

# Security in European Union External Border Law

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**AFSJ** Area of Freedom, Security and Justice

**CISA** Convention Implementing the Schengen Agreement

**ECHR** European Convention for the Protection of Human Rights and Fundamental Freedoms

**ECJ** European Court of Justice

**Eurodac** European database for storing the fingerprints of asylum applicants

**Europol** European Police Office

**Frontex** European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

**SIS** Schengen Information System

**SIS II** Second Generation Schengen Information System

**TEC** Treaty Establishing the European Community

**TEU** Treaty of the European Union

**TOA** Treaty of Amsterdam

**UNCaT** United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**VIS** Visa Information System

# 1 Introduction

Safeguarding the security of its citizens is one of the essential tasks of a state. Border control with its real and perceived security function is therefore of great material and symbolic importance. Developments in European Union law, notably the Schengen interpretation of the internal market as an area without internal frontiers, have introduced a logic that renders some form of European Union external border policy indispensable. As a result, this traditional *domaine réservé* is turning into a *domaine partagé*, a field of shared competence. Although international obligations, practical limitations and globalization processes diminish the effective meaning of autonomous state power, formal and fundamental shifts in competence such as these are still of great significance.<sup>1</sup>

The objective of this research is twofold: to analyze the legal expression of security considerations in the control of persons seeking to cross the European Union external border, and to clarify the division of competence with regard to this aspect of the border security regime. Central questions in this investigation are: what is or are the concepts of security that are employed in European Union external border law when it comes to the control of persons seeking to cross that border? What risks are considered and how are they dealt with in this law? At what level are the risks defined and asserted, and what actors are competent to make and judge these assessments?

Legal writing on migration in Europe has focused predominantly on the rights of individuals. Within this research however, questions of constitutional design and governance are central. State and Union Institutions take it as their responsibility to protect their citizens: to provide them with ‘security’. In order to do so, they must have or form an idea of the threats to be faced. These perceived threats do not necessarily correspond to objective risks, or to the knowledge of these. Yet, in the end, perceptions determine policy and law-making. Perceptions thus lead to legal facts, are based upon these facts and create a framework of reference, a view of the world that reflects and determines at least in part our dealing with it. Policy and rules in turn influence people’s lives in a very real way. It is therefore important to analyze the arguments and measures that are produced in the European political discourse on security and migration. Fundamental rights are involved insofar as they are part of the legal regime to be studied, and for the part that is taken to be relevant for the issue of security. Other constitutional aspects concern the division of competence over border control and the determining and maintenance of security in European societies.

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<sup>1</sup>The term ‘globalization’ has several definitions. In this context it refers to the proliferation of state-transcending interdependence relationships created by worldwide developments in areas such as international trade, ecology, crime and political alliances. For an account of effects of globalization processes on the role of the State in migration regulation, see (Sassen 1999).

## What are the external borders of the EU?

Intuitively perhaps the external borders of the European Union should be the borders of Member States with non-Member States. Legally speaking, this is not the case. The European Union legal regime on external borders applies to the former Schengen area. What later became known as ‘Schengen’, started in 1986 with the Single European Act, when the functioning of a European internal market was linked to the abolishment of internal border controls. Some Member States of the European Communities however felt that free movement rights should apply only to Member State nationals; as a consequence no EC-wide agreement could be reached on the lifting of controls on inter-Member State frontiers. Five Member States (Belgium, France, Germany, Luxembourg and the Netherlands) took the initiative to create their own free movement area and laid down their intents in an agreement that later became known as the Schengen Agreement.<sup>2</sup> In Article 17 of this Agreement, external borders are referred to as the place to which checks will be transferred. Mention is made in the same article of the need to harmonize laws, regulations and administrative provisions for this purpose, complemented by measures aimed at safeguarding internal security and preventing illegal immigration.

An Implementing Convention (Convention on the Implementation of the Schengen Agreement, further: CISA) replaced the Schengen Agreement in 1990, but did not come into force until 1995. In the mean time the European Union had been established through the Maastricht Treaty - Italy, Spain, Portugal and Greece had signed up to Schengen; subsequently, Austria, Denmark, Finland and Sweden joined in. Two non-EU Member States, viz. Iceland and Norway, joined the Schengen area on 19 December 1996. With the Treaty of Amsterdam (further: TOA) in 1999 the body of Schengen rules (the *acquis*) was incorporated into EU law.<sup>3</sup> From the 1st of January 2005 all title IV measures, except for those on legal migration, will be taken in accordance with article 251 TEC, i.e. on the basis of co-decision with the European Parliament and qualified majority voting in the Council.<sup>4</sup> The United Kingdom and Ireland, the only Member States of the European Union that never joined Schengen, opted out of the TOA provisions concerning former Schengen law, reserving an option to opt in on separate measures. They can do so only with permission from the other Member States. Denmark also reserved for itself a special position in that it can choose whether or not to apply EU law that builds upon the Schengen *acquis*.

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<sup>2</sup>Agreement between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen, 14 June 1985.

<sup>3</sup>EU competence in migration, asylum and border policy was laid down in Title IV TEC on visas, asylum, immigration and other policies related to free movement of persons; police and judicial cooperation, including the Schengen Information System, fall under Title VI TEU; separate Protocols annexed to the TEU and TEC deal with the integration of the Schengen *Acquis* into the European Union and with the special positions of the UK, Ireland and Denmark.

<sup>4</sup>Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, 2004/927/EC

Switzerland concluded several agreements with the European Union on the free movement of persons in 1999, and a decision on an association agreement to the model of the agreements with Norway and Iceland is pending.<sup>5</sup> The states that joined the Union in 2004 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia) accepted the full body of Schengen rules within the Union framework. However, the new Member States must first meet ‘the necessary conditions’, that is: exercise adequate external border control, before the Schengen acquis will be applicable. A decision to this end will be taken on the basis of unanimity by the Council.<sup>6</sup> Internal border controls with the new Member States will be lifted in 2007 at the earliest.<sup>7</sup>

### **What law and what security are we talking about?**

Since its beginnings in the Schengen agreements, EU external border law has primarily been associated with security: most of the Schengen rules are measures to guarantee the internal security of the Schengen Area. Borders are considered an appropriate place to protect the community from outside threats. In terms of movement of people this means checking, and, if necessary, keeping out people who are not part of the inside community. Standards for checking and admission procedures are part of migration law; integration and residence rights are also part of this legal discipline, but not our main concern here, because they deal with situations after the borders have been crossed. This is not to say that they can have no relevance for internal security. The recent debate in the Netherlands on expulsion of certain non-Dutch nationals on grounds of public order is an illustration that security considerations still influence aliens’ rights after they have been admitted (Ministerie van Justitie 2005). However, here I will refer to ‘migration law’ only for the part that concerns movement of people across borders.

Different regimes of migration law apply to different categories of people. EU citizens as a rule enjoy the right of free movement, subject to limitations set out in the Treaty and implementing legislation.<sup>8</sup> This includes right of entry to any Member State. Some citizens though, are more free than others. ‘Transitional measures’ apply to nationals of the ten newly acceded Member States;

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<sup>5</sup>Proposal for a Decision of the European Parliament and the Council establishing a simplified regime for the control of persons at the external borders based on the unilateral recognition by the Member States of certain residence permits issued by Switzerland and Liechtenstein for the purpose of transit through their territory, COM/2005/0381 final - COD 2005/0159

<sup>6</sup>Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, published in OJ L 236 of 23 September 2003.

<sup>7</sup>This is because evaluation of their external border control will take place in 2005 and 2006, and because the new generation Schengen Information System (SIS II), will be ready only by then. The current SIS lacks the capacity to serve 25 Member States.

<sup>8</sup>Article 18 TEC, Directive 2004/38/EC

only the Maltese and Cypriots enjoy free movement of workers.<sup>9</sup> This situation of inequality between EU citizens may last until 2011. Third country national family members of ‘free mover EU citizens’ enjoy free movement rights themselves, be it that they may be required to have entry visa.<sup>10</sup> Nationals from Iceland and Norway, and probably in the near future: Switzerland, take part in the Schengen system of free movement in virtue of their countries’ Association Agreements with the EU. Turkish nationals enjoy freedom of movement on the basis of their country’s Association agreement with the EU, but Turkey does not take part in the Schengen acquis and its follow-up, and first admission is still a matter of national discretion.<sup>11</sup> Third country nationals may or may not need a visa, depending on the country of their nationality. The Council draws up a ‘black list’ with countries whose nationals are required to obtain visa to enter the Union.<sup>12</sup> This list only concerns visa for admission for stays of up to three months, the ‘Schengen visa’. Admission for longer stays and for residence is still largely a matter of national discretion.<sup>13</sup> In virtue of article 63 (3) (a) TEC however, the EU is competent to set conditions of entry and standards on procedures for the issuance by Member States of long-term visas and residence permits. A final category of migrants for purposes of determining the applicable migration regime is that of asylum seekers. They derive rights from international obligations of protection that states undertook under the Geneva Convention and from the principle of *non-refoulement* following from Article 3 of the European Convention on Human Rights. The EU is competent to set minimum standards in asylum law on grounds of article 63 (1) and (2) TEC, and has expressed its intent to do so in the Hague Programme (see below). Having defined the concepts of ‘EU external borders’ and ‘border control law’ for the purposes of this article, we come to the most problematic concept: that of ‘security’. Some authors argue against what they term ‘securitization’ of the discourse on migration. It would be stigmatizing all migrants as threats, it would lead to an exceptionalist logic, feed a ‘governmentality of risk’ and easily

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<sup>9</sup>Article 24 of the Act of Accession with the related Annexes

<sup>10</sup>Article 5 of Directive 2004/58, OJ L 229 of 29 June 2004, which is to be implemented by June 2006; currently the provisions are spread over various instruments regulating free movement that this Directive is to replace: Regulation (EEC) No 1612/68 and Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

<sup>11</sup>Agreement establishing an Association between the European Economic Community and Turkey of 12 September 1963, OJ L 361 and Decision No 1/80 of the Association Council of 19 September 1980 On the development of the Association

<sup>12</sup>Article 62(2)(b)(i) TEC, Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

<sup>13</sup>Article 18 CISA: “Visas for stays exceeding three months shall be national visas issued by one of the Contracting Parties in accordance with its national law.[...]” With regard to the issuance of residence permits, Article 25 CISA poses an obligation on the parties to take SIS-alerts into account. Persons who are reported in the SIS may not be granted a residence permit but for “substantive reasons”, notably on humanitarian grounds or by reason of international commitments.” The issuing state must consult and inform the state that entered the alert. A consultation procedure is also obligatory in case a party wants to enter a person into the SIS who holds a valid residence permit of one of the Schengen States.

be misused to justify illiberal practices. Without downplaying this critique, the fact remains that border control is perceived and treated as a matter of security. Migration policy in the EU has been placed within the Area of Freedom, Security and Justice, and the Schengen measures were largely security measures. Most of EU border control law is justified on security grounds. I will take this linking of security and migration as a fact, not to endorse the reasoning a priori, but as a starting point for investigation.

Security is a contested concept, perhaps even ‘essentially contested’ (Gallie 1956), in that the criteria for its application will inevitably remain disputed. It is hardly surprising then, that in relation to border control and migration, its usage is also not unequivocal. Some would doubt if its users have any particular concept in mind at all. It often appears rather like an excuse to reserve broad discretionary powers by appealing to general feelings of fear and unease. Lawyers seem to have developed a professional allergy for the S-word because it is vague, contested, and prone to abuse. To me this appears unjustified. Law is *par excellence* a field with experience in dealing with vague, contested, value-laden concepts: ‘guilt’, ‘causation’, ‘justice’, ‘prudence’, to name but a few. I cannot think of a reason not to treat security as another of those challenging concepts in our legal system that is apt to debate and (re-)definition. At this point however, I will not attempt to write a conclusive lemma on security for application to EU external border law; rather, I will take the above described concept of EU border control law, and see what conceptions of security emerge from it, from the policy that underlies it, and the scholarly literature that comments on them. Before turning to the literature, I will first give an overview of recent developments in EU external border law.

## Developments in EU External Border Law

### The Hague Programme

The Hague Programme is the second five-year program fixing priorities in EU policy in the Area of Freedom, Security and Justice, agreed upon by the Council. It states that “Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole.”<sup>14</sup> Regarding border control, several actions are proposed. Controls need to be strengthened according to an ‘integrated border management system’. Teams should be formed from national experts to assist Member States upon request in guarding their borders. A new supervisory mechanism, including unannounced inspections, is to be set up alongside the existing Schengen evaluations. The evaluation of the External Border Agency should include the feasibility of a European system of border guards. Effectiveness and interoperability of information systems like the SIS II, VIS and Eurodac should be optimized. Biometrics will be integrated into

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<sup>14</sup>The Hague Programme: Ten priorities for the next five years - The Partnership for European renewal in the field of Freedom, Security and Justice (Communication from the Commission), COM(2005)184 final, par. 7 of the introduction

travel documents and minimum standards for national identity cards will be prepared.<sup>15</sup> In the long term, common visa offices should be established. A first step would be the setting up of common application centers. As of 1 January 2008, information between law enforcement agents should be exchanged based on the principle of availability. This comes down to the rule that where information is available in one Member State, it *must* be supplied to another Member State's authority upon request. There will be conditions for the request, but these are as yet unclear. Information should be retrievable "where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS."<sup>16</sup> The Council repeats its invitation for a Commission proposal on the use of passengers data for border and aviation security and other law enforcement purposes.<sup>17</sup> The Council (probably: the Commission) should set up a network of national terrorism and border control experts together with Europol and the External Border Agency. These experts could train and instruct third countries' authorities on request.

The Hague Programme has been worked out in an Action Plan by the Commission.<sup>18</sup> Among the actions foreseen in the field of border control - besides the ones already mentioned above - are the composition of a Handbook for Border Guards, after the Community Code on the rules governing the movement of persons across borders has been adopted, and a proposal on the executive powers conferred to Member States' officials operating at the external borders of another Member State.

### **External Borders Agency (Frontex)**

One of the most notable achievements so far in EU border management is the establishment of the External Border Agency 'Frontex'.<sup>19</sup> It has become operational from May 2005. Its tasks are: risk analysis (Article 4 of the Regulation), training border guards and national instructors (Article 5), follow-up to and dissemination of relevant research (Article 6), contributing to the "pooling" of technical equipment (Article 7), giving technical and operational assistance when needed (Article 8) and coordinating joint return operations (Article 9).

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<sup>15</sup>The EU does not have competence to set standards for national ID cards (art. 18 (3) TEC). This limiting provision would however not return in the Constitutional Treaty.

<sup>16</sup>COM(2005)184 final, par. 2.1, last paragraph

<sup>17</sup>COM(2005) 184 final, par. 2.2, referring to the Council Declaration on Combating terrorism adopted on 25 March 2004, doc. 7906/04, point 6.

<sup>18</sup>COM(2005) 184 final of 10-5-2005, Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years, The Partnership for European renewal in the field of Freedom, Security and Justice

<sup>19</sup>Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

## Community Code

Under the intergovernmental Schengen regime, a Common Manual was composed on the rules governing controls at the external borders of the Schengen area. Detailed rules with regard to the issuance of Schengen visas were laid down in the Common Consular Instructions.<sup>20</sup> With the Treaty of Amsterdam, both were integrated into the European Union framework. Their legal status however is unclear, as they do not take the form of regular EU legislation.

The Common Manual is both a source of law and a practical guide for border guards. A proposal for a Community Code on the rules governing the movement of persons across borders is to replace the Common Manual, as well as certain provisions of the Schengen Implementing Convention, two decisions from the Schengen Executive Commission, Regulation (EC) no. 790/2001 and Annex 7 to the Common Consular Instructions.<sup>21</sup> It will contain rules on (the abolishment of) internal and external border checks. Besides the Community Code, a practical Handbook for Border Guards will be developed. The Community Code will be the first title IV measure to be adopted according to the article 251 procedure. Through negotiation with Commission and Council in the first stage at Parliament level, an agreement was reached on the final text. At several points, Parliament managed to strengthen the position of individuals. The most important improvements are the inclusion of a right to appeal for every person refused entry and an article on the conduct of checks. Every refusal must be justified through precise reasons filled in on a standard form. Two other proposed amendments, one concerning the right to financial compensation for ill-founded refusals, and another to add the possibility for Member States to suspend the entry into force of refusal decisions, did not make it to the final text. The Council is expected to accept the Code with Parliaments amendments at first reading.<sup>22</sup>

## Databases

The Schengen Information System is a database in which Member States can file entries on persons wanted for arrest, persons to be subject to surveillance or specific checks, persons to be refused entry and on lost or stolen items.<sup>23</sup> A second generation of this database is needed first and foremost for practical reasons: the current system was designed to accommodate eighteen States. It cannot cope with the accession of ten new Member States and (partial) participation of the UK and Ireland. Its technology is outdated.<sup>24</sup> SIS II however

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<sup>20</sup>The Schengen Acquis was published in OJ L 239, 22 September 2000, the Common Manual in OJ C 313, 16-12-2002, the Common Consular Instructions in OJ C 310 of 19-12-2003.

<sup>21</sup>Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, COM(2004)391 final, article 34.

<sup>22</sup>A6-0188/2005 of 13 June 2005, EP: tabled legislative report, 1st reading or single reading and COD/2004/0127 : 23/06/2005, EP: legislative opinion, 1st reading or single reading.

<sup>23</sup>Article 92-101 CISA

<sup>24</sup>COM (2003) 771 final, Communication from the Commission to the Council and the European Parliament, Development of the Schengen Information System II and possible synergies with a future Visa Information System (VIS), p. 5

will not just be a more advanced system with increased capacity. In its design and regulation some substantial adjustments have been made compared to the first generation SIS. New features should include the possibility to link records, to insert biometric data and the flexibility to include new functions over time. SIS II is given a legal basis in the proposed Regulation 2005/0106 on the establishment, operation and use of the second generation Schengen information system (SIS II)<sup>25</sup>, together with Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism<sup>26</sup> and the proposed Council Decision on the establishment, operation and use of the second generation Schengen information system (SIS II)<sup>27</sup>. These parallel instruments are needed, because the SIS, as opposed to the rest of the Schengen measures, is based both in Title IV TEC (first pillar law) and Title VI TEU (third pillar law).

An entirely new database, for exchange of visa data, is to be operational at the same time the SIS II is ready for use. In this Visa Information System (VIS) data will be stored on visa applications for entry to the EU and the decisions upon them.<sup>28</sup> Not only will information on the applicant be stored, including photographs and fingerprints - companies or persons that invite the third country national or are liable for their costs of stay, will also be registered.<sup>29</sup> Competence for setting up the VIS is asserted on grounds of articles 62 (2)(b)(ii) and 66 TEC. Purposes of the VIS include prevention of threats to the internal security of any of the Member States<sup>30</sup> and facilitation of checks at external border checkpoints and within the territory of the Member States<sup>31</sup>. The many purposes that are given to the VIS make it hard to judge its overall added value, as was stressed by the Dutch Standing Committee of experts in international immigration, refugee and criminal law (Commissie Meijers 2005, p. 2). National law enforcement agencies and Europol are to have access to the VIS 'for purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences'.<sup>32</sup> The European Data Protection Supervisor has stressed that the VIS should not be turned into a law enforcement tool, as it is primarily a visa policy instrument.<sup>33</sup>

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<sup>25</sup>COM(2005) 236 final

<sup>26</sup>OJ L 162, 30-04-2004 p. 29-31

<sup>27</sup>COM(2005) 230 (final)

<sup>28</sup>Not all visa applications will need to be stored. Which visa applications need to be filed is defined in article 2 (1) of the proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, COM (2004) 835 (final).

<sup>29</sup>Article 6 of the proposal

<sup>30</sup>Article 1(2)(a) of the proposal

<sup>31</sup>Article 1(2)(d) of the proposal

<sup>32</sup>Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, COM (2005) 600 (final) of 24-11-2005

<sup>33</sup>Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the au-

The SIS II and VIS are supposed to create ‘functional synergies’ in that SIS and VIS users, if so authorized, can use data from both systems to identify the persons they are dealing with and check the validity of their documents.<sup>34</sup> The Commission has proposed creating a European criminal Automated Fingerprints Identification System (AFIS) and a European register for travel documents and identity cards.<sup>35</sup>

### **The Prüm Convention**

The Prüm Convention<sup>36</sup> builds on and supplements the CISA flanking measures on cooperation in dealing with cross-border crime, terrorism and illegal immigration. Similar to the first Schengen Agreements it was concluded by a small group of Member States wishing to make faster progress than would be possible within the European Union as a whole. The treaty is however intended to become part of Community law. A proposal to this end will be submitted after three years.<sup>37</sup> The measures for ‘closer cooperation’ include: sharing information from national dna, fingerprint and vehicle databases; coordinating the use of armed air marshals; adding ‘document advisers’ to the existing EU network of liaison officers, to train and advise Contracting Parties representation abroad, carriers and host country border officials in order to detect document abuse and prevent illegal immigration; joint deportation, joint patrols and other forms of ‘joint intervention’.

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thorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (COM (2005) 600 final) of 20 January 2006, retrieved from [http://www.edps.eu.int/legislation/Opinions\\_A/06-01-20\\_Opinion\\_access\\_to\\_VIS\\_EN.pdf](http://www.edps.eu.int/legislation/Opinions_A/06-01-20_Opinion_access_to_VIS_EN.pdf)

<sup>34</sup>Communication from the Commission to the Council and the European Parliament, Development of the Schengen Information System II and possible synergies with a future Visa Information System (VIS) of 11-12-2003, COM (2003) 771 final

<sup>35</sup>Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs of 24-11-2005, COM(2005) 597 final

<sup>36</sup>Vertrag zwischen dem Königreich Belgien, der Bundesrepublik Deutschland, dem Königreich Spanien, der Französischen Republik, dem Groherzogtum Luxemburg, dem Königreich der Niederlande und der Republik Österreich über die Vertiefung der grenzüberschreitenden Zusammenarbeit, insbesondere zur Bekämpfung des Terrorismus, der grenzüberschreitenden Kriminalität und der illegalen Migration of 27 May 2005. There is no authentic version in English, but a translation has been published on the internet by Statewatch. It is intended by the initiators to be linked to the initial Schengen Agreement and the Schengen Implementing Convention. That is why it became known unofficially as ‘Schengen III’.

<sup>37</sup>Article 1 (4) Prüm Convention

## 2 State of the Art

### 2.1 Linking Migration and Security

#### Conceptions of Security relating to Migration

It is not self-evident that the movement of people should be linked to security at all, or in what ways this should be done. In politics and public debate the linkage is often suggested, but hardly or only vaguely substantiated. Academic research does not provide satisfactory answers either. As Choucri (2002, p. 118) observes: “[...] the migration-security linkage remains a remarkably understudied domain of research”. She makes an attempt to fill the gap and proposes a ‘calculation’ of State Security from three components (Choucri 2002, p. 99). The first is Military Security, being the ability to ward off outside threats; the second, Regime Security, being “[...]the ability of government and its institutions to discharge formal responsibilities and also to protect itself from domestic disorder, revolt or dissension”; the third element of State Security is Structural Security, referring to the ability to “[...]protect the resilience of life-supporting properties, as well as prevailing sources of livelihood, from erosive pressures.”. This third element (Structural Security) is dependent upon Population (P), Resources (R) and Technological development (T) in the context of a given Environment (E). Migration is defined as “the movement of people across jurisdictions (both within and across sovereign states)” (Choucri 2002, p. 106). It might influence any of the above mentioned components of State Security.

Anderson and Bort write on the function of frontiers as limits of security communities (Anderson & Bort 2001, p. 22). In this context they describe the trend to treat migration as a security issue and the concurrent merging of internal and external security. Security is becoming an issue of multi-level governance, not the sole responsibility and sovereign domain of state authorities. The state however retains a monopoly in policing and criminal law, and in these aspects remains a security community. Although there are movements towards europeanization in these areas (e.g. Europol, Schengen), for the moment the state remains central (Anderson & Bort 2001, pp. 72-74).

For all the different conceptions of security that are employed, be it in relation to migration or otherwise, one element is recurrent: assertion of a risk of harm to some good, i.e. a threat. Legal measures are constructed as protection against such threats. From this viewpoint, Guild and Van Selm (2005) have bundled perspectives from different scientific fields on the question whether immigrants are an asset or a threat. Bhabha (2005) in her contribution shows that migration has made Western legal systems more universalist, and this has had a positive spill-over effect on the general population. On the other hand, particularly since the attacks on the World Trade Center of September 11th 2001, measures to promote ‘national security’ focused on migrants have had negative spill-over to the overall population.

The contribution of Van Selm (2005) on immigration and regional security describes the trend of states seeking to create an area of security together with

common ‘problem-free’ external borders, meaning that at the border itself, people are in the possession of the right documents. So-called ‘smart borders’ should facilitate wanted and effectively stop unwanted movement of people and goods. To this end the states also seek to reach agreement on common visa and asylum procedures. Refugees pose a specific problem as they will almost by definition not have the right documents when they arrive at the borders. Guild (2005) recalls that one of the goals of the visa regime is to prevent asylum seekers from reaching Member State territory. This system is enforced with the help of private parties, carriers, who are not bound by international asylum law as are states. The security that is at issue with refugees might involve regional stability, but the idea of ‘human security’, understood as protection of people’s fundamental rights, also influences policies (van Selm 2005, p. 21, 22).<sup>38</sup> According to Guild (2000a, p. 300) ‘human security’, in the sense of protection from persecution or torture, must be considered part of the concept of ‘security’ within the AFSJ.

### **Export and Expansion of Border Security**

Kostakopoulou (2000) argues that communitarization of migration and asylum policy has in fact made it possible for states to impose their security logic beyond their borders. Referring to Buzan and others she describes securitization as the “removal of an issue from the normal political arena and to its normal bounds of political procedure” (Kostakopoulou 2000, p. 505, note 12). Monar (2000, p. 12 ff.) describes security regimes as essentially expansionist. Zielonka (2001, p. 522) explains that remote policing is the most efficient way of combating transnational crime and illegal immigration.

Kostakopoulou (2000), identifies three main characteristics of the EU remote control approach to migration. The first element she mentions is the approach of ‘tackling the root causes of migration’. Secondly, Kostakopoulou distinguishes a ‘model of concentric circles’. The EU Member States are at the center, surrounded by prospective members and associated states that keep about the same standards in exchange for privileged treatment. A third circle of former Soviet and North African states cooperate to perform transit checks and fight illegal immigration networks. An outer circle of Middle Eastern states, China and Africa, cooperate to limit migration push factors in exchange for favors. The third element of the EU remote control system, according to Kostakopoulou, is a shift in focus from apprehending people after illegal entry towards deterring illegal entry from a distance instead.

An important instrument in remote control of migration is visa policy. The EU legal visa logic is based on three principles (Bigo & Guild 2005, p. 238 ff.). First: no third country national is to be admitted if he or she is a risk to any Member States’ security. The perceptions of risk and security however are by no means

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<sup>38</sup>An explanation of and further references on the concept of ‘human security’ can be found on the website of the Human Security Centre at <http://www.humansecuritycentre.org>. Some analytical and critical reflections may be found in the September 2004 (volume 35, no. 3) special issue of *Security Dialogue*, available at <http://sdi.sagepub.com/content/vol35/issue3/>

uniform. Second, there is an assumption - weaker than a legal presumption - of admissibility for third country nationals with a short stay visa. The Common Consular Instructions are devised to identify risk groups and individuals who are to be checked more thoroughly than others. Two instruments are used: the visa black list, and the categorization of individuals from black list countries according to a risk intensity scale. This assessment is done at the consulates, a method which Bigo and Guild classify as ‘remote control’. They see it as “a police logic [being] introduced into consulates” (Bigo & Guild 2005, p. 240). The third principle Bigo and Guild mention is that the third country national can travel freely within the Union for a period up to three months once she is admitted.

## 2.2 Who decides? Questions of Competence

### State Discretion, Individual Rights

States’ discretionary power to decide who may cross their borders, is curtailed by three international law principles: nationals must be admitted to their state (Protocol 4 ECHR), family life must be respected, and people may not be returned to places where they fear inhuman or degrading treatment or punishment (Article 3 ECHR, 3 UNCaT) or persecution on defined grounds (UN Convention on the status of refugees 1951 and Protocol 1967) (Guild 2000a, p. 1). In applying these principles, states have a wide discretionary margin. States within the European Community do not enjoy this discretion fully anymore, since European law also places obligations upon them to admit non-nationals in certain cases. The principle of free movement of workers brought a large group of foreigners into the circle of people who must be admitted. Community law has gradually transferred the right of Member States to decide on admittance, to a right for the individual citizen to choose his place of residence (Guild 2000a, p. 13). The abolishment of internal border controls brought in the new question of control over the movement of non-citizens and people with no ‘derivative’ free movement rights. Member States are reluctant to give up their powers in this domain. Although Guild does not endorse this logic, she observes that the harmonization of external border controls and the issue of security became central in the discussion on a free movement area (Guild 2000a, p. 16).

Guild (2000b) interprets ‘Freedom’ in the AFSJ as wider than free movement alone. It needs to be expressed through individual rights, as otherwise there would be “no clear check on state discretion” (Guild 2000b, p. 299). ‘Security’ for Guild must mean clarity in the division of rights and obligations. ‘Justice’ should entail individual protection and upholding international human rights standards. A rights-based approach is to be favored over a discretion-based approach because: (a) administrative delay and costs are reduced, (b) it provides freedom and security for the individual, (c) alien and society enjoy security (certainty), and (d) suspicion of ‘abuse’ by immigrants should be diminished by transparent rules (Guild 2000b, p. 314).

Hailbronner downright states that third country nationals have no ‘right of en-

trance' to any Member State (Hailbronner 2000, p. 158). Neither does any procedural right exist from which a right to reasoned decisions could be derived (ibid.). Both Article 64 (1) TEC and Article 5 (1) (e) CISA promote prevalence of national public order concepts. The assessment whether an alien is to be considered a threat to public order is a matter of national discretion, subject only to an arbitrariness test. Community law thus implicitly makes clear, according to Hailbronner, that the issue of public order is outside its scope.<sup>39</sup> Other than most authors, Hailbronner does not see the CISA mechanism as encouraging a 'race to the bottom' in migration law standards, as really minimal interpretations would not pass the arbitrariness test (Hailbronner 2000, p. 151). Neither does Hailbronner view the absence of an EU public order concept as deleterious to aliens. In his perception, Schengen states, through their common traditions, share security interests and humanitarian commitments, which makes good for the lack of a unified concept (Hailbronner 2000, p. 160, 161).

Cholewinski (2003) reaches the same conclusion as Hailbronner and others on the (non-) existence of a right of entry for aliens. Other than Hailbronner however, he chooses to argue in favor of a rights-based approach (Cholewinski 2003, p. 408, quoting Peers). In a report from 2002, Cholewinski finds that the EU entry control system for third country nationals, based on mutual or cross-recognition of national decisions, leads to discrimination (Cholewinski 2002, p. v). A similar line of argumentation can be found with Pastore (2004). The current system works to the disadvantage of immigrants, as recognition of negative decisions comes more easily than that of favorable ones. Overall, the EU entry control system overemphasizes control and defense, at the cost of liberties (Pastore 2004, p. 114). Recent developments continue on this path of strengthening controls. Whereas the first shared databases for border control, the SIS and Eurodac, were designed for recording exceptional cases, plans for new systems such as VIS start from the principle of scrupulously monitoring all. The European security model is based on an integration strategy, providing security through interdependence (Pastore 2004, p. 128). So far, integration is not so much taking place on a normative as on an operational level. With enlargement, it appears that a trade-off has begun between border management costs and sovereignty, with the old Member States paying their way into control over the new borders.

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<sup>39</sup>This would only hold true for third country nationals without 'derivative rights'. As was made clear recently in the Case of the Commission v. the Kingdom of Spain of 31 January 2006, C-503/03, the same restrictive interpretation of the public order exception to free movement as established under EC law for Union citizens applies to third country nationals with derivative free movement rights. Directive 64/221/EC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals is applicable by analogy.

### Public Order and National Security: a *domaine réservé*?

Within Title IV there is a reservation regarding measures that are taken with a view to national public order and internal security.<sup>40</sup> The scope of this reservation however, is unclear. Staples (2003) regrets the fact that the notions of ‘public order’ and ‘national security’ have not been more clearly defined, as they are central concepts in migration and asylum law. Peers (2000) assumes that article 64(1) TEC does not represent a large discretionary facility for the Member States to derogate from title IV measures, but rather that it means that implementation of the measures is left to the Member States. He bases this assumption on the ECJ’s general restrictive stance regarding derogation from the Treaty, and its denouncement of the view that immigration policy equals or entails public order by definition (Peers 2000, p. 80). Peers also suggests that the prohibition of discrimination on grounds of nationality, laid down in article 12 TEC, could now apply to third country nationals.

Staples (2003) took three proposals for directives to analyze the Commission’s view on limitations on national security and public order exceptions to citizens’ free movement rights.<sup>41</sup> Staples concludes that the Commission considers the limitations developed under the EU free movement regime equally applicable to third country nationals seeking residence in the Union. Article 64 section 1 would then not be as broad an exception as would appear at first sight (Staples 2003, p. 53, 54).

Article 68 TEC contains some restrictions to ECJ competence for cases regarding measures that were taken under title IV. The first limitation concerns the right to request preliminary rulings (Article 234 TEC), from which lower national courts are excluded. This restriction would have been inserted for fear of a flood of requests coming from asylum procedures. The second restriction regards measures taken pursuant to Article 62(1) with a view to law and order and internal security. These are not subject to ECJ review. The meaning of this restriction is unclear. Staples (2003) suggests that it should be interpreted in the first place in connection with Article 64 section 1, which would mean that the ECJ is competent to explain the concepts of public order and national security in so far as they serve as bases for decisions of admittance or expulsion. Secondly, from the ruling in the Airport Transit Visa Case<sup>42</sup> it would follow that the Court is competent to review whether measures were taken on the appropriate legal basis (title IV or other). Staples (2003, p. 53, 54) concludes that under Title IV the EU and states share competence in determining public

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<sup>40</sup>Article 64 (1) TEC: “1. This title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

<sup>41</sup>Two of the three directives Staples discusses were adopted: Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. The issue of legal migration, subject of the third proposal, is still under discussion. The original proposal to regulate admission of third country nationals for employment and establishment (COM (2001)127 final) is no longer in procedure.

<sup>42</sup>C-170/96, Commission v Council of the EU, Jur. 1998, p. I-2763

order and national security. Where decisions on the admission or expulsion of aliens is concerned, the concepts are determined by EU law. The division of competence in other cases however is still unclear.<sup>43</sup>

There is no definition of the concepts of public order or national security in the Schengen agreements, but Article 96 CISA gives some indication as to when an alien may be considered a threat to public policy or public security for purposes of entrance into the Schengen Information System. The grounds mentioned are not limitative. As a result, states employ very different definitions. Staples finds this situation undesirable. For the future, it would be better to have a common definition of the concepts of national security and public policy in the field of European migration policy under Title IV TEC.

Security does not only play a role in exception clauses. Risk assessments are made in part through the visa system. Although individual decisions on visa requests and the actual issuance of visa are an exclusively national prerogative, the visa system is determined in part on the Community level. It is the Commission that draws up a 'black' list of countries whose nationals are required to obtain visa before presenting themselves at the EU borders. To determine whether a country should be included in the black list, it is not judged in isolation: the regional situation is taken into account. The Commission has named three categories of considerations that determine whether countries are included on the black list: illegal immigration, public policy and international relations.<sup>44</sup> The concept of 'public policy' is interpreted differently by Member States. The ECJ recognizes that they have a 'margin of appreciation' and does not clarify the concept.<sup>45</sup> For the consideration of international relations, states must respect other states' objections to countries which they do not share. According to Bigo and Guild, "[t]he implicit criterion which connects the three criteria is the suspicion of transnational population flows which would affect the internal security of the Union." (Bigo & Guild 2005, p. 245). Certainly the sensitive issue of security makes it difficult to find common ground in EU migration policy, resulting in a complex system of partial harmonization, cross-recognition and reservation of national powers.

## Concluding Remarks

Controlling movement of persons wishing to enter the EU is perceived primarily as a security issue. This fact is apparent from all policy documents and legislation on the subject. Recent EU policy and regulations focus strongly on tracing and keeping out undesired individuals. This filtering process does not

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<sup>43</sup>The recent case of the Commission v. the Kingdom of Spain of 31 January 2006, C-503/03, concerning a Spanish decision contrary to Directive 64/221/EC, supports the argument that restrictive interpretation of public order exceptions to free movement is extended to third country nationals with derivative free movement rights. It does not follow however that third country nationals without such derivative rights enjoy similar protection; rather the opposite. States may still define public order exceptions for this 'residual' category.

<sup>44</sup>COM (2000) 027 final, Council Regulation No 539/2001, par. 5

<sup>45</sup>Bigo and Guild(2005, p. 2414) refer to the case of Donatella Calfa (C-386/96), the correct number is: C-348/96 of 19 January 1999.

start or stop at the borders, and is not restricted to ‘suspect’ migrants. A much broader class is subject to survey. The EU migration security regime can for these reasons rightly be called ‘expansionist’.

Different regimes apply to different classes of people. The position of citizens from the 15 Member States that formed the Union prior to the 2004 enlargement and nationals of their Schengen partners is the strongest; other ‘free movers’ such as third country nationals with derivative rights have a similarly strong position, as their rights are modeled to the EU citizens’ regime. Third country nationals without free movement rights will have more or less difficulty gaining entry to the EU, depending first of all on their country of origin. Worst off are third country nationals from black list visa countries, who are considered a *prima facie* immigration risk. Member States are not free to invoke reasons of public order and security to refuse entrance of Community Nationals and third country nationals with ‘derivative’ rights. For the residual category of third country nationals however, the issue of public order seems in principle to be reserved to the Member States. There is never a ‘right of entry’ for this category. Asylum applicants and those who claim to be exposed to persecution or torture if returned to their country of origin or transit may however not be turned away at the border without first examining their request for protection. Obviously, borders are the place to discriminate between classes of people and individuals: citizens, non-citizens, privileged foreigners, regular aliens and those in need of international protection. The right to discriminate at will is limited by EU law, although there remains room for discretionary decisions, depending on the class of people concerned. But even these decisions, if negative, now need to be ‘reasoned’ to a minimum degree and on a limited number of grounds, if the Community Code is accepted in its current draft form.

In EU law, the rules for discriminating migrants from outside the Union have been embedded in the Area of Freedom, Security and Justice. This ‘Area’ includes both community (title IV TEC) and third pillar (title VI TEU) law, adding constitutional complexity to conceptual vagueness. Of the three concepts, ‘security’ raises the most suspicion, at least in the eyes of lawyers. Although all three can be said to be contested concepts, security has the reputation of serving the interests of governments at the cost of individuals.

In connection to migration, security is given many different meanings. In some contexts it is part of an exceptional clause, reserving power for Member States to act in the interest of public order and national security. As such, it is not defined exhaustively at EU level, but different opinions exist on the broadness of the exceptions. Even if there is no European public order concept for all cases of migration, there might be marginal control or even spill-over from protection that privileged migrants enjoy in the Union.

Another way in which security plays a role in migration control is in the identification of groups as *prima facie* threats through the visa system. Individual identification of people as threats takes place through the Schengen Information System. The reasons to file people as risks to security are not exhaustively specified, resulting in an accumulation of national threat assessments. Whereas SIS alerting should be focused on threats of a criminal nature, the visa system

as a whole includes the risk of ‘illegal migration’ as a legitimate reason to refuse entry in order to protect EU citizens.

A third way in which security comes into play is in the protection of migrants: in the form of legal protection (legal certainty, the right to reasoned decisions and recourse to judicial review); in the form of ‘human security’ when the migrant is threatened to be persecuted or tortured; in the protection of migrants’ human rights and in honoring rights migrants may have under EU free movement law. A final class of security considerations is very broad, but nevertheless relevant for migration policy: international, regional and structural state security. Regional stability may be a reason to admit or refuse refugees, and long-term stability of a nation may be a reason to encourage (certain types of) migration.

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