5.7.2023

NOTICE TO MEMBERS

Subject: Petition No 0004/2023 by Razvan Eugen Nicolescu (Romanian), on behalf of ‘Asociatia pentru Energie Curata si Combaterea Schimbarilor Climatice’, on Romania’s accession to the Schengen area

1. Summary of petition

The petitioner claims that Austria has violated Article 2 TEU and Article 4 TEU on sincere cooperation between EU Member States during the voting in the Council on 8 December 2022 and by presenting of false data on migratory routes. In view of the petitioner, arguments contained in Austria’s official position, which was published on 9 December 2022, do not concern issues related to the fulfilment of the conditions for Romania’s accession to the Schengen Area, but the fact that the Schengen area would not function properly and that after 24 February 2022 many Ukrainians would have settled in Austria. The petitioner also denounces that the vote in the Council regarding Romania’s accession to the Schengen Area did not take into account the European Commission’s report which concluded that Romania fulfils the conditions for the application of the Schengen acquis in its entirety and points out that the outcome of the consultation with the European Parliament was ignored. The petitioner recalls that with its resolution of 18 October 2022, the European Parliament expressed its favourable position regarding Romania’s acceptance in the Schengen area. In view of the petitioner, also Article 13(1) and (2) of the TEU concerning sincere cooperation between the institutions was violated by the Council and many other rights enshrined in the TFEU and the Charter of Fundamental Rights of the EU were affected. The petitioner asks the Committee of Petitions to declare that an abuse of rights has been committed and that such a vote in the Council cannot have legal effect. He asks the Committee of Petitions to recognise that there was a serious breach of the values set out in Article 2 of the TEU because Austria discriminated between Romanians and Croats given that Austria’s own arguments for the vote against Romania’s accession were also valid in the case of Croatia for whose entry into Schengen area Austria voted. Further the petitioner asks the Committee of Petitions to declare that Article 4(3) TEU has been infringed concerning Austria’s sincere cooperation with
Romania and the EU as a whole and to take the necessary institutional measures so that this situation does not create a precedent. Finally, the petitioner asks the Committee of Petitions to take all the necessary steps in order for the point regarding Romania’s accession to the Schengen Area to be put back on the Council’s voting agenda.

2. **Admissibility**

Declared admissible on 17 February 2023. Information requested from Commission under Rule 227(6).

3. **Commission reply**, received on 5 July 2023

As stated in the Commission Communication of 16 November 2022\(^1\), the Schengen area without internal border controls is among the most emblematic achievements of European integration and one of the most tangible manifestations of the European way of life, driving the economy and uniting Europeans across internal frontiers. The Schengen *acquis* is an integral part of the EU’s legal framework, with significant obligations and responsibilities, which every new Member State must accept in full as candidate for admission. Beyond meeting the requirements\(^2\) set out in the Treaty on European Union (TEU)\(^3\) and Treaty on the Functioning of the European Union (TFEU)\(^4\), full application of the Schengen *acquis* relies on unanimous approval from all other Member States applying the Schengen *acquis* in full. Nonetheless, as stated in the State of Schengen report of 16 May 2023\(^5\), it is both a legal expectation and a European promise that Member States acceding to the Union participate fully in the Schengen area once all the agreed conditions are verified and met.

The Commission regrets that the Council on 8 December 2022 did not reach unanimity on the decision on Romania’s and Bulgaria’s accession to the Schengen area. Both Romania and Bulgaria have constantly acted as essential actors for the continuous development of the Schengen *acquis* and have gone beyond what was necessary in agreeing to a new set of checks during the fact-finding missions of October and November 2022 to further confirm their readiness to join the Schengen area without internal border controls.

As communicated in the State of Schengen report of 13 June 2023, the Commission is working closely with the Swedish and the incoming Spanish Presidency to prepare for a decision to be taken by the Council to lift internal border controls as soon as possible this year. It is high time the EU honours its commitment to grant the two Member States full membership to the Schengen area, and further strengthen European unity in doing so.

The following sections provide additional explanations of the legal and procedural framework for the full application of the Schengen *acquis* to Romania and Bulgaria.

### 1. **Legal framework and procedure for the full application of the Schengen acquis**

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\(^1\) Communication from the Commission to the European Parliament and the Council of 16 November 2022 on Making Schengen stronger with the full participation of Bulgaria, Romania, and Croatia in the area without internal border controls, COM(2022) 636 final.


\(^3\) Consolidated version of the Treaty on European Union, OJ C 236, 7.8.2012.


\(^5\) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 May 2023 – State of Schengen report 2023, COM/2023/274 final.
Article 4(2) of the Act of Accession⁶ states that “those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that State”.

The verification of the necessary conditions by the Commission as well as the consultation of the European Parliament constitute the legal requirements for the Council to be able to put to a vote a Decision on the full application of the Schengen acquis by Romania.

The applicable Schengen rules concerning the verification of the necessary conditions for full application of all parts of the Schengen acquis are determined by the rules set out in the Act of Accession. The verification process started in 2009 and all relevant parts of the acquis were thoroughly assessed in line with the applicable procedures at the time⁷. The Council recognised the completion of the evaluation process of Romania in its Conclusions of 9 June 2011⁸. In addition, the draft Council Decision on the full application of the provisions of the Schengen acquis in Bulgaria and Romania received a positive opinion from the European Parliament on 8 June 2011⁹. Since then, the Council has not taken a decision to that effect.

To demonstrate the continued application of the latest developments of the Schengen acquis since the completion of the Schengen evaluation in 2011, Romania, as well as Bulgaria, invited, on a voluntarily basis, a team of experts under the coordination of the Commission to conduct a fact-finding mission, which took place between 9 and 14 October 2022. As a result, on 16 November 2022, the Commission issued the Communication “Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls”, which took note of the results of the fact-finding mission and its confirmation of Romania’s (as well as Bulgaria’s and Croatia’s) correct implementation of the Schengen acquis. At the same time, the Commission Communication clarified that the “full application of the Schengen acquis relies on unanimous approval from all other Member States applying the Schengen acquis in full”. The European Parliament reiterated its positive

⁶ Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, OJ L 157, 21.6.2005, p. 11.

⁷ At the time of the evaluation of Romania’s compliance with the Schengen acquis in 2011, the Council of the European Union was the institution in charge of the process. As of 2013, the European Commission is responsible for monitoring the implementation of the Schengen acquis through the Schengen evaluation and monitoring mechanism, as established by Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27, subsequently amended by Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013, ST/7609/2022/INIT, OJ L 160, 15.6.2022, p. 1.

⁸ Council conclusions on completion of the process of evaluation of the state of preparedness of Romania to implement all provisions of the Schengen acquis (Council Document 9166/11 of 9 June).

⁹ European Parliament legislative resolution of 8 June 2011 on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania (14142/2010 – C7-0369/2010 – 2010/0820(NLE)).
opinion on the accession of Romania (and Bulgaria) to the Schengen area – already expressed in the legislative resolution of 8 June 2011 – in its Resolution of 18 October 2022.10. The Czech Presidency of the Council put the issue of lifting controls at internal borders with Romania, Bulgaria and Croatia to a vote at the JHA Council on 8 December 2022. A positive decision was however taken only with regard to Croatia as Romania and Bulgaria did not receive the unanimous backing of the Council.

The Commission stands by its positive assessment of the compliance by Romania with all parts of the Schengen acquis. Nonetheless, the Act of Accession does not imply any automatism, in the sense that the Commission’s assessment of the fulfilment of the necessary conditions for full application of the Schengen acquis and a positive opinion of the European Parliament are followed, in a mechanical way, by a positive vote of the Council. In the Commission’s view, Article 4(2) of the Act of Accession determines the applicable procedure and the sequence of the actions, however not the grounds for the decision. Adopting a different approach would render the Council’s vote a formality, not the expression of the Member States’ (collective) interests in the exercise of its role in the decision-making and legislative process. In the Commission view, taking a different approach in this matter would undermine the institutional balance11 in the EU architecture.

2. Non-discrimination & freedom of movement

The rights granted by the Treaties as well as the respect of principle of non-discrimination do not imply an entitlement for a Member State to obtain a positive decision of the Council regarding the full application of the Schengen acquis. Controls at the borders between the Schengen area and Romania apply to all persons crossing that border, irrespective of their nationality. In this sense, the absence of a decision lifting controls at the Romanian internal borders affects all EU citizens, long-term residents and holders of Schengen visas who cross these borders, not only Romanian citizens.

The absence of a decision for full application of the Schengen acquis does not put into question the right of free movement of Union citizens, including, Romanian nationals, under Article 21 TFEU and Directive 2004/38/EC.12 While joining the area without controls at internal border will further facilitate the exercise of free movement of Romanian citizens, they already now can move and reside freely in the other Member States, subject to the general conditions set out in the EU.

3. Principle of sincere cooperation

The principle of sincere cooperation set out in Article 4 TEU requires Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union, or refrain from actions that would undermine the working of the Union”. In the context of Romania’s accession to the area without controls at internal borders, the obligation of sincere cooperation

10 European Parliament resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area (2022/2852(RSP)).
11 This principle requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (judgment of 2 September 2021, EPSU v Commission, C-928/19 P, EU:C:2021:656, paragraph 48).
does, however, not imply an obligation on a Member State to cast a positive vote in the Council. Similarly, Article 13(2) TEU establishes that “each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation”. As stated in Section 1 of this document, the procedure for the Council to put the accession of Romania to the Schengen area to a vote requires that the Commission first verifies that Romania has fulfilled all the necessary conditions and that the European Parliament was consulted. The Treaties, however, only contain the obligation to follow a certain procedure, but not to cast a positive vote once that procedure is completed.

4. Border carbon emissions
The Commission takes note of the KPMG report “The Unnecessary Burden” shared by the petitioner for petition 004/23, which estimates the CO2 emissions generated by road vehicles at the border in relation to the postponed accession of Romania and Bulgaria to the Schengen area. Nonetheless, it needs to be noted that the absence of a decision for the full application of the Schengen acquis and any emissions that might occur due to vehicles waiting at border crossing points would not put into question the application of the Union’s environmental policy, under Articles 191 and 192 TFEU.

Conclusion
While the discussions in the Council in December 2022 have not resulted in a positive decision for Romania and Bulgaria, they have triggered a discussion, at the highest political level, on the importance of having these two Member States fully participate in the Schengen area. Thus, the full application of the Schengen acquis in Bulgaria and Romania is strongly advocated for not only by the Commission, but also by the European Parliament, and it is a key priority for the current and future Presidencies of the Council of the European Union. Schengen enlargement remains a political priority for the Commission, and we will do the utmost, in close cooperation with the Presidency of the Council and with the European Parliament, to ensure that the Council takes the necessary steps for a decision as soon as possible this year on Romania and Bulgaria to become part of the Schengen area without internal border controls.

13 KPMG Romania, The Unnecessary Burden, March 2023, accessible here.