

Deputy PM visit to Council of Europe Summit May 2005

Briefing: Border Agency and UK ECJ challenges

UK OBJECTIVES

- To congratulate the Poles on being awarded the location of the European Border Agency, which was agreed at the JHA Council on 15 April 2005.
- To thank the PM for continuing Polish support for the UK on the Working Time Directive... (Passage omitted)
- To thank for agreeing to consider making a positive intervention to support us in our ECJ challenge to our exclusion from the Border Agency and Passports Regulations. We look forward to an update on whether the Poles plan to make that intervention.

LINES TO TAKE

1. Border Agency – General

- The UK will continue to participate in joint EU operations at the external borders and attend (but not vote at) Border Agency Management Board meetings. We remain committed to contributing to efforts to strengthen the EU external border and we want to see the Agency get off to a good start. We plan to second a UK official to the Agency.

2. ECJ Challenges

- As you are aware, we have lodged two separate applications before the ECJ that challenge UK exclusion from the Border Agency and Biometrics in Passports Regulations.
- Our Ambassador has been in touch to discuss this case and has passed more detailed papers to your officials. Grateful to you for agreeing to consider this in detail and we look forward to receiving an update on whether you plan to intervene to support us. Officials would be happy to discuss this with you in more detail.
- (Passage omitted) We want to keep the challenge low key.

If needed:

- We believe that we can participate in both of these measures and do not think it sensible that we are excluded. Have therefore asked the ECJ to clarify whether we can, legally, take part. This challenge will not affect Member States ability to implement either measure and will not damage the Schengen acquis itself.

- A successful challenge will allow us to participate in these two Regulations. This will strengthen our ability to work with you to combat illegal immigration, disrupt organised crime groups that target the EU and prevent and detect a terrorist attack.

Handling

Poland has expressed sympathy for our exclusion from the Borders Agency and Biometrics in Passports Regulations. The Ambassador at our Embassy in Warsaw has met with the Polish Deputy Interior Minister, Pawel Dakowski, to lobby for Polish support in our challenges and the Poles are considering this. This meeting is a useful opportunity to discreetly follow up on previous discussions, to see if Poland has made a final decision.

Background

1. An application challenging our exclusion from participating in the EU Regulation establishing a European Borders Agency was lodged with the ECJ on 14 February 2005. The Border Agency will co-ordinate Member States' joint activities at the EU external borders. It will have a role in risk analysis, training of border guards, and new technology. Much of this work already takes place on an ad hoc basis, and the UK participates without question.
2. The UK's formal notification of its intention to participate in the Borders Agency and Biometrics in Passports Regulations were rejected. Our exclusion has been based on the grounds that these measures build upon a part of the Schengen acquis in which we do not participate. We dispute our exclusion and believe that we have a right under the treaty to participate.
3. Consequently, the UK has lodged two separate applications with the ECJ challenging its exclusion from these Regulations. Given that the legal arguments are the same in both cases, we have asked that the ECJ consider them both together.
4. There is now an opportunity for Member States to intervene in these cases. Notification of an intention to intervene in the Border Agency case must be made by 24th May. We do not yet know the deadline for notifying an intention to intervene in the Passports case.
5. There is a risk that Member States may decide to intervene against us... (Passage omitted).
6. UK participation in Schengen measures is a sensitive subject. We do not take part in the immigration and border related elements of Schengen, but have used our Protocols to participate ('opt-into') in some Title IV measures classified as 'Schengen building'. (Passage omitted).