.

In view of its objective, the legal basis for such an agreement could therefore be Article 62(2)³⁸ in conjunction with Article 300 of the Treaty establishing the European Community, as well as Articles 62(1), 63(3) and 95 of the Treaty establishing the European Community, which are the appropriate legal bases for the other aspects of the Schengen *acquis* which are to be implemented by Switzerland in the context of its association with the Schengen *acquis*.³⁹

³⁸ This analysis would be in line with the allocation decided by the Council as regards Article 136 of the Schengen Convention:

Article 136(1) of the Schengen Convention states: "A Contracting Party which envisages conducting negotiations on border checks with a third State shall inform the other Contracting Parties thereof in good time". Article 136(2) states: "No Contracting Party shall conclude with one or more third States agreements simplifying or abolishing border checks without the prior agreement of the other Contracting Parties, subject to the right of the Member States of the European Communities to conclude such agreements jointly." This provision was incorporated into the framework of the European Union and assigned to the first pillar. In agreement with the Commission, the Council decided that Article 62(2) of the Treaty establishing the European Community (taking into account the protocol on external relations of the Member States with regard to the crossing of external borders, annexed to the Treaty establishing the European Community by the Treaty of Amsterdam) was the legal basis in the Treaties for Article 136 of the Schengen Convention, rather than Article 62(1) on internal borders.

³⁹ The choice of legal bases in Title IV of the Treaty establishing the European Community raises the issue of Denmark's participation: the association agreements with Iceland and Norway were concluded by the Council under Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, with Denmark's full participation. According to the Protocol on the position of

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However, it must be said that the arguments set out above do not establish as convincingly as in the case of Iceland and Norway the need for the Community to conclude such association agreements with Switzerland in order to be able to achieve its internal objective of establishing an area without internal borders.

24. Article 38 of the Treaty on European Union states: "Agreements referred to in Article 24 may cover matters falling under this Title." ["Provisions on Police and Judicial Cooperation in Criminal Matters"]. Article 24 of the Treaty establishing the European Community states: "When it is necessary to conclude an agreement with one or more States ... in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be agreed by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them."

The provisions of this Article shall also apply to matters falling under Title VII."

In the present case, the conditions enabling the Council to conclude an agreement with a third country under Articles 24 and 38 reside in the need for Switzerland to implement the Schengen *acquis* in their entirety, including the measures on police and judicial cooperation on criminal matters, so as to enable the borders of the Schengen zone to be monitored properly in cooperation with Switzerland and to eliminate obstacles to the free movement of persons.

25. In view of the need to ensure the overall consistency of Switzerland's association with the implementation and development of the Schengen *acquis*, the Commission takes the view that negotiations should be conducted by the same negotiator throughout. The Commission should thus be given authorisation to conduct negotiations, in close cooperation with the Presidency, again with a view to Switzerland's association with the implementation and development of those aspects of the Schengen *acquis* **which fall under the third pillar**. For one thing, the negotiations do not relate to the substance of the areas falling under Title VI of the Treaty on European Union, and for another, their purpose is to establish a single organisational framework which will also apply to areas covered by the EC Treaty: moreover, the sole purpose of the negotiations is to reproduce the wording of an existing agreement.

It should also be recalled here that the Commission is responsible for negotiating all the other agreements with Switzerland which are envisaged. Likewise, the Commission is responsible for negotiating the agreement associating Switzerland with the implementation and development of the Schengen *acquis*, it will therefore be in a position to ensure that the negotiations as a whole are consistent.

Denmark, Denmark does not take part in adoption by the Council of proposed measures falling within the scope of Title IV of the Treaty establishing the European Community, nor is it bound by the provisions of an international agreement concluded by the Community pursuant to Title IV of the Treaty establishing the European Community (Article 2).

As the agreements envisaged should apply to Denmark as well, which is part of the area without borders, a mechanism allowing such participation and establishing rights between Denmark and Switzerland should be established. To this end, the association agreements to be concluded with Switzerland could include an article enabling Denmark to accede to the agreements and stating that if Denmark agreed to participate, this would create rights and obligations between Denmark and Switzerland.

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26. The arguments set out above show that there are serious doubts as to the legality of concluding agreements with Switzerland with a view to associating that country with the implementation and development of the Schengen *acquis* on the basis of the model used for Iceland and Norway, under the existing Treaties. The only way of obtaining the requisite certainty as to the law is to submit the issue to the European Court of Justice for an opinion, in accordance with Article 300(6) of the Treaty establishing the European Community. In this eventuality, the Council should join the Commission in requesting such an opinion, given that similar doubts have been expressed in its instances and this demarche also suggested.

27. On the basis of the above, the Commission recommends that the Council of the European Union

- authorise the Commission - where those aspects of the Schengen *acquis* covered by the EC Treaty are concerned - and the Commission in close cooperation with the Presidency - where those aspects of the Schengen *acquis* governed by the EU Treaty are concerned - to negotiate the adoption between the European Community and the Council, Iceland and Norway, on the one hand, and Switzerland, on the other, agreements associating the latter with the implementation and development of the Schengen *acquis*;
- appoint a special committee composed of representatives of the Member States to assist the Commission and the Presidency;
- call on Iceland and Norway, in accordance with the association agreements of 18 May and 30 June 1999, to take part in negotiations with Switzerland;
- adopt the negotiating brief in the annex.

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ANNEX

Instructions for negotiations for the adoption of an agreement between the Community, the Council, Iceland and Norway, on the one hand, and Switzerland, on the other, to associate the parties with the implementation of the Schengen *acquis* and its further development

Substance of the Schengen *acquis*

Switzerland must adopt the Schengen *acquis* in its entirety; no exemptions or derogations are permissible.

Organisational framework with a view to enabling Switzerland to be associated with the implementation and development of the Schengen *acquis*

Switzerland must adopt in its entirety the organisational framework established by the two association agreements with Iceland and Norway, subject to the following provisos:

- The provisions on Switzerland's acceptance of a measure to develop the Schengen *acquis* (Article (2)(b) and (c) of the agreement of 18 May 1999) must be adapted to its constitutional requirements.
- the provisions (Article 12(1) of the agreement of 18 May 1999) must establish Switzerland's annual contribution.

Denmark's participation in the association agreements with Switzerland in the areas governed by Title IV of the Treaty establishing the European Community

The association agreements must include a provision establishing a mechanism whereby Denmark can be party to the agreements insofar as they relate to areas falling within the remit of Title IV of the Treaty establishing the European Community.

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Recommendation for a
COUNCIL DECISION

Authorising the Commission to open negotiations for the conclusion of an agreement between the Community, Iceland and Norway on the one hand, and the Swiss Confederation on the other, concerning the criteria and mechanisms for establishing the State responsible for examining requests for asylum lodged in a Member State, Iceland, Norway or Switzerland

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EXPLANATORY MEMORANDUM

I. Introduction

- 1.** Within the framework of the second package of sectoral agreements to be concluded between the European Community and Switzerland, the latter has made it known that it wishes to be associated with implementation of the *acquis* of the Community and the Member States concerning the criteria and mechanisms for establishing the State responsible for examining requests for asylum (hereinafter referred to as "the Dublin *acquis*"), in the same way as Iceland and Norway.¹

The Commission is submitting this recommendation for a Council Decision in response *inter alia* to the request made by the Coreper of 27 February 2002.

- 2.** It should be stressed that Switzerland wished to be associated with "the Schengen and Dublin *acquis*" in the same way as Iceland and Norway. The Dublin *acquis* is not, strictly speaking, part of the Schengen *acquis*, although it is closely linked to the smooth operation of an area without borders. This is why Article 7 of the Agreement of 18 May 1999 between the Council and Iceland and Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*² stipulates that the contracting parties agree that an appropriate arrangement must be made regarding the criteria and mechanisms establishing the State responsible for examining a request for asylum lodged in a Member State, Iceland or Norway.

The indissoluble conceptual and operational links between Schengen and Dublin³ were also reflected in the simultaneous implementation: Article 7 of the Agreement associating Iceland and Norway with the implementation and development of the Schengen *acquis* stipulates that the arrangement concerning the Dublin *acquis* must be in place by the date on which the provisions of the Schengen *acquis* enter into force for Iceland and Norway. The Schengen *acquis* was implemented by Iceland and Norway as of 25 March 2001:⁴ the agreement

¹ Council Decision 2001/258/EC of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, OJ L 93, 3.4.2001, p. 38.

² Council Decision No 1999/439/EC of 17 May 1999 on the conclusion of that Agreement, OJ L 176, 10.7.1999, p. 35.

³ These links are confirmed by Article 61 of the Treaty establishing the European Community, which states: "In order to establish progressively an area of freedom, security and justice, the Council shall adopt [...] measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to [...] asylum [...] in accordance with the provisions of Article [...] 63(1)(a)", that is, measures concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum.

⁴ Cf. Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway.

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with Iceland and Norway concerning the Dublin *acquis* entered into force on 1 April 2001.⁵

The above demonstrates the need to establish a firm, indissoluble link between the implementation of the agreement associating Switzerland with the implementation and development of the Schengen *acquis* and that of the agreement concerning the Dublin *acquis*, although the Schengen *acquis* and the Dublin *acquis* are covered by different draft texts authorising negotiations, for reasons to do mainly with the different legal bases underlying the agreements to be concluded on the two issues and the different negotiation procedures.

3. A preliminary analysis of the agreement with Iceland and Norway concerning the Dublin *acquis* will enable parameters to be determined for the negotiation of a similar agreement with Switzerland.

II. The Agreement of 19 January 2001 between the European Community, Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State, Iceland or Norway

4. In accordance with Article 7 of the Agreement between the Council and Iceland and Norway on the latter's association with the implementation, application and development of the Schengen *acquis*, an Agreement was signed on 19 January 2001 by the European Community, Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway.⁶

This Agreement is primarily an **institutional agreement**. The substance of the Dublin *acquis* of the European Community and the Member States has not been (re)negotiated with Iceland and Norway, so the agreement does not include any amendments or exemptions of substance.

5. The Agreement of 19 January 2001 begins by defining its material scope (see Article 1 and the Annex to the Agreement):
 - the Dublin Convention of 15 June 1990,⁷ except Articles 16 to 22, which are of an institutional nature and which, in particular, set up an executive committee (Article 18);

⁵ OJ L 93, 3.4.2001, p. 40.

⁶ Cf. Footnote 1.

⁷ OJ C 254, 19.8.1997, p.1.

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- decisions taken by the executive committee setting out arrangements for the implementation of the Dublin Convention (decisions 1/97 of 9 September 1997 and 1/98 of 30 June 1998);
- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention;⁸
- measures which represent a development of the Dublin/Eurodac *acquis* (see Articles 2(1) and 3(4)). The following are or will fall within this scope, provided that the procedures established under the agreement for this purpose have been respected: the executive committee's decision 1/2000 of 31 October 2000, Council Regulation No 407/2002 of 28 February 2002 laying down certain rules to implement the 'Eurodac' Regulation⁹, and, after its adoption by the Council, the "Dublin II" Regulation, which will bring the Dublin Convention within the Community's remit.^{10 11}

The instruments referred to above apply to relations between the Member States and Iceland and Norway, and between the two latter states (see Article 1(1) and (2) of the agreement).

6. The **institutional aspect** of the agreement of 19 January 2001 closely resembles that of the agreement of 18 May 1999 associating Iceland and Norway with the implementation and development of the Schengen *acquis*,¹² although they are not identical.

- A Joint Committee is established which enables Iceland and Norway to take part in discussions on the implementation of the Dublin/Eurodac *acquis* and proposals for measures to develop this *acquis* (see Articles 2 and 3). These measures are adopted, as appropriate, by the executive committee referred to in Article 18 of the Dublin Convention or by the Council.

The Joint Committee meets at the appropriate level (working party, senior officials (Coreper) or Ministers), but there is an important difference between the "Dublin Joint Committee" and the "Schengen Mixed Committee"; the latter comprises representatives of the Member States, the Commission and Iceland and Norway, whilst the "Dublin Joint Committee", owing to the fact that the Dublin Convention was concluded by the Community, is made up of

⁸ OJ L 316, 15.12.2000, p. 1.

⁹ OJ L 62, 5.3.2002, p. 1.

¹⁰ COM(2001)final - CNS 2001/0182.

¹¹ It should be noted that Article 1(3) states that the provisions of Directive No 95/46/EC (OJ L 281, 23.11.1995, p. 31) on the protection of personal data, as they apply to the Member States in relation to the data processed for the purpose of the implementation and application of the provisions [falling within the agreement's material scope] will be implemented and applied *mutatis mutandis* by Iceland and Norway.

¹² See paragraph 13 of the draft text authorising negotiations on "Schengen".

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representatives of the Community (the Commission) and Iceland and Norway.¹³

- The Agreement establishes mechanisms and procedures which enable Iceland and Norway to accept new measures designed to develop the Dublin/Eurodac *acquis*, and a "guillotine" clause, according to which the agreement is suspended in the absence of a reply, or if a measure intended to develop the Dublin/Eurodac *acquis* is rejected. If the Joint Committee has not rescinded the suspension within ninety days, the agreement ceases to apply (Article 4(6) and (7)).
- The Agreement includes a safeguard clause which applies if a contracting party encounters serious difficulties. This clause is temporary; it applies only to the period for which the Dublin Convention remains in force (Article 5);
- The Agreement also includes a variety of provisions: setting up rules to apply and interpret the Dublin/Eurodac *acquis* in as uniform a way as possible: (Articles 6 and 7); on dispute settlement (Article 8); Iceland's and Norway's financial contribution (Article 9); cooperation between the Icelandic and Norwegian monitoring authorities as regards data protection with the supervisory body referred to in Article 286(2) of the Treaty establishing the European Community (Article 10); and on links with other international agreements (Article 11);
- Of the final provisions (territorial scope, Article 13; ratification, Article 14; the option for each contracting party to terminate the agreement, Article 15), particular attention should be drawn to Article 12, which states that the Kingdom of Denmark may request to participate in the agreement, and that the contracting parties, acting with Denmark's consent, shall establish the conditions governing such participation in a Protocol to the Agreement. The reason for this Article is that the Agreement referred to here was concluded by the Community on the basis of Article 63(1) of the Treaty establishing the European Community, and that Denmark is not bound by the Agreement, on account of the Protocol on the position of Denmark annexed to the Amsterdam Treaty.

7. The Agreement of 19 January 2001 was concluded by the Community on the basis of Article 63(1), in conjunction with Article 300 of the Treaty establishing the European Community, and was therefore negotiated by the Commission.

In its draft recommendation with a view to obtaining authorisation for negotiations, the Commission had proposed that an agreement be concluded by

¹³ According to Declaration No 2 annexed to the Agreement, the contracting parties underline the importance of close and active dialogue of all those involved in implementing the Dublin/Eurodac *acquis*, and the Commission will invite experts from the Member States to meetings of the Joint Committee in order to exchange views, in full compliance with Article 3(1) of the agreement, with Iceland and Norway on all matters covered by the Agreement.

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the Community, despite the fact that the main element of the Dublin/Eurodac *acquis* was the Dublin Convention, an instrument of public international law concluded by the Member States in 1990. On the one hand, part of the *acquis* to be covered by the agreement to be negotiated with Iceland and Norway (the Eurodac Regulation) had already been adopted within the framework of Title IV of the Treaty establishing the European Community; and on the other, the fact that the issues falling within the scope of the Dublin Convention had been incorporated into the Community sphere under the Amsterdam Treaty meant that the Dublin Convention was likely to be replaced in the medium term by a Community legal instrument.¹⁴

The Member States accepted this reasoning, because of the commitment enshrined in Article 7 of the agreement of 18 May 1999 associating Iceland and Norway with the implementation, application and development of the Schengen *acquis*, and also because of the need to have in place the agreement on the Dublin *acquis* by the time the Schengen *acquis* was implemented by Iceland and Norway.¹⁵

III. Switzerland and its part in the implementation, application and development of the Dublin/Eurodac *acquis*

(a) Objective and substance of the agreement to be negotiated

8. Analysis of the Agreement between the Community and Iceland and Norway on the Dublin/Eurodac *acquis* leads to the definition of a number of parameters which, in the Commission's view, will be necessary if a similar agreement is concluded with Switzerland:

8.1 Switzerland will have to accept the entire Dublin/Eurodac *acquis*, without any renegotiation, amendment or derogation from that *acquis*; negotiations with Switzerland must not relate to the substance of the various components of the Dublin/Eurodac *acquis* (that is, all the measures falling within the scope of the Agreement with Iceland and Norway);

8.2 The negotiations with Switzerland will therefore relate only to the organisational framework to be established so as to allow the country to participate in the implementation, application and development of the Dublin/Eurodac *acquis*;

On this point, the Commission takes the view that its reasoning on the institutional framework to be established in order to associate Switzerland with

¹⁴ SEC(1999)1405 final, 14.9.1999.

¹⁵ See Council document No 8418/00, 11.5.2000, item A note for JHA Council meeting of 29 May 2000.

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the implementation, application and development of the Schengen *acquis* applies equally in this context.¹⁶ In brief, this reasoning runs as follows:

- A similar organisational framework - a joint committee - already exists for relations with Iceland and Norway;
- It is inconceivable that a different organisational framework should be established for relations with Switzerland,
- The Commission therefore takes the view that participation should take the form of incorporation of Switzerland in the joint committee set up for the participation of Iceland and Norway in the Dublin/Eurodac *acquis*.

The organisational framework of the joint committee must not, therefore, be renegotiated with Switzerland, as it should operate in the same way with the three countries concerned. In principle, Switzerland must therefore accept all the provisions of the Agreement of 19 January 2001 with Iceland and Norway. Only the following articles, which include specific provisions on Iceland and Norway, will require negotiation with a view to inserting similar provisions pertaining specifically to Switzerland: Article 4(3) and (4): the procedure for accepting a new measure, depending on national constitutional requirements; Article 9(1): the annual financial contribution of each third country. To ensure that Switzerland pays towards for the initial development of Eurodac's central unit, provision must also be made for a contribution to the initial reference amount referred to in Article 9(1) of the Agreement of 19 January 2001.

- 8.3** It is clear that the European Community plays a decisive and pivotal role on the question of whether Switzerland should participate in the implementation, application and development of the Dublin/Eurodac *acquis*. However, the Community is already bound by an agreement on the subject with Iceland and Norway. Since Switzerland's participation in the implementation, application and development of the Dublin/Eurodac *acquis* will also create rights and obligations between Switzerland and Iceland and Norway, the latter two countries must therefore be involved in negotiating the new agreement with Switzerland.

This should not, however, lead to renegotiation of the agreement concluded between the Community and Iceland and Norway.

(b) The legal base for the agreement to be concluded with Switzerland

- 9.** As things stand, the agreement to be concluded with Switzerland will still relate to the Dublin Convention, an instrument of public international law concluded by the Member States, which will remain in force. This makes the legal position a complex one.

¹⁶ Cf. paragraphs 15(5) and 15(6) of the draft recommendation with a view to obtaining authorisation for negotiations on "Schengen".

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However, the Commission believes that the reasoning it developed to justify the Community's conclusion of the agreement with Iceland and Norway concerning the Dublin/Eurodac *acquis* (see paragraph 7 above) applies in this case as well: indeed, all the more so because a proposal for the incorporation of the Dublin Convention in the Community framework has been presented and is currently under negotiation in the Council.¹⁷

IV. Conclusions

10. On the basis of the above, the Commission recommends that the Council of the European Union
- authorise the Commission to negotiate the adoption between the European Community and Iceland and Norway, on the one hand, and Switzerland, on the other, an agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State, Iceland, Norway or Switzerland;
 - appoint a special committee composed of the Member States to assist the Commission;
 - call on Iceland and Norway, in accordance with the Agreement of 19 January 2001, to take part in negotiations with Switzerland;
 - adopt the negotiating brief in the annex.

¹⁷ See paragraph 5 above.

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ANNEX

Brief for negotiations for the adoption of an agreement between the Community, Iceland and Norway, on the one hand, and the Swiss Confederation, on the other, concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State, Iceland, Norway or Switzerland

Substance of the Dublin/Eurodac *acquis*

Switzerland must adopt the Dublin/Eurodac *acquis* (including the forthcoming Dublin II Regulation) in its entirety; no exemptions or derogations are permissible.

Organisational framework with a view to enabling Switzerland to participate in the implementation, application and development of the Dublin/Eurodac *acquis*

Switzerland must adopt in its entirety the organisational framework established by the agreement of 19 January 2001 with Iceland and Norway, subject to the following provisos:

- The provisions on acceptance of a measure to develop the Dublin/Eurodac *acquis* (Article 4(3) and (4) of the Agreement of 19 January 2001) must be adapted to its constitutional requirements.
- the provisions (Article 9(1) of the agreement of 19 January 2001) must establish Switzerland's annual contribution and a contribution to the reference amount referred to in Article 9(1) of the Agreement of 19 January 2001.

The link between the Schengen and the Dublin *acquis*

The Agreement must include a provision linking its entry into force to the date of Switzerland's implementation of the Schengen *acquis*.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Recommendation for a

COUNCIL DECISION

authorising the Commission to open negotiations with the Swiss Confederation with a view to concluding a Free Trade Agreement on Services

(presented by the Commission)

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COMMISSION OF THE EUROPEAN COMMUNITIES



Directorate-General

Directorate

Directorate

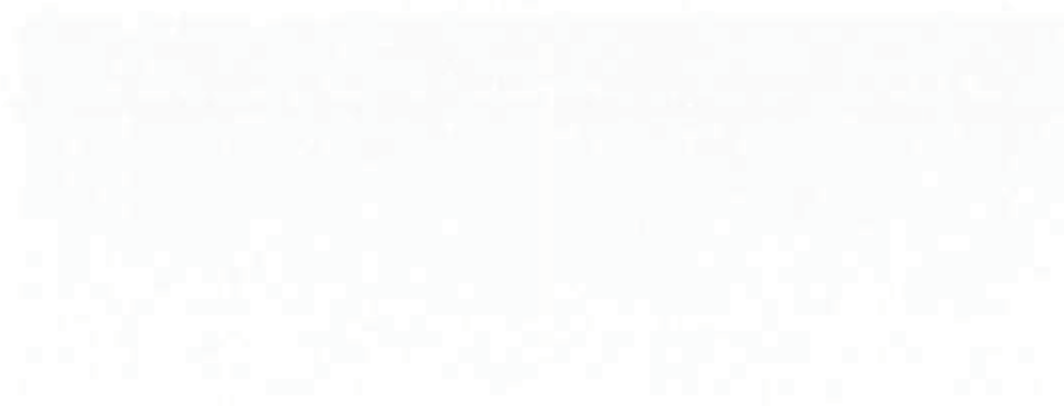
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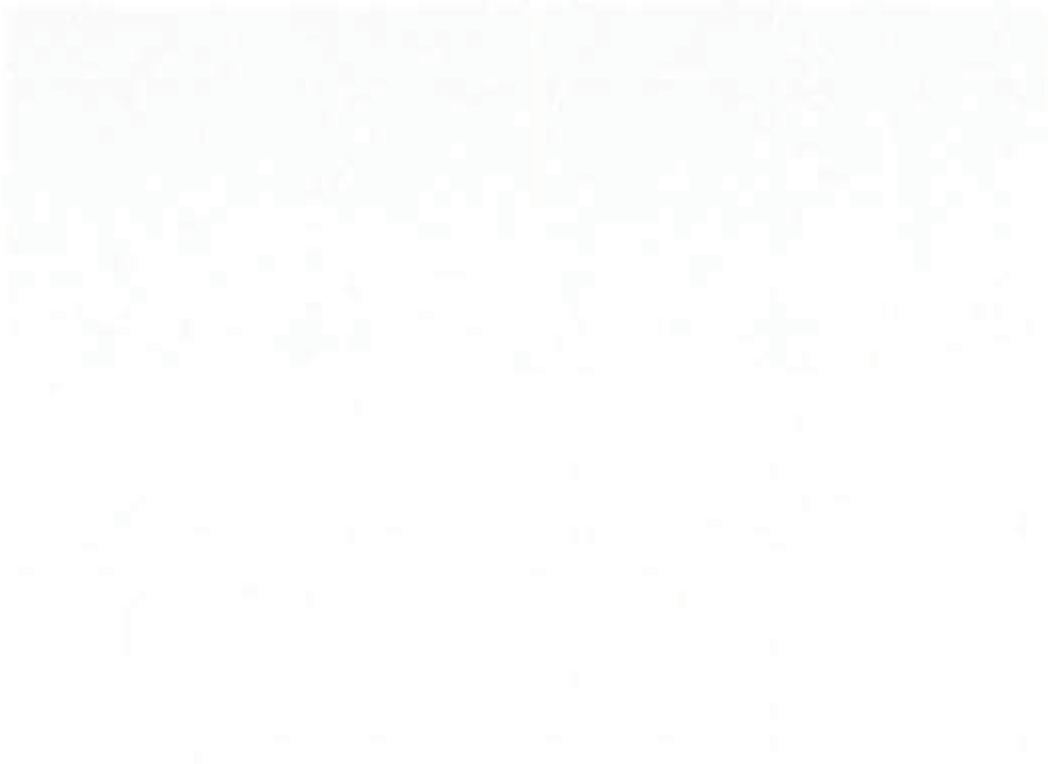
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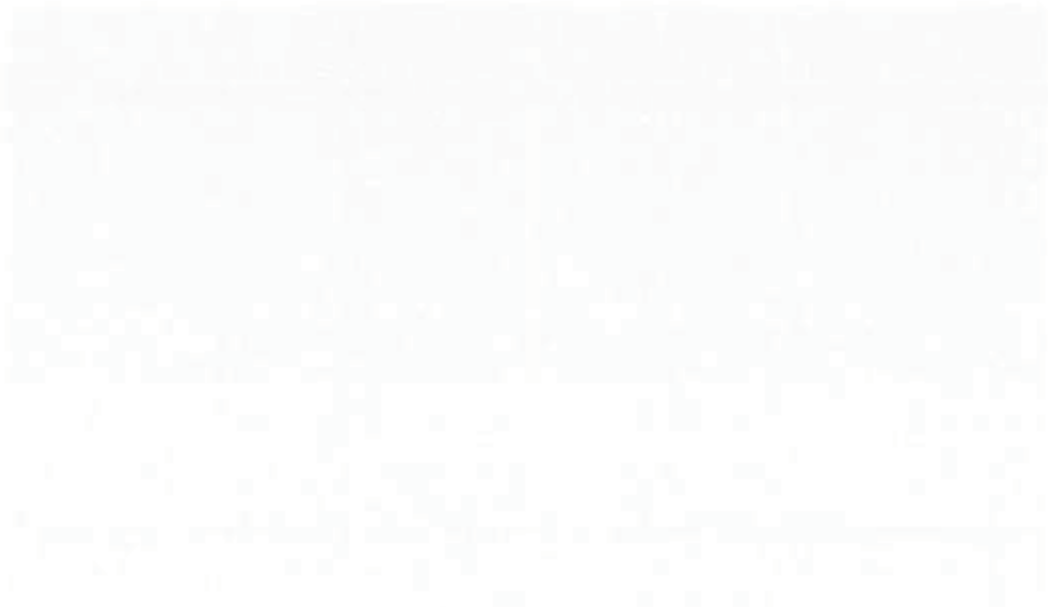
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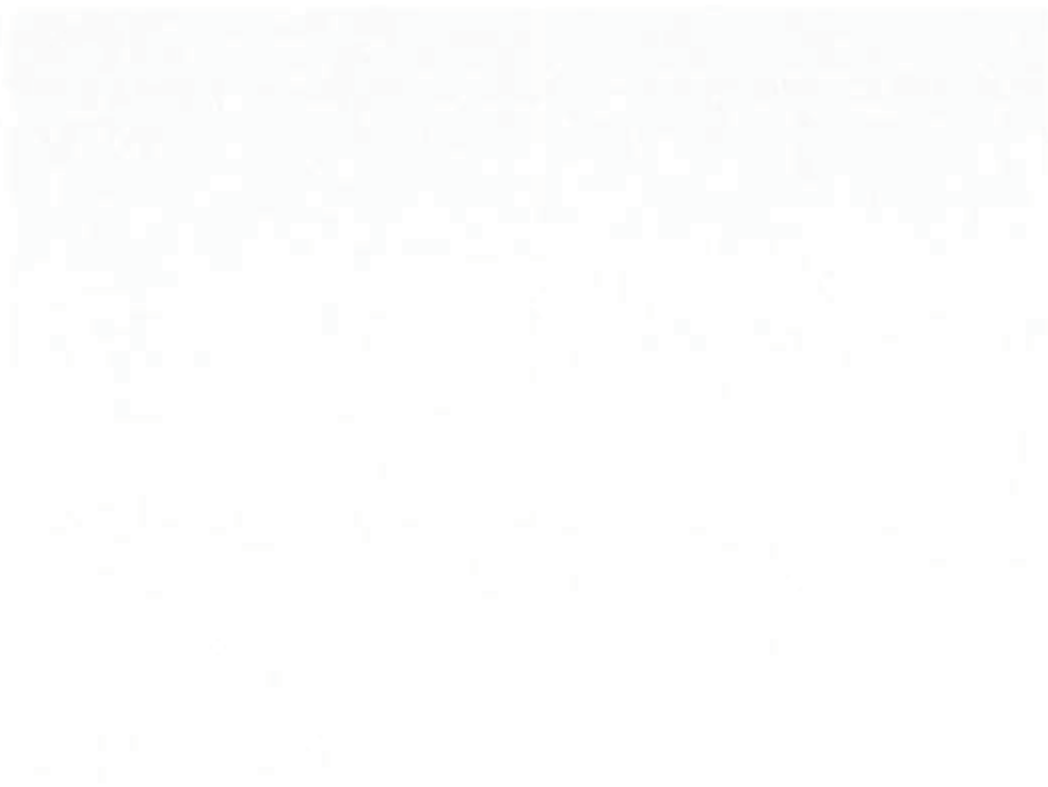
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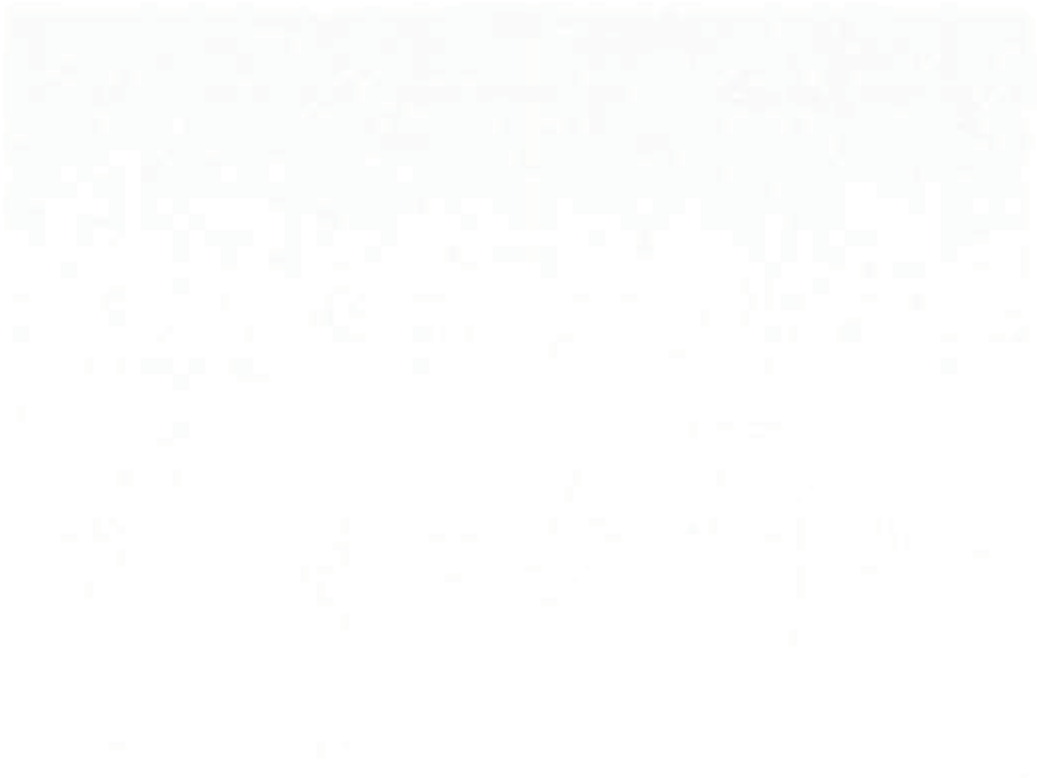
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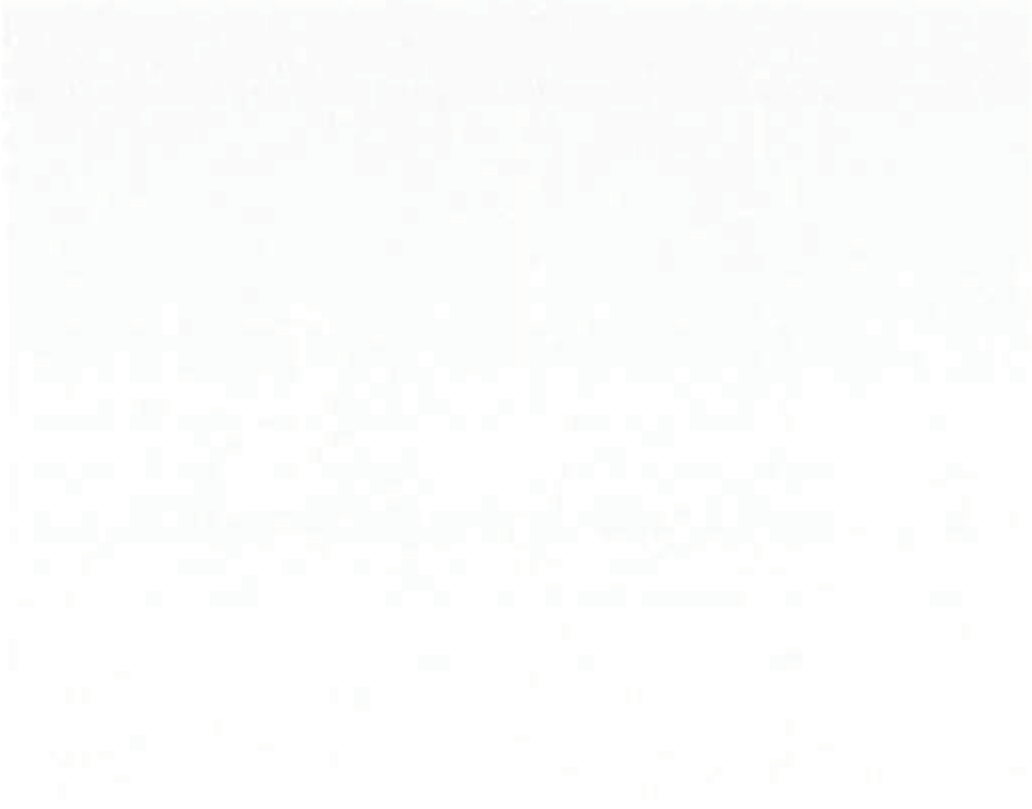
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COMMISSION OF THE EUROPEAN COMMUNITIES

Recommendation for a

COUNCIL DECISION

authorising the Commission to open negotiations with the Swiss Confederation with a view to concluding a bilateral Agreement in the Audiovisual field

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EXPLANATORY MEMORANDUM

Participation in MEDIA Plus and MEDIA Training Community programmes, as defined in the legal texts establishing them, can be open, inter alia to those EFTA countries which are members of the EEA Agreement as well as European third countries parties to the Convention of the Council of Europe on Transfrontier Television. The opening-up of the Programme to such European third countries is subject to prior examination as to the compatibility of their national legislation with the Community acquis, in both its internal and external dimensions.

Following the results of the 1992 referendum, rejecting Switzerland's participation in the EEA Agreement, Switzerland has shown continued interest to strengthen cooperation with the EU in the audio-visual sector and, in one of the joint declarations of 1999, both sides stated that they would broach this matter in future negotiation rounds.

During the preparation of the current round of negotiations, Switzerland requested that its participation in the MEDIA Plus and MEDIA Training programmes be included for consideration. The Commission services, during informal technical discussion, have explained to the Swiss side that, while Switzerland is party to the Council of Europe Convention on Transfrontier Television, their country's participation in these programmes would require the convergence of the Swiss audiovisual policy with the Community audio-visual policy both in terms of domestic legislation and positioning in international fora. Technical exchanges between Commission services and Swiss authorities have shown that such a convergence cannot be ascertained for the time being due to persisting discrepancies identified both in the internal and external dimension of Swiss audiovisual policy.

In the light of these circumstances, the Commission proposes to consider that negotiations for participation of Switzerland in these Community programmes should only be started once Switzerland has offered the necessary guarantees for the convergence of Swiss audiovisual policy with that of the Community, both on the internal and external level.

In light of the above considerations, the Commission recommends that the Council decide that:

- the Commission be authorised to open negotiations with the Swiss Confederation with a view to concluding a bilateral Agreement in the Audiovisual field;
- the Commission will conduct these negotiations in accordance with the negotiating directives attached hereto and in consultation with a special committee appointed by the Council.

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ANNEX

NEGOTIATING DIRECTIVES FOR A BILATERAL AGREEMENT IN THE AUDIO-VISUAL FIELD BETWEEN THE EUROPEAN COMMUNITY ON THE ONE PART, AND THE SWISS CONFEDERATION, ON THE OTHER PART

1. General Objective

Conclusion of a bilateral cooperation agreement with Switzerland in the audiovisual field. The agreement is principally designed to enable Switzerland to take part in the MEDIA Plus programme as established by Council Decision 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works, and in the MEDIA Training programme as established by Decision 2001/163/EC of the European Parliament and of the Council of 19 January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry.

2. Start of the negotiations

In line with the rules laid down in the decisions establishing the MEDIA Plus and MEDIA Training programmes, the start of negotiations with Switzerland will be subject to it providing the necessary guarantees concerning the convergence of Switzerland's audiovisual policy with Community audiovisual policy, both internally and externally. These guarantees specifically concern the Swiss regulatory framework applicable to broadcasting activities and the position adopted by Switzerland during negotiations on services within the World Trade Organisation.

3. Content of the agreement

Apart from any undertakings which Switzerland may enter into pursuant to the preceding paragraph, the agreement should provide for:

- Switzerland's participation in the MEDIA Plus and MEDIA Training programmes;
- Switzerland's financial contribution to the budget of these programmes in accordance with two indicators linked to the audiovisual sector, namely national investment in film production and gross box office receipts.

Switzerland will have to accept Community rules concerning financial participation, including those governing controls by Community bodies.

4. Management of the agreement

The agreement will be managed by a joint committee, made up of representatives of the contracting parties. The agreement contains provisions on cooperation between the contracting parties that is required for its implementation, including exchanges of information and views on their respective audiovisual policies.

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5. Term of the agreement

The agreement will be concluded for a period which will expire at the end of the MEDIA Plus and MEDIA Training programmes (until 31 December 2005).

The agreement contains provisions on the procedure for its termination or renegotiation should these programmes be revised.

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