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Abstract: The Border control cooperation in the European Union in the perspective of Schengen visa regime

European Union nationals and nationals from those countries that are part of the Schengen area and their family members have the right to enter the territory of EU Member States without prior authorization. They can only be excluded on grounds of public policy, public security or public health. Border control, policing and the administration of justice is today an important part of the European integration process. In contemporary Europe, internal borders have been physically dismantled across most of the continent and common rules put in place to regulate the entry of visitors and are in place to govern external borders and coordinate police and judicial collaboration. This regional free travel area is usually referred to as the Schengen cooperation.

That border cooperation being controversial is not surprising. The development of passports, visas and the guarding of territorial frontiers play a central role in processes of state formation. These practices help to establish who is present within a polity and determine their status as citizens, residents or temporary visitors. Border control is thus important to the on-going construction and policing of national identity and state sovereignty.

The 2007 Schengen enlargement provides the material for a quasi-experiment. It allows us to study the effect of EU-cooperation by measuring visa-issuing practices before and after. This paper investigates the governing of Europe’s external border. It analyses how the common Schengen short-stay visa policy has been applied in practice by member states.

I. Introduction

In contemporary Europe, internal borders have been physically dismantled across most of the continent and common rules are put in place to regulate the entry of visitors. This regional free travel area is usually referred to as the Schengen cooperation, which has generated considerable public debate. Supporters of the policy see it as a key symbol of the unification and stabilization of the continent following the Second World War and the fall of the Berlin Wall. Critics stress that common border policies infringe on state sovereignty and endanger national identity.

That border cooperation being controversial is not surprising. The development of passports, visas and the guarding of territorial frontiers play a central role in processes of state formation. These practices help to establish who is present within a polity and determine their status as citizens, residents or temporary visitors. Border control is thus important to the on-going construction and policing of national identity and state sovereignty.

The enlarging and deepening the EU/Schengen regime, as part of the process of enlargement of the EU, candidate countries that want to become EU members must adopt and implement the Schengen regime on border controls. After they display the ability to fully implement these rules and this is confirmed through the Schengen evaluation process, border controls between the incumbent and the new Member States will be lifted and several of the new

Member States will become the main actors responsible for controlling the EU's external frontier. The EU's external border will thus increase significantly in length whereas controls will take place in a regional environment that is often likely to be more difficult.

At the same time the process of 'deepening' EU cooperation in the field of border controls is gathering momentum. The import of the Schengen *acquis* into the EU framework by the Treaty of Amsterdam (which entered into force on 1 May 1999) has been a major step towards the abolition of internal border controls within the EU. Initially the ambition to remove internal border controls was primarily economically motivated (e.g., removing all barriers to trade within the Internal Market). More and more, however, it is also being presented as a political project (e.g., removing all barriers to free movement of persons in a 'Union of the citizens'). While controls on internal borders are thus being dismantled, cooperation in the field of external border controls is deemed necessary as a 'compensatory measure'. Since the Treaty of Amsterdam, external border controls cooperation has been high on the EU agenda, with successive European

Council meetings emphasizing its role in the fight against illegal immigration networks and trafficking in human beings, cross-border crime and terrorism. Moreover, EU policy makers are up to the fact that new policies have to be developed in order to prevent negative side effects of intensified EU external border controls on relations with third countries.

European Union officials and policy-makers have hailed Europe's border control regime (Schengen) as the epitome of —freedom, security, and European success. The EU is developing a border management strategy which aims at an “integrated and global response” to the challenges emerging from irregular immigration through the common external borders.

As we will argue, one of the dominant premises behind this apparently renewed political discourse on a *'global and integrated approach'* is the enhancement of security at the EU external territorial border through an increased use of coercive measures and surveillance technology, as well as the deployment of an improved system of coordinated actions under the umbrella of FRONTEX.

II. Border control cooperation in the European Union

The borders of Europe used to be governed by a wide variety of national legal rules and practices. In the mid-1990s, for example, a citizen of Bolivia could freely embark on a trip to Germany, Sweden or Spain, but had to apply for a visa beforehand when travelling to Belgium, France or Denmark. If the visit involved several countries, he or she would likely have had to obtain several entry permits and have the papers checked at the territorial border of each member state. Today, in marked contrast, uniform rules and procedures regulate the entry of foreign visitors to Europe, and internal frontiers have been physically dismantled across most of the continent. This new regional free travel area is usually referred to as the 'Schengen' cooperation. The transformation of the borders of Europe has generated considerable public debate. Criticism of cooperation is particularly strong on the opposite ends of the political spectrum. Left-wing parties, non-governmental pro-migration and refugee rights organizations often label it 'Fortress Europe'. Schengen, from this perspective, is about the undermining of civil liberties, the proliferation of new forms and sites of police checks, denying asylum-seekers access, and the institutionalization of discrimination and racism towards outsiders. On the other hand, right-wing parties, in contrast, often refer to the cooperation as a form of 'sieve Europe'. This frame

highlights the eroding effects of EU-integration on borders for national identity and sovereignty, and the loss of control caused by the dismantling of national frontiers.

The establishment of common policies in the area of policing and border control – justice and home affairs – thus raises fundamental and interesting questions on the character and direction of the European integration process. The political contestation surrounding the cooperation mirrors the importance attributed to the subject in academic studies of borders and state-making. Establishing and exercising control over the ‘coming and going’ of persons play a central role in the formation of nation-states. Passports, visas and document inspections are necessary, in practice, to acquire knowledge on who is present on a territory and establish who belongs and who does not. These mundane actions of classification and sorting of individuals are central to the on-going enactment of citizenship, national identity and state sovereignty.

The way border control is set up and carried out is molded by interests and identities at a given time, but can also set a path which makes different later changes and actions more or less likely. The form, scope and depth of the implementation of the new European common border policy are thus important to study.

Turning to the implementation of Schengen, systematic and in-depth studies are largely absent. We thus know surprisingly little about how European border control cooperation works in practice. Existing analyses have established theoretical typologies of border regimes using contemporary events and trends to illustrate features of the arguments. A key focus of empirical conjecturing has been Eastern Europe and the implications of the enlargement of the European Union. The main conclusion of these studies is that the picture is mixed: the new border regime is neither supranational nor national and frontiers neither open nor closed. Legislative rules, for example, are negotiated at the European level but the implementation is left to the member states. Nationals of Indonesia need to obtain a visa to travel to Europe whereas Malaysian citizens do not. Visa applications from Russia are seldom refused whereas entry requests lodged in Algeria often are. European borders are, thus, selective in who they seek to allow in and try to exclude, and are governed using a combination of supranational and intergovernmental elements. The main aim of this thesis is to advance and deepen our understanding of what characterizes this complex and multifaceted border regime.

III. Integrated Border Management concept

An overall model for European border management is an important tool for safeguarding internal security of the Member States and, in particular, to prevent and reveal illegal immigration and related crime as well as other cross-border crime.

Integrated border management (IBM) is a concept consisting of the following dimensions:

- Border control (checks and surveillance) as defined in the Schengen Borders Code, including relevant risk analysis and crime intelligence
- Detection and investigation of cross border crime in coordination with all competent law enforcement authorities
- The Fortier access control model (measures in third countries, cooperation with neighboring countries, border control, control measures within the area of free movement, including return)
- Inter-agency cooperation for border management (border guards, customs, police, national security and other relevant authorities) and international cooperation
- Coordination and coherence of the activities of Member States and Institutions and other bodies of the Community and the Union. Coherence between these dimensions and the way they are applied by Schengen States is the key to the success of the Integrated Border Management concept.

However border control is in the interest not only of the Schengen Member State at whose external borders it is carried out, but of all Member States that have abolished or will abolish border control at their internal borders. Therefore, while implementing border management, it should be borne in mind that Member States are controlling their external borders for themselves, but also, at the same time, for other Schengen Member States (principle of solidarity). Efficient border control should be maintained constantly, and control should cover all illegal phenomena, including those which do not have an impact on local security.

In this sense, external border control should receive appropriate attention from each responsible Member State. In order to avoid continuous lack of resources in areas where the demands of local security conflict with those of the Schengen area in general, border control including risk analysis and crime investigation should remain the main function of the responsible operational units. Border management is a task which requires a high level of professionalism. There should be one main responsible public authority (not military) for implementing the IBM concept in each Member State, especially and necessarily with regard to border control, preventing illegal

immigration along external borders and combating illegal immigration inside the Member State's territory. There should be centralized command, control, supervision and instructions especially for border control, risk analysis and criminal investigation as well as for inter-agency and international cooperation with regard to preventing and combating illegal immigration. The responsible authority, typically Border Guard or Border Police, should be centralized and clearly structured. There should be a direct chain of command between units of responsible authority at central, regional and local level, ensuring a common approach to border control, a unified planning and training system and an extensive and fast data flow at all levels of the organization. The main legal basis for border management comes from the aforementioned Community legislation. Nevertheless, there is still a need for complementary legislation at national level, *inter alia* border guard law, alien and immigration law as well as data protection law, in order to be able to fully implement the IBM concept. There should also be a legal basis which will allow smooth and efficient inter-agency and international cooperation, and exchange of information. Agreements such as border agreements, local border traffic and readmission agreements with neighboring third countries and countries of origin should be concluded. Additionally, illegal border crossings should be made punishable by law, and fines as well as an obligation for return transportation should be imposed on carriers of illegal immigrants.

A National Border Management Strategy should clearly delegate tasks such as assessments to be drafted in order to give guidelines for developing and planning within the relevant units at national, regional and local levels. The strategy should include assessments of the working environment, risks and threats, analyses of resources needed, as well as action and development plans. As a general rule, persons performing border guard duties should be specially trained professionals. Persons with less experience can be used only for auxiliary duties assisting professionals temporarily. No exception is allowed in respect of duties that require any use of personal data, consultation of confidential registers or decisions interfering with an individual's physical integrity or freedom.

Risk analysis and management of borders need to be backed by systematic intelligence. Border management systems should be able to gather intelligence, analyze it, and, finally, utilize the products in field work. The Comprehensive Risk Analysis Model for border control links together intelligence, risk analysis and border management at all levels. Strategic intelligence is organizing all information and extracting a strategic situation picture: phenomena of interest and

underlying factors. It produces statistics, trends and qualitative descriptions. Strategic risk analysis analyses strategic key information. It indicates potential changes and proposes policies. Analysts must be fully informed of the fundamental paradigms, interests, threats and risks. Strategic management is managing the organization through strategic key objectives (short term) and through transformation (long term). Operational intelligence connects the operational field information and strategic information (inputs and outputs in both directions) in an “operationally” valid context. The task of operational risk analysis is to make qualitative and quantitative analyses of the operational environment, active objects and the results of one’s own activity. The aim is to get valid information on the prevailing situation. This information should be used to facilitate optimal direction of resources. Special attention should be paid to loopholes, i.e. where the system fails. Operational management means managing resources and requirements within given tasks, budgetary frameworks, assets and jurisdiction. This function is related to organizational units that have a defined sphere of responsibility, for example a regional jurisdiction. Operational risk analysis also provides risk indicators and profiles for tactical level. Tactical (field level) intelligence is connecting operational field workers in their daily work with the information system. This means a two-way data flow (inputs and outputs). At a practical level, this means assessment of persons, vehicles, vessels or flights to be checked. This assessment is carried out in the context of a real-time tactical situation. Thus the methods can be called tactical risk analysis.

IV. The EU’s Integrated Strategy on Borders and Immigration

This section offers a concise overview of the latest policy developments at EU level which have created a close interrelationship between the common policy on borders and the policy on immigration. It sets the policy scenario of European cooperation in these two areas by looking at what the priorities are. As we will argue, the strategy that the EU seems to be pursuing consists of a reinforcement of the security rationale at common EU external territorial borders – through the development of a discursive nexus between an integrated approach on borders (IBM) – and a global approach on migration. The role of FRONTEX in implementing this nexus in the national arena is presented as a key step in EU policy strategy. However, what are the exact nature and functions of the sort of security as utilized by both approaches? And how is this nexus elaborated and justified at EU official level?

One of the key priorities that the German Presidency of the EU identified in its program was “*a more effective protection of external borders*” in order to tackle “*illegal immigration and human trafficking*”.

This prioritization is not at all new, but actually follows the pattern carefully set out by the previous Finnish Presidency, which paid close attention to the development of the EU's integrated management system for external borders and the so-called 'EU Border Management Strategy'. The Finnish made considerable effort to consolidate the concept of Integrated Border Management. While this term had previously been used at official level as a pre-defined concept,³ in reality it has a rather short history and implies a wide range of different functionalities and meanings. There was therefore a need to fill in this terminological gap, and at the Conclusions of 4-5 December 2006 the JHA Council agreed the following dimensions as constituting the conceptual framework of IBM:

1. Border control (checks and surveillance) including risk analysis and crime intelligence;
2. Detecting and investigating "cross-border crime" in cooperation with all the relevant law enforcement authorities;
3. The four-tier/filter access control model, which as stipulated in the EU Schengen Catalogue of 2002 includes⁷ measures in third countries of origin or transit, cooperation with neighboring countries, measures on border control at the external borders and control measures within the common area of free movement;
4. Inter-agency cooperation in border management including border guards, customs and police, national security and other relevant authorities; and
5. Coordination and coherence at the national and transnational level. The guiding principles inspiring these five dimensions seem to be that 'border management' of the common Schengen regime external border must be 'integrated' and must cover all border related threats that the EU is supposed to be facing. The way in which this definition sees the achievement of these two goals as plausible is through the strengthening of a common "*area of policing*" which uses coercive border control and surveillance as the main tools. In the same vein, coordination and inter-agency cooperation are also conceived as essential items. It is also striking to see how, along with an increasing operational and inter-agency coordination, risk analysis and threat assessments are now treated as two constitutive aspects of EU border-management strategy. This conceptualization also implies an improved exchange of information between law enforcement security agencies and the use of modern technologies as pivotal to the accomplishment of overall EU strategy. Therefore, this kind of innovative management of the EU's external borders relies on the development of a series of operational mechanisms which are rooted in the management of risk and threat, on the exchange of information and on the use of technology as the most efficient 'solution' to guarantee a secured European border. In addition, the JHA Council meeting of December 2006 recognized the following three components as part of the IBM: 1) A common corpus of legislation; 2) Operational cooperation between Member States, including cooperation as coordinated by FRONTEX; and 3) The principle of solidarity. In fact, the current phase of the EU borders management strategy,

which has at times been called the “First Generation of the EU IBM”, has already achieved the two first points in the last couple of years: the adoption of the Schengen Borders Code, which has codified, restructured and further developed the *acquis* on internal and external borders, and the setting up of the FRONTEX as a common institutional mechanism for the operational coordination at EU level. As regards the Schengen Borders Code, it has represented the first legislative output resulting from the application of the co-decision procedure (Art. 251 EC Treaty) in the field of borders. Its final output has demonstrated how the involvement of the European Parliament in the decision-making process is not only necessary for democratic control, but also efficient and positive. The positive connotations have consisted of the inclusion of a wider set of guarantees and rights in the event of refusal of entry onto EU territory. In particular, Art. 13 of the Code now stipulates that the persons whose entry has been refused will need to receive a standard form stating in writing the precise reasons for refusal and they will be also offered a right of appeal. In our view, both steps (the substantial and the institutional) appear to give predominance to the understanding of the border as territory and as a dividing line clearly demarcating the inside from the outside. In particular, Art. 2 of the Schengen Borders Code provides a harmonized definition of what ‘the border’ is according to European Community law. In particular, this provision establishes that external borders are conceived as “*the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders*”. This kind of border aims to secure and police the limits of the common Schengen territory. In addition, one of its most important objectives is to send a clear message to “the outside” about a common European security identity substantiated in an Area of Freedom, Security and Justice. In fact, while some authors have rightly identified the changing and dynamic nature of the borders in Europe from territoriality towards a hugely disperse and complex web of non-physical lines which move every time a person exercises mobility, actual policy strategies at EU level still present the strengthening of the principle of territoriality, and its securitization, as one of the more important European responses and values for dealing with the dilemmas posed by globalization and modernity. A large body of literature now advocates that the traditional Weberian conceptualization of borders as lines clearly defining the boundaries of the state and its sovereignty is no longer valid. Indeed, the actual common borders regime, and the European policy on border security, appears to be primarily focused on the development of non-tangible, technology-based and dispersed borders centered on the need to track and ‘manage’ the individual through the use of new technologies (i.e. biometrics) and Europe-wide data bases. However, while the European borders regime currently promotes a de-linking with territoriality, it still bases its legitimacy and identity very strongly on the further reinvigoration of the idea of European borders as legal institutions and a territorial demarcation of Europe and what remains ‘European’, from the rest of ‘the other world’. Moreover, it is interesting to see how the “Southern maritime borders”, and particularly

those of the Mediterranean Sea,²⁰ are used as the commonly constructed source from which the threat (i.e. irregular immigration) comes and against which all the security means need to be made operational, effective and pro active. In the same vein, the phenomenon of irregular immigration, especially coming from the Southern European borders, represents the target against which “the EU border” and its multilayered components as framed by the IBM have been conceived. In fact, one of the more important objectives of EU border management is the building of a common immigration policy which “manages comprehensively” and “fights against” the sort of mobility negatively qualified as “illegal”. This is the sort of mobility that is at stake because of its non-compliance with the rigid legal rules of the common Schengen regime.²² It is somehow surprising to see how the EU still continues to use the term “illegal immigration” and verbs like “fight against” and “combat” when dealing with the phenomenon of irregular immigration. The negative implications inherent in the use of this terminology have often been qualified as ascribing to the person involved a status which implies suspicion and criminality. Following this logic, the European Commission presented a Communication on *“Reinforcing the Management of the EU’s Southern Maritime Borders”* on November 2006 which presented a series of policy recommendations destined to improve the “European model for integrated border management” in this particular geographical area of Europe.²⁴ The approach proposed by the Commission focused on fostering operational measures to deal with irregular immigration and reinforce “control and surveillance” of the external maritime border. Furthermore, as regards the control of maritime borders, the Commission emphasized that it was necessary to adopt a two-pronged approach: 1) operational measures *“to fight illegal immigration”* and the strengthening of the control and surveillance of the external maritime border; and 2) the external dimension consisting of building on the existing relations and cooperation with third countries.

In the view of the European Commission: *“operational activities designed to fight illegal immigration need to be read in the wider context of the comprehensive approach to migration”*. Border management is therefore an integral part of the EU’s policy on irregular immigration. In light of this, in November 2006 the Commission published another Communication on *“The Global Approach to Migration one year on”*. The main objective of this communication is to pave the way for the accomplishment of a “comprehensive European migration policy”. It offered an overview of EU policy actions mainly centered on Africa and the Mediterranean region. The Communication restated the importance of an *“integrated management of the maritime borders”*, and their reinforcement, in *“the fight against illegal migration”*. In fact, the call to ensure a global response covering all the dimensions relevant to migration had been already adopted at the European Council meeting of December 2005.

The last sentence on building *“capacity to better manage migration”* consists of increasing operational cooperation between member states in the field of border management under the umbrella of

FRONTEX's coordination. Once more we can see how "the Global Approach" primarily focuses on "priority actions focusing on Africa and the Mediterranean". It reinforces the call for an integrated perspective for initiatives such as "on the migratory routes and safety at sea, which concern both the Mediterranean and certain African countries". In particular, the Council endorsed concrete actions intending to increase cooperation between Member States. In fact, both the integrated and the global approaches constitute an innovative discursive and political strategy at EU level whose real purpose is to present in a more 'fashionable' manner the vision according to which "more security measures in the common Southern maritime external borders" are the more plausible 'solution' to the challenges and dilemmas that Europe is currently facing in the areas of borders and mobility.

V. The basic requirements for Schengen-like border security

The EU Common Positions define two essential features of high-level external border-control: 1) all persons crossing the external borders are checked in a systematic manner and 2) effective border surveillance is ensured between authorized border-crossing points. However, there is no fixed list defining the practical measures relating to "a high level of external border control" to be achieved at the point of EU accession. Other than the Schengen *acquis*, the Union has practically no other *acquis* concerning external border control. Therefore guidance in interpreting the notion of "a high level of external border control" has to be sought from there, whilst appreciating that it is partly a political notion.

The basic requirements for effective external border control can be found in Chapter 2 of Title II of the Schengen Convention and the so-called 'Common Manual on External Borders'. Notwithstanding these specific rules, the Schengen Evaluation Working Group has the task of specifying certain criteria and requirements, (including the requirements related to external border control), to be fulfilled before internal border controls are lifted. These criteria and requirements would not be directly applicable to the current enlargement process as they are formulated on a case-by case basis, taking into account the specific characteristics of the country (including its geographical situation) and are subject to evaluation. Moreover, the Schengen Evaluation Working Group has a role to play in drawing up recommendations and best practices. Upon accession, a sufficiently high level of border control is also required at the temporary external borders⁵, whilst appreciating that special arrangements at these borders are justified, to tighten the cooperation between the future Schengen partners. This is in order to allow for a smooth transition when internal border controls are abolished, and to avoid unnecessary

investments. The border control system should be based on cooperation with the border authorities operating on the other side of the border. Practical cooperation models across the temporary external border should be accepted: for instance, everyone crossing the border is checked but the control authorities on either side of the border co-operate so that the administrative and logistical burden does not lie with only one country.

Consideration should, whenever possible, be given to shared infrastructure and removable and/or shared equipment and joint controls could. Such mechanisms, infrastructure and equipment offer a good basis for effective cooperation between relevant authorities working at the border, even after the accession to the Union by all of the candidate countries in question, especially in implementing cross-border cooperation.⁶ Furthermore, from the “user’s” point of view, these arrangements would facilitate the movement of people and goods by rendering the control procedures more straightforward and smooth. Finally, it should be emphasized that the current Schengen States will be responsible for the control of the Schengen external borders until the internal border controls are lifted *vis-à-vis* new member states. However, after accession, the nationals of the new member states would no longer be third country nationals who have to fulfill all entry requirements. For nationals of the EU Member States, the mere presentation or production of a travel document would be sufficient. With a view to the point when internal border controls are lifted with a particular new member state, and the full Schengen *acquis* enters into force, the new member state will, without exception, become fully responsible for the protection of its external Schengen borders according to the Schengen *acquis*. This also includes borders with those member states or candidate countries with which the internal borders have not yet been lifted.

Conclusions

The ever-increasing growth of globalization continues to pose new challenges for the EU. The top priority of border control is to ensure that borders remain under surveillance and are controlled. This helps ensure tourist activity remains fluid, and also helps to ensure safety for all by:

- Reducing the number of illegal immigrants who enter country borders undetected
- Increasing internal security as a whole by contributing to the prevention of cross-border crime

- Reducing the traffic of drugs, weapons and illicit substances
- Preventing deaths of illegal immigrants entering countries by sea, by plane or by vehicle.

The first step of this objective is the creation of surveillance systems at national level in the member states forming the Eastern and Southern maritime borders of the EU.

Nowadays this involves the development or modernization of these systems in the new member states from the last expansions including Bulgaria, Romania, Estonia, Latvia, Lithuania, Cyprus and Malta. A second step would be to integrate all existing sectoral systems into a broader network, reporting and monitoring traffic and activities in areas under the jurisdiction of the member states, along with adjacent areas, thus allowing border control authorities to take advantage of the integrated use of these various systems. The Unions external borders agency, FRONTEX, may be to take on an influential role in particular with respect to the convergence of information management systems, interoperability, training and cascading best practice. Subsequently, an important step that must be taken needs to establish the current capabilities that are available within the EU member states, identifying the member countries that already have the capabilities at hand and the other member countries who may require additional help. Whether this is done in a cost saving way by sharing equipment across borders, or alternatively countries can outsource to benefit from new capabilities. An example of existing capabilities is the Integrated Surveillance System (SIVE) that the Government of Spain developed for their coastal borders.

Considering the current economic climate, an ideal step is to pool together and share resources on security and defense. By identifying countries that are interested in developing capabilities, agreements can then be established between member's countries. They will then be in a position where they can identify what they require to be produced together and developed directly by the EU. These capabilities will cover all of the following functions identified by the EU;

- Detection, Identification and authentication
- Situation awareness and assessment, including surveillance
- Information management
- Communication
- Training and exercises.

Border control is a challenge and an opportunity that EU should tackle with cooperation, coordination, and interoperability between all member states. It is a challenge but upon

implementation of new technologies, it will help contribute towards an increased amount of security for all citizens with more secure frontiers. But it also provides member states the opportunity to contribute their present capabilities, and to work together in a collaborative way they can create new capabilities which will benefit the EU as a whole.

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