

The following information is extracts from documents to Scottish Government Ministers between 2013-14 in preparation of a “Yes” vote at the referendum on 18 September 2014. It is provided as extracts because it comes from documents containing other information outwith the scope of your request.

Item 1:

1.1 SCHENGEN / COMMON TRAVEL AREA [\(Back to top\)](#)

The Scottish Government does not intend that an independent Scotland will join the Schengen Area. Protecting the integrity of the current social union with the remainder of the UK and Ireland requires an independent Scotland to remain within the Common Travel Area presently comprising the UK, the Republic of Ireland, the Channel Islands and the Isle of Man.

- **The EU has spent all of its 50 or so years of existence seeking to demolish borders across the EU.** It is hardly likely that the Commission will use the moment of Scotland’s independent membership of the EU to insist that a new internal border is created between Scotland and the rest of the Common Travel Area.
- There are a number of flexibilities in the Schengen protocol already to reflect regional practice, e.g. with Nordic Passport Union.
- The Common Travel Area (CTA) has existed for many decades and allows freedom of movement for nationals of the UK, the Republic of Ireland, the Isle of Man and the Channel Islands **and will continue in an independent Scotland.**

Item 2:

Schengen

A total of 26 countries, including 22 EU Member States and **four non-EU members (Iceland, Norway, Switzerland and Lichtenstein)** participate in the Schengen Area. Of the six EU Member States that do not form part of the Schengen Area, four (Bulgaria, Croatia, Cyprus and Romania) have signed up and are legally obliged to join the area, but do not yet fulfil the required conditions, while the other two, Ireland and the UK have chosen to opt-out. Protocol 19 of the Lisbon Treaty provides that the UK has “opted out” from the Schengen system (passport free travel zone).

CTA

The Common Travel Area (CTA) comprises Ireland, the UK, the Channel Islands and the Isle of Man. The CTA pre-dates the EU. It came into being in the 1920s and its aims include ensuring free movement for nationals of the UK and Ireland. Co-operation between the United Kingdom and the Republic of Ireland on measures to secure the external CTA border are underpinned by a Joint Statement published in December 2011¹. This commits both Governments in an unbinding agreement to continue the co-operation through the CTA and to align visa requirements, data sharing practice and the e-Borders/Irish Border Information System.

Legal issues

The current CTA between the UK and the Republic of Ireland is based on administrative agreements, rather than binding Treaty obligations to which an independent Scotland would

¹ <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/1/foi-archive-immigration/21197-mea-sec-trav/21197-mea-sec-trav?view=Binary>

succeed. These arrangements are reflected in the UK's immigration laws (and those of the Republic of Ireland) and could be replicated by an independent Scotland in due course. **An independent Scotland would be required to secure a continuing 'opt-out' of the Schengen arrangements as part of future EU membership negotiations.**

[Redacted S.38(i)(b)]

Item 3:

Q. Would Schengen be a matter of negotiation?

A. Scotland will remain part of the Common Travel Area which has existed between the UK and the Republic of Ireland, and the Isle of Man, Jersey and Guernsey, for many decades. This provides freedom of movement within the area for nationals of Ireland and Britain. The EU Treaties recognise that **membership of the Common Travel Area is not compatible with membership of the Schengen Area.**

Q. Can we assume that the Republic of Ireland and rUK will let Scotland remain in the Common Travel Area?

A. Erecting border controls with Scotland would be inconvenient and costly, for all common travel area partners, including Scotland and the rest of the UK, and not in the interests of any party. Our shared history, culture and borders make the common travel area of benefit to all the five unique territories within it.

Q. How would common travel area policy be agreed with the rest of the UK and with the EU?

A. Following a 'yes' vote in 2014, a process of negotiation will take place with the UK government on the transfer of powers to an independent Scottish Parliament. In parallel to negotiations with the UK Government, it would be our intention to negotiate the terms of an independent Scotland's continuing membership of the EU.

The EU has spent all of its 50 or so years of existence seeking to demolish borders across the EU. It is hardly likely that the Commission will use the moment of Scotland's independent membership of the EU to insist that a new internal border is created between Scotland and the rest of the CTA.

Item 4:

Q. And Schengen?

A. Scottish Ministers have outlined their aspiration to remain as part of the Common Travel Area (CTA) and outside Schengen, in an independent Scotland. There is no reason whatsoever to believe our EU partners would have any difficulty accepting this position. Once again the history of Schengen membership – which incidentally included non-EU countries – is one where countries apply for inclusion rather than are required to join. Once again candidates must meet certain pre-conditions for Schengen membership – pre-conditions that it is impossible for the EU to "force" upon them (including erecting border posts).

Following a 'yes' vote in 2014, a process of negotiation will take place with the UK government on the transfer of powers to an independent Scottish Parliament. In parallel to

negotiations with the UK government, it would be our intention to negotiate the terms of an independent Scotland's continuing membership of the EU. This has long been made clear by the Scottish Government in Choosing Scotland's Future in 2007, in Your Scotland, Your Voice in 2009 and in Your Scotland, Your Referendum in 2012. A satisfactory agreement will be reached because it is in the best interests of all the parties to do so.

MEMBERSHIP OF SCHENGEN/ COMMON TRAVEL AREA

Top Line

Scottish Ministers have outlined their intention that an independent Scotland will continue membership in the EU. Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the rest of the UK in the common travel area.

Facts and Figures

Following a 'yes' vote in 2014, a process of negotiation will take place with the UK government on the transfer of powers to an independent Scottish Parliament. In parallel to negotiations with the UK government, it would be our intention to negotiate the terms of an independent Scotland's continuing membership of the EU. This has long been made clear by the Scottish Government in Choosing Scotland's Future in 2007, in Your Scotland, Your Voice in 2009 and in Your Scotland, Your Referendum in 2012. A satisfactory agreement will be reached because it is in the best interests of all the parties to do so.

Schengen

A total of 26 countries, including all EU Member States (except Ireland and the UK) and **four non-EU members (Iceland, Norway, Switzerland and Lichtenstein)** have signed the Schengen agreement. Protocol 19 of the Lisbon Treaty provides that the UK has "opted out" from the Schengen system (passport free travel zone).

However, all countries cooperating in Schengen are not parties to the Schengen area. This is either because they do not wish to eliminate border controls or because they do not yet fulfil the required conditions for the application of the Schengen acquis. **Bulgaria, Cyprus and Romania are not yet fully-fledged members of the Schengen area.** Border controls between them and the Schengen area are maintained until the EU Council decides that the conditions for abolishing internal border controls have been met.

Pre-conditions for joining the Schengen area include capacity to;

- to take responsibility for controlling the external borders on behalf of the other Schengen States and for issuing uniform Schengen visas,
- to efficiently cooperate with law enforcement agencies in other Schengen States in order to maintain a high level of security once border controls between Schengen countries are abolished,
- apply the common set of Schengen rules (the so-called "Schengen acquis"), such as controls of land, sea and air borders (airports), issuing of visas, police cooperation and protection of personal data
- connect to and use the Schengen Information System (SIS.)²

²http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

Schengen timeline

- 1985: Schengen Agreement signed
- 1997: Amsterdam Treaty signed which absorbed Schengen Agreement and rules into EU law. UK and Ireland obtain opt-outs
- 1999: Amsterdam Treaty comes into force.

Nordic Countries

From 25 March 2001, the Schengen acquis fully applied to the five countries of the Nordic Passport Union (Denmark, Sweden, Norway, Finland, and Iceland) (except for the Faroe Islands, which remain outside the Schengen Area). Border checkpoints have been removed within the Schengen zone. However, there are some provisions in the Nordic Passport Union that give extra rights for Nordic citizens, not covered by Schengen, such as less paperwork if moving to a different Nordic country, and fewer requirements for naturalization of citizenship.

Greenland and the Faroe Islands are not members of the EU, so these parts of the Danish Kingdom are not subject to the regulations that apply between the Schengen nations. Denmark's instrument of accession to the Schengen convention (paragraph 5.1) provides that the Faroe Islands and Greenland are not subject to the regulations. However, the Schengen agreement (paragraph 5.2) provides for people travelling between Greenland and Faroe Islands and countries in the Schengen partnership, to not have their passport checked when entering another country.

CTA

The Common Travel Area (CTA) comprises Ireland, the United Kingdom, the Channel Islands and the Isle of Man. The CTA pre-dates the EU. It came into being in the 1920s and is based on the principle of free movement for nationals of the UK and Ireland. Co-operation between the United Kingdom and the Republic of Ireland on measures to secure the external CTA border are underpinned by a Joint Statement published in December 2011³. This commits both Governments in an unbinding agreement to continue the co-operation through the CTA and to align visa requirements, data sharing practice and the e-Borders/Irish Border Information System.

Operation Gull, a UK and Ireland initiative operates on both sides of the land border and aims to curb illegal activity and migration between Ireland and Great Britain through Northern Ireland. There are no border controls between the UK and the Isle of Man or the Channel Islands.

Previous supportive quotations

Professor Sir David Omand (evidence to Foreign Affairs Committee, 4 December 2012):
"...the only sensible thing would be for Scotland to have an opt-out of Schengen... It depends on the level of agreement that has been achieved between Scotland and the United Kingdom, so an agreed position can be presented to the EU. Without an opt-out from Schengen, you would have the nonsense of 20-mile tailbacks of trucks on the M74. You would have border posts and biometric checking along Hadrian's wall. It does not make any sense, so the two parts of the island really have to have a common border system."

³ <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-immigration/21197-mea-sec-trav/21197-mea-sec-trav?view=Binary>

Your Scotland Your Voice (SG, 2009): *“As a full member of the European Union, Scottish borders would remain open to European Union nationals, just as Scots are free to move throughout the European Union.”*

Professor Bernard Ryan (evidence to the Scottish Affairs Committee, 5 September 2012) *“I don’t see any real prospect of Scotland joining Schengen unless the United Kingdom does it, and I don’t see any real prospect of that. Schengen is a little bit off the table. I would foresee that Scotland would continue to be part of the common travel area but as a separate state.”*

Irish Position on Schengen

In 1995 the Irish Government said that “It would not be in the interest of Ireland to have a situation where the common travel area with Britain would be ended and Ireland would impose both exit and entry controls on persons travelling between here and Britain and, in addition, on the land frontier.” (Dail Eireann, Written Answers, <http://historical-debates.oireachtas.ie/D/0450/D.0450.199503140014.html>)

In 1999 they said that “For reason’s related to the United Kingdom’s position on freedom of movement of persons and to the common travel area between both countries, neither Ireland nor the United Kingdom participate in the Schengen process. (Dail Eireann, Written Answers, <http://historical-debates.oireachtas.ie/D/0501/D.0501.199903090246.html>)

Supporting information:

Legal issues:

The current CTA between the UK and the Republic of Ireland is based on administrative agreements, rather than binding Treaty obligations to which an independent Scotland would succeed. These arrangements are reflected in the UK's immigration laws (and those of the Republic of Ireland) and could be replicated by an independent Scotland in due course.

An independent Scotland would require to secure a continuing ‘opt-out’ of the Schengen arrangements as part of future EU membership negotiations.

Operational issues

It is likely that in order to continue being a member of the CTA, an independent Scotland would be asked by the rUK and Irish governments to ensure that visa and immigration controls and practice met certain shared standards. The detail of this would require negotiation, but it should be noted that the Republic of Ireland and the UK already operate different systems within the Common Travel Area and therefore we should not assume that full harmonisation will be required.

'Elephant Traps' and Line to take: (including any critical third party quotations and our counter argument)

The EU will make Scotland join Schengen

- Our arguments for being out of Schengen and remaining in the CTA are based on valid practical considerations of geography and working arrangements that predate the EC. These arrangements are robust and help protect the security of the Schengen area.

- There are a number of flexibilities in the Schengen protocol already to reflect regional practice, eg with Nordic Passport Union.

Can't assume that the Republic of Ireland and rUK will let Scotland remain in the Common Travel Area

- Erecting border controls with Scotland? This would be inconvenient and costly, for all CTA partners, including rUK.
- Our shared history, culture and borders make the CTA of benefit to all the five unique territories within it.

DFM Statement in Scottish Parliament – 13 December 2012

Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the rest of the UK in the common travel area. Both those positions are practical and justifiable and would, I am sure, be supported by all parties here in Scotland. Given the approach that has been taken in other circumstances, the evidence suggests that those would be understood by our European partners.

REASONS FOR NOT PROVIDING INFORMATION

Section 29(1)(a) – formulation or development of government policy

An exemption under section 29(1)(a) of FOISA (formulation or development of government policy) applies to some of the information requested because it relates to the formulation of the Scottish Government's policy on an independent Scotland.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Their candour in doing so will be affected by their assessment of whether the policy development work regarding an independent Scotland will be disclosed when it may still undermine or constrain the Government's view on that policy, which remains a matter of significant political relevance and controversy, and which is still under discussion and development.

Section 30(b)(i) – free and frank provision of advice

An exemption under section 30(b)(i) of FOISA (free and frank provision of advice) applies to some of the information requested. This exemption applies because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption recognises the need for officials to have a private space within which to provide free and frank advice to Ministers before the Scottish Government reaches a settled public view. Disclosing the content of free and frank advice on policy development for an independent Scotland will substantially inhibit the provision of such advice in the future, particularly because these discussions are still ongoing and decisions have not been taken, and these discussions relate to a sensitive issue such as Scotland's constitutional future, which remains a matter of significant political relevance and controversy.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing a private space within which officials can provide full and frank advice to Ministers, as part of the process of exploring and refining the Government's policy position on an independent Scotland, until the Government as a whole can adopt a policy that is sound and likely to be effective. This private thinking space is essential to enable all options to be properly considered, based on the best available advice, so that good policy decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the policy making process, which would not be in the public interest.

Section 30(c) (prejudice to effective conduct of public affairs)

An exemption under section 30(c) of FOISA (prejudice to effective conduct of public affairs) applies to some of the information requested. This exemption applies because providing this information would be likely to prejudice future negotiations between the Scottish Government and the UK Government and the EU, in the event that the people of Scotland were to vote in favour of independence in a future referendum. This in turn would be likely to impair the Government's ability to take forward its work on policy development for an independent Scotland. This would constitute substantial prejudice to the effective conduct of public affairs in terms of the exemption.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in enabling the Scottish Government to enter into potential future negotiations with the UK Government and the EU without the risk of these negotiations being prejudiced by information released while the Scottish Government's policy was still under development on a matter of significant political relevance and controversy.

Section 38(i)(b) - personal information

An exemption under section s.38(1)(b) of FOISA applies to some of the information you have requested because it is the personal data of a third party, i.e. names and contact details of individuals, and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.