

RIGHTS OF POLISH CITIZENS ON THE BASIS OF SCHENGEN CONVENTION

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General remarks on Schengen Convention

The EC Treaty has always envisaged the possibility of a frontier-free Europe.¹ This was re-emphasised by the insertion by the Single European Act (SEA) of art. 14 which provides for “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. Progress on achieving an internal market in persons, by abolishing barriers existing at the frontiers of Member States, was slow, partly because of the sensitivity of the area and partly because Member States were not agreed on whether the internal market in persons should include third country nationals or be limited to EC nationals. The result was that certain Member States concluded an agreement outside the framework of EC/EU to achieve such an area.²

Schengen Convention is a very interesting international agreement due to its connections with European Community law and changeable catalogue of Polish citizens rights. Those rights are connected with fundamental community rights: free movement of persons and the right to reside freely as the base of the Union’s citizenship. In 1974 the leaders of Member States adopted the idea to establish passport union. In 1981 and 1984 the Council adopted two resolutions, which indicated the need of creation a special borders control points for Member States citizens. Unfortunately those acts were not binding. In 1984 Germany and France signed an understanding on the gradual abolition of checks at their common borders. In the same year States of Benelux sent a memorandum by which indicated the will to access to this document. On the 14th of June 1985 Benelux, Germany and France signed an agreement on the gradual abolition of checks at their common borders (known as Schengen agreement from the name of the town in Luxemburg where it was signed). The Schengen Convention was signed on the 19th June 1990 and came into effect in March 1995. Despite the fact that the initiative of signing those agreements came from the European Commission, they were international agreements in character binding only among those five States. Consequently it was interstate cooperation, outside the community law.³

The Schengen Convention abolished the checks at internal borders of the signatory States and created a single internal frontier, where checks for all the Schengen signatories were to be carried out in accordance with a common set of rules. Parallel, in the community law the discussion on the liberalisation of control on internal frontiers was continued. The Commission in White Book of 1985 paid an attention into the fact that one of the difficulties in the establishment of internal market is connected with borders control. In nineties there was a further development of free movement of persons. Between 1990 and 1996 new states entered agreements except Great Britain and Ireland. Norway and Island became Associated Members.

¹ Steiner J., Woods L., *Textbook on EC Law*, 7th ed., Blackstone Press Limited, 2000

² *Ibidem*

³ M. Zdanowicz, *Uprawnienia obywateli polskich wynikające z Konwencji z Schengen*, Opolnica 2004

A decisive meaning to legal character of those agreements is connected with a Protocol to Amsterdam Treaty which incorporated *acquis Schengen* to the European Union. The consequence of Schengen Protocol adoption was the incorporation of *acquis Schengen* to the first pillar (visas and migration politics) or third pillar (judicial cooperation in criminal matters). By the date of Amsterdam Treaty enforcement, *acquis Schengen* including decisions of Executive Committee adopted before this date, are directly applied to thirteen Member States. Poland and other Member States by the date of 1st May 2004 were obliged to implement *acquis Schengen*. A very important is also the fact that European Community Tribunal has jurisdiction over those politics. Tribunal does not have jurisdiction over measures and decisions concerning protection of public security.¹

The connection of community law with Schengen conventions are based on the initiative of European Commission. Because in 1985 most States were not able to cooperate fully in this matters only five of them decided to sign an agreement. *Acquis Schengen* became the part of community law after the adoption of Protocol to Amsterdam Treaty.

On 19 June 1990 the Convention Implementing the Schengen Agreement was signed. Its key points relate to measures designed to create, following the abolition of common borders checks, a common area of security and justice. Specifically it is concerned with:

- harmonising provisions relating to entry into and short stays in the Schengen area by non-EU citizens (uniform Schengen visa);
- asylum matters (determining in which Member State an application for asylum may be submitted);
- measures to combat cross-borders drugs-related crime;
- police cooperation;
- cooperation among Schengen states on judicial matters.²

Summing up, the most important points of the Convention implementing Schengen Agreement are as following:

- citizens of countries implementing the Schengen Agreement can cross the internal borders of the implementing countries at any point without checks;
- a visa with no territorial restrictions (visitor's or business visa allowing the holder to stay up to 90 days per six-month period, transit or airport visa) granted to third-country national by one implementing country entitles the holder, for the same purpose and for the duration of the visa's validity, to enter without border checks other implementing countries as well;
- any third country national with a residence permit valid in one implementing country may travel on a valid passport, without requiring a visa, for up to 90 days per six-month period to other implementing countries;
- harmonised visa policies of Schengen countries (common list of third countries whose nationals require visas);
- external border checks according to a common Schengen standard;
- access by all Schengen countries to the Schengen Information System (SIS) providing personal identity and other data throughout the Schengen area;
- close police and judicial cooperation;
- joint combat to drug-related crime;
- rules determining competence for asylum procedures (now largely replaced by similar provisions in the Dublin Convention of 15 June 1990).³

Rights of Polish citizens before EU accession

The rights of Polish citizens on the basis of Schengen convention are different and dependent on the relations between Poland and European Union. Generally we can divide them into three periods:

- the first one, in which Polish citizens were treated as aliens-third country nationals (it is a time between the convention came into effect and 30th April 2004)
- the second one, in which Polish citizens are not treated as aliens- third country nationals but convention is still not binding Poland (it is the time between 1st May 2004 and the whole period in which Poland will not apply *acquis Schengen*)
- the third one, in which Polish citizens will not be treated as aliens- third country nationals and Poland will apply *acquis Schengen* (according to Polish Government prognostics since 2006).

¹ Ibidem

² www.auswaertiges-amt.de

³ Ibidem

According to art. 1 of the agreement, alien is somebody who is not a citizen of any European Union Member State. This agreement provides the rules of entrance and conditions of travelling for aliens and third country nationals. They are allowed to enter the territory of the EU for a period of three months if he or she possesses:

- valid document or documents authorising to cross the border;
- visa if it is required;
- sufficient means of subsistence, both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted, or are in the position to acquire such means lawfully;
- the alien shall not be a person for whom an alert has been issued for the purpose of refusing entry;
- the alien shall not be considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties.¹

Polish citizens were free from the obligation of possessing a visa. If somebody does not provide such conditions he or she is refused to enter or is considered to be a threat to public order, national security, international relations and consequently is refused the entry to the territories of Contracting Parties. Exceptionally it is allowed to consider and resign from this rule derogating from the principle of humanitarian grounds, national interest or international obligations (art. 5). Personal data third country nationals who are refused to enter the territory of EU were included into SIS (art.96) which refers only to the third country nationals. The interdiction issued by the authority of one state meant the same interdiction in other Contracting-Parties of the agreement. It was an additional restriction for foreigners.

The refusal decision can be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose. Such a situation may arise in particular in the case of:

- an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of a last one year;
- an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, (...) or in respect of whom there is clear evidence of an intention to commit such offence in the territory of a Contracting Party (art. 96 § 2).

The decision on the refuse to enter can also be based on the fact that the alien has been subject to measures involving deportation, refusal to entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens (art. 96 § 3).

Third country nationals are controlled at the entrance in details (art. 6). If they legally entered the territory of one of Contracting Parties, they can freely move through the territory of all Contracting-Parties of the agreement. Despite this fact they are obliged to arrive in three days before the legal authorities of that Contracting-Party on the territory of which they currently passed. Such an obligation referred also to Polish citizens.

The third country national who does not fulfil those conditions should leave the territory of Contracting-Parties as quickly as possible. It is recommended only to third country nationals to control them aiming the protection the threat to national security and public interest and criminal investigations. The same like at the entering also at the moment of leaving the Member-States territory alien pass the border through the separate passage.

If the alien will not leave voluntarily or regarding the national security and public order it is recommended to leave immediately he or she can be, according to domestic law, expelled from the territory of this Contracting-Party of the agreement by which he or she was stopped. Execution agreement includes limitations only for citizens of those States which are not Member-States of the European Community.²

Summing up, until 30th April 2004 Polish citizens among other third country nationals (aliens) used to pass the borders through the separate passage, were controlled in details at the entering the territory, had an obligation to register on the territory of all Contracting-Parties where they stayed, they could be refused to enter the territory and their personal data could be included to SIS.

¹ Art. 5 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; Official Journal L 239, 22/09/2000 P. 0019-0062; www.europa.eu.int

² M. Zdanowicz, op. cit.

The rights of Polish citizens in the period from the 1st May 2004 to the end of the period in which Poland will not apply *acquis Schengen*

Rights of Polish citizens based on Schengen Convention became much different after the EU accession. Polish citizens will not be treated as aliens or third country nationals which is directly based on the definition of the alien included in art. 1 of the Convention implementing the Schengen Agreement. It is necessary to emphasise that Contracting-Parties of the agreement treat in a favourable way citizens of those Community States which are not Contracting-Parties to the Schengen agreement. This treatment refers to citizens of Great Britain and Ireland and after the 1st May 2004 also to new Member States. Under the accession treaty signed by new Member-States *acquis Schengen* will be applied when the Council, after the consultation with European Parliament will take appropriate decisions on its application. The Council will examine if according to Schengen procedures new Member-States fulfilled the minimum conditions to apply *acquis Schengen*. In the first years of membership Poland will not be bounded by Schengen conventions and Polish citizens will not be treated as aliens third country nationals. What are the consequences of this fact like ?

The first one and the most important is that – Polish border with EU Member-States (Germany, Czech Republic and Republic of Slovakia) is still external border. Polish people crossing this border will be still controlled but this control will not be detailed in character. The document allowing to pass the frontier is also, except the passport, an identity card. The crossing of the border takes place on a special passage for EU citizens. Additionally after 1st May 2004 personal data of Polish citizens were automatically cancelled from the SIS base.

There are also some changes in the rules on which Polish citizens stay in the territory of the Community States. Polish citizens have the right to move and reside freely on the basis of the Union's citizenship and free movement of persons. Concerning free movement of persons, previously it referred to Member States citizens – hired workers and people having their own establishment. Secondary legislation distended subjective scope of the freedom to the following categories of people:

- members of workers family, independently from the citizenship;
- students and their family members, also independently from the citizenship;
- retired and pensioners people and their family members; also independently from the citizenship.

The most extensive subjective scope of free movement of persons was designated in the Council's Directive of 28th Jun 1990 on the residence. Member-States admitted the right to reside to citizens of other Member-States who do not exercise that right on the basis of other provisions of community law under the following conditions:

1. they possess health insurance referring to all kinds of risks in residing country;
2. they possess sufficient means in order not to be encumbrance for the system of social help in the residing country during the period of staying. Those means should be at the high of social minimum.

This right applies, also independently from the citizenship, to spouses and ascendants and descendants staying under the keeping of the right's possessor or the right's possessor's spouse. This person receives a document of residence of European Community Member-State citizen. The right to reside on the basis of directive provisions, is binding as long as the person fulfils obligations imposed by art. 1.

The described regulations emphasize that subjective scope of free movement of persons was distended by secondary legislation. In primary legislation this referred only to hired workers and persons of their own establishment. Now, each citizen of a Member-State possessing health insurance and sufficient means to self-keeping can have the right to reside on the territory of Member-State. As for citizens of Member-States the limitations of free movement of persons are separately regulated. On the basis of art. 39 par. 3 of the TEC and art. 3 par. 2 of the Council's Directive 90/364/EEC Member-States can limit the freedom because of public order, public security or public health.

Detailed provisions of this domain can be found in the Council's Directive 64/221/EEC of 25th February 1964. This Directive refers to the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. It concerns the entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.¹ Regards of public order, public security or public health shall not be invoked to economic ends.

¹ Art. 2 of the Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Official Journal P. 056, 04/04/1964 P. 0850-0857; www.europa.eu.int

Eventually taken measures can be based only on personal conduct of the individuals concerned. Previous criminal sentences cannot be regarded as justifying taken actions. The expiry of documents validity on the basis of which this person entered the territory of residing State does not justify the expulsion from the territory. According to the ECJ jurisdiction prevention measures are forbidden and illegal possession of weapons is not the only sufficient reason for expulsion. The person who has been excluded once can enter the territory and apply the permission for residence.

In the second period the situation of Polish citizens looks much better: they cross external borders through a special passage for Union's citizens, they are not controlled in details, their personal data have been excluded from SIS base. The limitation of free movement of persons can take place only regarding public order, public security and public health.

Rights of Polish citizens in the period when Poland will apply *acquis Schengen*

As it was mentioned above, Poland will apply *acquis Schengen* after Council's decision evaluating if the conditions necessary to apply *acquis Schengen* have been fulfilled. Current situation is examined by European Integration Committee which adopts the report of the plan's realization. It is very difficult to determine a concrete date when Poland starts applying *acquis Schengen*. This fact consequently will cause further changes in Polish citizens rights. They will be positive. If Poland in the same time receives all acceptance decisions from the Council, crossing Polish borders with EU States will take place without any control.

Schengen Conventions regard primarily passage of the borders. We cannot forget that the rules of residence on the territory of other Member-States are connected with the free movement of persons and realization one of fundamental rights issued from Union's citizenship. In connection with this last statement, on the basis of art. 18 par. 2 TEC, the Council was authorised to adoption of provisions facilitating using the right of free movement and residence – enumerated as one of the Union's citizens rights. Using this delegation in 2001 Commission initiated the adoption of Directive complexly regulating entrance and residence of Union's citizens on the territory of Member-States. After changes to art. 18 par. 2 made by the Treaty of Nice, in 2003 Commission changed the project. The Directive of European Parliament and Council was adopted 29th April 2004. It abates all previous Directives concerning the right to reside and changes the Regulation 1612/68/EEC. Directive 2004/38/EC provides new institutions referring to the definitions of family members. This category has been extended to partners of partners matrimony under the condition that domestic legislation of Member-States registers such matrimones. It also introduces the right to permanent residence. Directive needs implementation by Member-States in two years from the enforcement which is the date of publication.¹

It is worth to emphasise that during the third period the situation of Polish citizens will be still better. They will not be controlled at the borders crossing with other EU Member-States of course under the condition that other new Member-States will also apply *acquis Schengen* in the same time.



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¹ Compare M. Zdanowicz, op. Cit

¹¹ Information available in: www.europa.eu.int/ Justice and Home Affairs Freedom Security and Justice

Lenkų piliečių teisės pagal Šengeno konvenciją

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Pagrindinės sąvokos: Šengeno konvencija, Europos Sąjungos plėtra, laisvas judėjimas.

SANTRAUKA

Laisvo darbuotojų judėjimo ir Europos be sienų idėja buvo įgyvendinta remiantis Vieningos Europos aktu. Pažanga siekiant laisvo asmenų judėjimo buvo palyginti lėta, nes Europos Sąjungos valstybės nenoriai atvėrė savo vidaus sienas trečiųjų valstybių piliečiams, tačiau jų atvėrimas buvo gyvybiškai būtinas siekiant sukurti vieną rinką. Todėl 1995 m. įsigaliojus Šengeno konvencijai buvo panaikinti patikrinimai tarp vidaus sienų ir sugriežtinta išorės sienų kontrolė.

Europos Komisijos iniciatyva Bendrijos teisė ir Šengeno konvencija buvo susietos priėmus papildomą Amsterdamo sutarties protokolą. Acquis Schengen tapus Bendrijos teisės dalimi, stojančioms į Europos Sąjungą šalims, taip pat ir Lenkijai, buvo numatyta pareiga įgyvendinti Šengeno nuostatas. Per acquis Schengen nuostatų įgyvendinimo prizmę būtų galima išvelgti tris Lenkijos ir Europos Sąjungos santykių laikotarpius kai: 1) Lenkijos piliečiai buvo laikomi užsieniečiais, t. y. trečiosios valstybės piliečiais; 2) Lenkijos piliečiai jau nebėra laikomi trečiosios valstybės piliečiais, bet Šengeno konvencijos nuostatos dar nėra privalomos Lenkijai; 3) Lenkijos piliečiai nebus laikomi užsieniečiais, t. y. trečiosios šalies piliečiais, ir Lenkija taikys acquis Schengen.

Nors įstojus į Europos Sąjungą Lenkijos piliečiai jau nebėra laikomi trečiųjų valstybių piliečiais, laisvai ir nekontroliuojamai kirsti senųjų Europos Sąjungos valstybių narių sienas jie galės tik tada, kai Lenkija pradės taikyti acquis Schengen.

