

# The Abolition of Internal Border Checks in an Enlarged Schengen Area: Freedom of movement or a web of scattered security checks?

Anaïs Faure Atger

## Abstract

This paper assesses some of the implications and practicalities stemming from the removal of land and sea internal border controls in an enlarged EU on December 2007. Freedom of movement represents a central feature of the supranational status of EU citizenship. Its practical application to the enlarged EU territory has constituted a necessary step to ensure equality among all European citizens. After providing an account of the processes and logic leading to the removal of checks at common borders, the state of play within the Schengen area is described. Particular attention is paid to the national security strategies carried out by the EU-15 member states currently in place and their consequences on the freedom of movement of individuals and on liberty. It is argued that by setting the removal of border checks as an important security challenge, we are witnessing the emergence of alternative and scattered security measures on the mobility of people which might weaken the Europeanisation processes inherent to the liberalisation of mobility inside the EU.

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# THE ABOLITION OF INTERNAL BORDER CHECKS IN AN ENLARGED SCHENGEN AREA: FREEDOM OF MOVEMENT OR A WEB OF SCATTERED SECURITY CHECKS?

ANAÏS FAURE ATGER\*

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## Introduction

21 December 2007 marked the completion of an historical process. Internal land borders among the 15 states (both EU and non-EU) already applying the Schengen regime<sup>1</sup> and nine of the ten that joined the European Union in May 2004<sup>2</sup> were finally brought down. The removal of checks at internal borders represents another important victory for the principle of free movement of persons in the EU. One of the most symbolic aspects of European membership for citizens, its realisation was awaited with great fervour by the nationals of the EU-9. The enlargement of the Schengen area constitutes an achievement towards the consolidation of the paradigm of equality among citizens of the Union. It is also a very strong statement of trust among the peoples of Europe and their governments. However, the road to the full enjoyment of this right has not been free from obstacles, and in the name of security, several constraints have at times been imposed on the newly acceding states. This paper examines the conditions under which such an historical process took place in the aftermath of the first wave of enthusiasm.<sup>3</sup>

Iikka Laitinen, Director of the European external border agency Frontex,<sup>4</sup> has commented that the enlargement of the Schengen area had been “a deliberate choice of the European Union to focus more on the free movement of persons than on security aspects.”<sup>5</sup> This paper argues, however, contrary to this statement, that security has been a priority concern in lifting internal border checks. This in effect has triggered a number of measures that can be regarded as new obstacles to mobility. The security rationale oriented the political debate as it had been the case in negotiations leading to the Schengen agreement. In this context, a safeguard provision was even included, allowing member states to use an ad hoc mechanism in case they considered it

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\* Anaïs Faure Atger is Research Assistant in the Justice and Home Affairs unit of CEPS. This paper falls within the scope of the CHALLENGE project (Changing Landscape of European Liberty and Security), funded by the Sixth EU Framework Programme of DG Research, European Commission (see [www.libertysecurity.org](http://www.libertysecurity.org)). The author would like to thank Elspeth Guild, Sergio Carrera and Florian Geyer for their valuable comments. She also expresses gratitude to the individuals who kindly shared their time and expertise in interviews (listed in Annex 2).

<sup>1</sup> France, Germany, Belgium, The Netherlands, Luxembourg, Spain, Portugal, Italy, Austria, Greece, Denmark, Finland, Sweden, Norway and Iceland (hereafter referred to as EU-15).

<sup>2</sup> Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia, Slovenia (hereafter referred to as EU-9). Due to political considerations in particular relating to the ceasefire line and the absence of infrastructure preparedness, Cyprus will join at a later date.

<sup>3</sup> The next step in the process is the lifting of air border controls on 30 March 2008.

<sup>4</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union established by Council Regulation 2007/2004 and operational since 3 October 2005.

<sup>5</sup> “Security fears as EU drops borders”, *BBC News*, 20 December 2007 (retrieved 22.02.2008 from <http://news.bbc.co.uk>).

necessary to reintroduce unilateral border checks. Today, however, it seems that new measures are put into place in order to monitor the movement of people to and from member states.

While border checks within the Schengen territory have been removed, we are in fact witnessing the emergence of alternative security controls and practices<sup>6</sup> affecting the mobility of people in some member states. It seems that a few member states are using policing measures as a form of compensatory security control within their borders. The lack of clear rules regarding the way these controls may be used while remaining consistent with EU law, and specifically the Schengen borders code, represents a hindrance to the full exercise of free movement rights in the EU border control free area. The situation within the Schengen territory is today uncertain especially when considering the role and competence of police authorities in the border area. Furthermore, a number of new administrative obligations are being imposed on non-nationals entering a country, including EU citizens.

This paper addresses the state of play of freedom of movement since 21 December 2007, and its implications for the liberty and security of those exercising it. It examines the main questions raised by the security posture maintained by some EU officials and governments in the process of realising this form of freedom. By looking at the rules applying after the formal disappearance of borders, we will then provide an account of the situation at a practical level by looking at some specific problems that have already been encountered in the field. Section 1 considers the route that has led to the formal removal of internal borders, and section 2 addresses the emergence of new barriers, including a lack of certainty as to the location and nature of security controls on the freedom of movement, and a high level of discretionary power on the part of the state in defining the scope of entry requirements on its territory. Finally, section 3 assesses the practical impact of such security practices on the mobility of individuals. In particular, the consequences for the communities most affected by these measures will be emphasised. For citizens of the newly acceding states, crossing internal borders at times takes even longer than before 21 December 2007. Moreover, the most vulnerable group, i.e. third-country nationals, appear to be the main targets of these new forms of security checks. While the cases referred to do not purport to illustrate systematic occurrences, they need nevertheless to be highlighted in order to prevent any further hindrance to mobility within the Schengen area.

## **1. Enlargement of the Schengen area**

### **1.1 Freedom of movement and EU citizenship: The legal context and practical application**

Freedom of movement today is a fundamental aspect of European citizenship, but this has not always been the case. Primarily intended for the free movement of workers, it was later extended to all EU citizens as well as to third-country nationals. Considered a key ingredient of the freedom rationale within the EU and an essential political symbol, its definition at European level has evolved over the years while the States have always managed to preserve significant control over its implementation.

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<sup>6</sup> According to Bigo et al. (2007) in their mid-term report on the CHALLENGE project, “the lifting of the internal border controls has implied both a reinvigoration of the territorial control over the common external border and a reconfiguration of the deterritorialised control around the individual and the free movement of persons”.

### 1.1.1 Evolution of the freedom to move in the EU

Although the free of movement of workers has been enshrined as a principle from the very first days<sup>7</sup> of the European Economic Community, its practical application and facilitation were only developed in stages. A transitional period ending in 1968 was foreseen to give effect to these rights. In 1986, the Single European Act called for the achievement of a common market described as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.”<sup>8</sup> The shifting of the conception of free movement of workers was to come progressively through rulings of the Court of Justice and the 1990 Directives on the free movement of persons,<sup>9</sup> which formally widened the scope to persons. The Maastricht Treaty then developed the notion of ‘Union citizenship’,<sup>10</sup> according to which the rights of exit and entry shall apply with no discrimination<sup>11</sup> to all nationals of the member states and to their family members.<sup>12</sup>

In practice, the main obstacle to moving freely is border controls, making their removal a prerequisite for the enforcement of this right. The Schengen Agreement concluded on the 14 June 1985 articulated the basic principle of the abolition of border controls on individuals while the Convention Implementing the Schengen Agreement (CISA), detailing its practical application, was signed five years later. The agreement was first reached at the intergovernmental level among a small number of member states<sup>13</sup> and it took five years thereafter to dismantle border checks among the signatories. The borderless Europe of today was achieved through successive waves with the first lifting of borders occurring among seven states in 1995 and the most recent to date being only three months old. Today, 24 countries apply the Schengen *acquis*<sup>14</sup> and another four<sup>15</sup> are planned to join in the near future.

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<sup>7</sup> Article 69, Title Three of the Treaty of Rome 1957 sets out the specific rights granted to the individuals within the Community in order to give effect to the abolition of obstacles to their movement – the free movement of workers, the self-employed, service providers and recipients.

<sup>8</sup> Article 14(2) of the consolidated version of the Treaty establishing the European Community (hereafter referred to as consolidated EC Treaty).

<sup>9</sup> Council Directives 90/366, 90/365, 90/364 of June 1990 guarantee the freedom of movement and of residence to persons and categories of persons who are not economically active (students, pensioners and the unemployed).

<sup>10</sup> Article 17 of the consolidated EC Treaty: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”

<sup>11</sup> Article 12 of the consolidated EC Treaty: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

<sup>12</sup> Further completed by article 4 and 5 of Directive 2004/58/EC of the European Parliament and of the Council on the right of citizen of the Union and their family members to move and reside freely within the territory of the Member States amending regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30.04.2004.

<sup>13</sup> The five original parties are Germany, France and the Benelux countries. Italy then joined soon after.

<sup>14</sup> The Schengen *acquis* incorporated into the Treaties by Protocol to the Amsterdam Treaty consists of the Agreement on the gradual abolition of checks at common borders signed on 14 June 1985, the Convention Implementing the Agreement signed on 19 June 1990, the Accession Protocols and agreements and the related final acts and declarations, the decisions and declarations adopted by the executive committee.

<sup>15</sup> Cyprus, Bulgaria, Romania and Switzerland.

Although originally conceived for European citizens alone, the practical application of the freedom of movement meant the crossing of borders would be open to all, irrespective of their nationality. The personal scope of this right therefore encompasses third-country nationals as well. However this right was not granted unconditionally: third-country nationals must, when requested to do so, prove that they have entered the territory lawfully, hold a valid visa, travel document or residence permit and satisfy entry conditions.<sup>16</sup> Their freedom to move is guaranteed for a maximum period of three months and may be subject to member states' requirements.

### *1.1.2 Towards the removal of internal border checks*

The Community Code on the rules governing the movement of persons across EU borders<sup>17</sup> (hereafter called the 'Schengen Borders Code') sets out the standards and procedures to be followed in controlling the movement of persons across internal and external EU borders. Based on a European Commission proposal, it was the first instrument in the area of Freedom, Security and Justice, where the Parliament acted as co-legislator together with the Council. Adopted at first reading, it illustrates the exceptional collaboration in this sensitive area among all the institutions. The Parliament's input is in particular recognisable, with the inclusion of the obligation to notify third-country nationals of the grounds for refusal of entry and the granting of a right of appeal.<sup>18</sup>

The principle of the abolition of control at common borders<sup>19</sup> is described in Title III of the Code. Border checks on persons are to disappear and it is clear from the wording that the principle of non-discrimination applies to this provision. Everyone is entitled to move from one country to another without being checked at the border. Furthermore, the physical dismantling of the corresponding infrastructure is expressly called for.<sup>20</sup> Traffic between member states should be able to take place smoothly without being slowed down either by physical or practical obstacles.

The Schengen Borders Code then goes on to list particular measures that may continue to apply regardless of such abolition. In particular it describes the conditions under which police powers may be exercised.<sup>21</sup> While the Schengen Agreement provided for the possibility of spot checks at internal borders on major main roads, the Schengen Borders Code defines the circumstances

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<sup>16</sup> Provided for in Articles 19 to 22 of the CISA. Moreover, they should not appear in the SIS as third-country nationals to be refused entry or stay.

<sup>17</sup> Regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.04.2006.

<sup>18</sup> Article 13(3) (Refusal of entry) of the Schengen Borders Code states: "Persons refused entry shall have the right to appeal."

<sup>19</sup> Article 20 (Crossing internal borders) of the Schengen Borders Code states: "Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out."

<sup>20</sup> Article 22 (Removal of obstacles to traffic at road crossing-points at internal borders) of the Schengen Borders Code states: "Member states shall remove all obstacle to fluid traffic flow at road crossing points at internal borders, in particular any speed limits not exclusively based on road-safety considerations."

<sup>21</sup> Article 21 (Checks within the country) of the Schengen Borders Code based upon Article 2(3) of the CISA reads as follows: "The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party's territory by the competent authorities under that Party's law, or the requirement to hold, carry and produce permits and documents provided for in that Party's law."

and scope of the legitimate exercise of policing, which is not to be affected by the removal of internal border checks. However, this should not be considered an alternative measure. Border control must therefore not be the objective of such practice and checks cannot be conducted in a systematic way. Based on general police information and experience regarding possible threats to public security, their main aim is to combat cross-border crime. They should take the form of spot-checks.

In order to allow individuals to move freely within their territory, it was necessary for participating Schengen countries to harmonise a number of issues relating to the entry and exit of their territory. The CISA therefore sets out, along with the abolition of checks on persons crossing internal borders, detailed provisions regarding the application of controls at the common external border. The principle for the establishment of a system of common provisions as to the entry and exclusion of third-country nationals is described as well as other accompanying measures, in particular police and judicial cooperation.<sup>22</sup>

The EU-9 were asked to apply the Schengen provisions in a “two-step approach”: upon full incorporation of a substantial part of the Schengen *acquis*, the green light for the lifting of borders would be given.<sup>23</sup> In order to enjoy freedom of movement as guaranteed by EU citizenship, they had first to enforce the provisions covering in particular the surveillance of external borders and police cooperation. Upon demonstration of their competence in protecting the territory of the enlarged EU, they were able to join the free movement zone.

### 1.1.3 Exception to the rule: Temporary re-introduction of internal border controls

Immediately after asserting the principle that internal borders may be crossed at any point without border checks on the persons crossing, the CISA provided for the possibility for member states to reinstate these checks where public policy or national security so require.<sup>24</sup> The conditions under which these may be introduced, further detailed in the Schengen Borders Code, emphasise their exceptional nature. It should only be for a short period if deemed in the interest of national security and follow a consultation procedure beforehand. Such a measure should be taken for no longer than strictly necessary. Firstly when there is a foreseeable need for the reintroduction of border control justified by an event that amounts to the aforementioned threat. This article has been widely used when a political or a sporting event takes place. Last year, for instance, Germany reinstated border checks when it was hosting the G8 Summit in Heiligendamm. Austria also plans to make use of it for the European football cup of 2008. Secondly, it is available for unforeseen public policy or internal security considerations, when a member state considers that urgent action is required. It is a requirement of the Schengen Borders Code that when introduced, the measures and grounds for border control must be disclosed to the public in an open and transparent way.<sup>25</sup> On the lifting of such measures, a report demonstrating the success of these operations in view of the aim pursued should be

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<sup>22</sup> On the Schengen principles, see E. Guild, “Moving the borders of Europe”, Inaugural lecture at the University of Nijmegen, 30 May 2001.

<sup>23</sup> In the past, this procedure was also applied to other acceding countries.

<sup>24</sup> Article 2(2) CISA states: “However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures ad at the earliest opportunity shall inform the other Contracting Parties thereof.”

<sup>25</sup> Article 30 (Informing the public) of the Schengen Borders Code states: “The decision to reintroduce border control at internal borders shall be taken in a transparent manner and the public informed in full thereof, unless there are overriding security reasons for not doing so.”

prepared. However, this obligation seems to be widely ignored by the signatories or to operate bilaterally as little evidence on the subject is available to the public.<sup>26</sup>

This practice has been widely used by member states in the past, in particular in 1995 following the first official abolition of borders. In France, at the Schengen executive meeting of April 1996, the French government announced the reintroduction of internal border controls between France, Belgium and Luxembourg. Terrorist threats are also common grounds for invoking Article 2(2) of the CISA, as was the case in France again after terrorist attacks in Paris, or after the July 2005 bombings in London. Now, in a time that combines both circumstances, one wonders to what extent this procedure will not be invoked to reinstate controls at the new common borders.<sup>27</sup>

It seems however that this would not be the favoured measure to respond to the situation, as border checks would only be introduced on a temporary basis. It is therefore not regarded as a sustainable measure in addressing the new threats, counter-terrorism being a long-term activity.<sup>28</sup> Moreover, practice has shown that these controls in fact primarily affected Union citizens or third-country nationals with residence permits in another member state.<sup>29</sup> The reinstatement of such controls would then have no other effect than to delay their travelling, as this last category enjoys the freedom of movement within the EU, regardless of controls at internal borders.

## 1.2 Enlargement and the fear about insecurity

In the preamble to the Maastricht Treaty, member states reaffirmed their objective “to facilitate the free movement of persons, while ensuring the safety and security of their peoples, in accordance with the provision of this Treaty”. The reformulation of borders for the movement of persons within the EU implied that what was traditionally viewed as a national barrier to foreign threats was to be removed. What was then supposed to come as ‘compensation’?

### 1.2.1 *The significance of border controls*

Borders have various connotations. First of all, they create effective barriers to human activity. The primary aim of the abolition of borders in the European context was the creation of a common market so as to enhance economic exchanges among member states. Secondly, they are an obstacle to freedom of movement, which is considered a fundamental right since 1948.<sup>30</sup> Also, clearly defined barriers are one of the constituting elements of the state. Frontiers have always been “conceived as the outer limits of the power of a sovereign state upon a population in a specific space.”<sup>31</sup> They define the physical limit within which a state may exercise its

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<sup>26</sup> Kees Groenendijk, “Re-instatement of controls at the internal borders of Europe: Why and against whom?”, *European Law Journal* 2, 2004, p. 163.

<sup>27</sup> Joanna Apap and Sergio Carrera, “Maintaining Security within Borders: Towards a Permanent State of Emergency in the EU?”, *Alternatives: Global, Local, Political*, Vol. 29, No. 4, Aug-Oct 2004, pp. 399-416.

<sup>28</sup> Point 28 of the Conclusions on the Fight against terrorism adopted at the Council of 20.09.2001 (SN 3926/6/01).

<sup>29</sup> Groenendijk (2004), op. cit.

<sup>30</sup> Article 13 of the Universal Declaration of Human Rights reads: Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.

<sup>31</sup> Malcolm Anderson and Didier Bigo, “What are EU frontiers for and what do they mean?”, in Kees Groenendijk et al., *In search of Europe's borders*, p. 8.



jurisdiction and enforce its authority upon those individuals who are present. Originally, nation-state frontiers were first and foremost barriers against external military threats. They are traditionally considered in relation to concepts such as sovereignty, security and citizen allegiance.

Borders were also long seen as an effective tool to control trafficking and criminality within a country. It comes as no surprise that emphasis has been given to possible security risks once borders are abolished since the very beginning of the discussions leading to the Schengen Agreement.<sup>32</sup> As Frontex Director Ilkka Laitinen put it, the absence of borders makes it more difficult to stop criminals as "border control is a very effective instrument for stopping those who you don't want coming in. Without that, you have to have concrete suspicions before you can stop people."<sup>33</sup> It is interesting to note that Laitinen seems to regret the divergence between both forms of check, i.e. border and police controls. While border controls target all individuals who cross the line, police controls must be related to crime. According to this statement, police should be allowed to conduct checks at internal borders among member states without concrete suspicion.

In the light of this statement, it is not surprising that in the process of abolishing borders, the political discussion focused in particular on control of the newly created common external frontier. By emphasising the stopping function of border controls, he transforms them to act as a filter. But the relocation of sovereignty to the external boundaries also triggered intense activity at European police and judicial cooperation level.

### 1.2.2 The Schengen Information System

A significant part of the Schengen *acquis* covers the measures to be taken in order to offset the foreseen loss in security that will inevitably be triggered by the abolition of border controls. From the outset of the discussions,<sup>34</sup> it was agreed that the creation of a common travel area had to be accompanied by compensatory measures. These included common checks on people entering the zone, harmonisation of conditions of entry, coordination of surveillance of borders and common rules for examining applications submitted by asylum-seekers. From then on, police and judicial matters within a country depended upon the cooperation among all participating states.

At the ministerial conference of 14-15 September 1987, the Schengen participating governments agreed to the creation of a computerised information system that was to be shared by border guards and police authorities. The Schengen Information System (SIS), established in order "to maintain public policy and public security, including national security and to apply the CISA's provisions concerning the movement of persons"<sup>35</sup> is the largest common European database. Its purpose is to maintain public security and manage external border controls. It is also the central tool for the application of the Schengen principles. In particular, member states notify, via this database, the identities of third country nationals whom the states consider a threat to their public security according to their national criteria. As a result, those persons signalled are to be

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<sup>32</sup> Didier Bigo, *Police en réseaux, l'expérience européenne*, Paris: Presses de la fondation nationale des sciences politiques, 1996, p. 101.

<sup>33</sup> "Passport-free travel from Estonia to Portugal", *Spiegel Online*, 19 December 2007 (retrieved on 22.02.2008 from <http://www.spiegel.de>).

<sup>34</sup> Article 17 of the Schengen Agreement provides for the states to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of states that are not members of the European Communities

<sup>35</sup> According to Article 93 of the Convention Implementing the Schengen Agreement (CISA).

denied admission anywhere in the EU. Its aim is to enhance security at the external frontier, act as a supportive measure in the fight against irregular migration and increase cooperation between police forces.

The SIS therefore became the conditioning factor for the implementation of the removal of borders. Already in the discussions prior to the lifting of borders in 1995, the relevant ministers and secretaries of state emphasised that the effective functioning of the SIS was a prerequisite for the abolition of border controls.

### 1.3 The conditions for the abolition of internal border controls

In September 2006, the Commission recognised that the initial deadline of October 2007 would not be met for bringing down the Schengen borders within the enlarged EU. A two-year delay was envisaged. Originally, the prerequisite for the EU-9 to join Schengen was that the second-generation Schengen Information System (SIS II) needed to be technically operational. This decision put pressure on the Portuguese Presidency to find an alternative solution in order to attain this aim within a reasonable timeframe. The date was set for December 2007 and evaluations were carried out in order to ensure that the EU-9 would meet all security requirements.

#### 1.3.1 *The SIS II: A prerequisite for the freedom to move*

The need to reform the SIS had been mentioned as early as 2001, that is, three years before the accession of the 10 new member states, but the same year as the fight against terrorism was launched. The reasoning was that the SIS needed to be changed so as to be technically ready for future members to be able to connect to the system. It was already modified in 2001, when the Nordic states joined and some technical upgrades were added, producing the so-called ‘SIS1+’. However, this system did not have sufficient capacity to accommodate the new members. From the very beginning, the discussions on the SIS reform gave rise to a larger debate as to whether to include new functionalities to the system.<sup>36</sup> The fight against terrorism meant that police cooperation among member states needed be intensified. The SIS as an instrument of cooperation among police authorities was thus considered the most appropriate tool to put this into practice. In its current form, however, it lacked the necessary legal basis and technical functionalities to apply the new anti-terrorist functionalities.<sup>37</sup>

Initially, the effective functioning of the SIS II was envisaged for March 2007, as the initial deadline for the Schengen borders to come down was October 2007. However, in 2006, it was announced its realisation would be postponed due to legal and technical problems, which would in effect delay the removal of internal borders. The EU-9 reacted vehemently as they considered this delay reflected a lack of trust on the part of the EU-15 towards their ability to control external borders.<sup>38</sup> In October 2006, the Portuguese delegation put forward a proposal aimed at

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<sup>36</sup> Council conclusions: on the new requirements for the SIS (No. 9773/02) of 07.06.2002, on the development of the SIS II (No.9808/03) of 26.05.2003 and on SIS II functions (No.10125/04) of 03.06.2004.

<sup>37</sup> In particular the inclusion of information contained in the European arrest warrant (EAW) and the creation of links between alerts and access by Europol and Eurojust. For an account of the provisions on new functionalities for SIS and the development of SIS II, see Evelien Brouwer, chapter 4 of *Digital Borders and Real Rights*, Nijmegen: Wolf Legal Publishers, 2006.

<sup>38</sup> For an account of the political discussion and the attitude of member states as regards the SIS II delay, see S. Bertozzi, *Schengen: Achievements and Challenges in Managing an Area Encompassing 3.6 million km<sup>2</sup>*, CEPS Working Document No. 284, CEPS, Brussels, February 2008.

overcoming the SIS II delay in a “simple, low-cost and low-risk” way.<sup>39</sup> The ‘SISone4all’, a clone of the Portuguese national SIS, was to be integrated in all countries. Thanks to this technical arrangement, the member states concerned were able to receive SIS data as from 7 July 2007, and to enter data into the system themselves as from 1 September 2007.<sup>40</sup>

Doubts remain as to the justification of such an ambitious project as SIS II, considering this technically feasible alternative. During the last informal meeting of the Justice and Home Affairs Council in Brdo, the date of the entry into force of the SIS II was again postponed and September 2009 was designated as the next deadline.

### 1.3.2 *The Schengen evaluation: Ensuring compliance with internal security*

Technical preparedness was not the only condition for lifting the internal borders with the EU-9. As was the case when Greece, Austria and the Nordic countries joined the Schengen regime, an evaluation to certify that these countries were capable of guaranteeing a high level of control at their external border was performed. In the case of the 2004 signatories, the evaluation procedures to assess the readiness to join the border-free area (Schengen evaluations) were foreseen in the Acts of accession.<sup>41</sup> The final decision was to be taken by the Council after examination of each country’s external border arrangements and their integration of the tools for border control. They had to prove that they were capable of protecting the territory of the enlarged EU from irregular migration and cross-border crime, the major threats to the EU’s integrity.

In 2006, 58 evaluation visits were carried out in the EU-9 and in 2007 another 15, this time in order to assess whether or not the recommendations issued in 2006 had been followed. Evaluations as to the correct use of the SIS were also carried out in September and October 2007. The areas assessed were data protection, police cooperation, external border controls at land, sea and air borders and visa policy. Experts nominated by the member states together with officials of the European Commission and the Council Secretariat carried out these inspection visits once the applicant member state had declared it was ready. Once the inspection was completed, the Council had to decide unanimously<sup>42</sup> whether to proceed with the lifting of internal borders or to require a new inspection.

In relation to police cooperation, it was assessed in particular whether the acceding countries had facilitated the implementation of the relevant CISA articles.<sup>43</sup> This facilitation should have taken the form of bilateral agreements with bordering countries. It is to be highlighted that this stage is the only one that implied a certain form of involvement of the EU-15 in the evaluation criteria. In fact, as common users of the Schengen facilities, the EU-15 were no longer subject

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<sup>39</sup> See the feasibility study from the Portuguese delegation – SIS one 4 all – Schengen Information System (13540/06), 12.10.2006.

<sup>40</sup> Council Decision on the application of the provisions of the Schengen *acquis* relating to the Schengen Information System in the Czech Republic, the Republic of Estonia, 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 (2007/471/EC), OJ L 179, 12.06.2007, pp. 46-49.

<sup>41</sup> Article 3(2) of the 2003 Act of Accession in conjunction with the decision of the executive Committee of 16 September 1998 setting up a standing Committee on the evaluation and implementation of Schengen.

<sup>42</sup> Unanimity included the member states fully applying the Schengen *acquis*, plus the member states applying for full implementation, Commission MEMO 07/619, Background on Schengen enlargement, 20.12.2007.

<sup>43</sup> Articles 40 and 41 of the CISA provide the details for the circumstances of cross-border surveillance and pursuit.

to the evaluation requirement. It seems that they were automatically considered to be applying the Schengen provisions correctly, with no consideration of the fact that the borders were now moved to another location and that their role in the controlling of borders was therefore to evolve.

At the Justice and Home Affairs Council of November 2007, the evaluation reports were assessed and it was eventually decided to proceed according to the last timetable.<sup>44</sup> The date of 21 December 2007 was agreed upon for the lifting of internal border controls at land and maritime borders and 30 March 2008, for the lifting of internal border controls at airports.

## 2. New barriers to the freedom of movement

Since the abolition of borders, movement within the Schengen territory was meant to encounter neither physical barrier nor border guard. As from the 21 December 2007, border controls have disappeared and the border may now be crossed without the usual queues and delays. However, as evidenced by the three following processes, the success of this measure should not obscure the fact that scattered security controls are now taking place at three levels within the Schengen territory:

- i) the expansion of mobile police controls,
- ii) the development of joint patrols in the context of enhanced police cooperation and
- iii) various administrative obligations imposed on European citizens as well as on third country nationals.

### 2.1 Reorganisation of border patrols and mobile controls

The CISA clearly states that the removal of internal borders shall not affect the exercise of police powers within a member state's territory.<sup>45</sup> Identity checks are thereby permitted and are governed by national legislation. There is a whole range of national legislative frameworks relating to the distance from the border within which checks may be performed. In some countries this is limited to the border area, whereas for others this is permitted to take place within the entire territory. The grounds on which identity checks may be performed also vary greatly from one country to another. It is interesting to note that most EU-15 have extensive legislation on the subject, allowing border controls to be performed on a large proportion of the territory while most EU-9 do not have any specific provisions.

Let us now look at some kinds of practices involving the reorganisation of border patrols since the lifting of internal land and sea borders in December 2007. Most probably due to their proximity to the EU-9, Austria and Germany are the countries where most travellers often encounter obstacles to their mobility. While Austria has already announced that it plans to make use of Article 2(2) CISA and reinstate border controls for the European Football cup in 2008, at present more policemen have already been appointed to carry out 'Schengen Kontrolle' within

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<sup>44</sup> Council Decision to extend Schengen fully to 9 new MS as from 21 December (2007/801/EC), OJ L 323, 08.12.2007, pp. 34-39.

<sup>45</sup> Article 2(3) CISA states: "The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party's territory by the competent authorities under that Party's law, or the requirement to hold, carry and produce permits and documents provided for in that Party's law."

the border regions, together with 1,500 soldiers.<sup>46</sup> Justifying this measure by the general fear among the population that an increase in criminality was expected, the government has planned to use these supplementary task forces for one year before reassessing this measure in the light of crime trends. The situation is similar in Poland where “in order to improve operations, the current Polish border patrol has expanded the number and activity of its mobile patrols in the border region and within our country.”<sup>47</sup> In Germany, the police are conducting searches on Polish cars on the grounds that criminality has increased since the enlargement.<sup>48</sup> Finally, to name one of the last examples, border checks in the Czech Republic have been replaced by more frequent inland control operations under the name ‘Territory mainly’, targeting in particular locations where migrants tend to gather (train stations, hostels, transport routes crossing the border, etc.).<sup>49</sup>

Until the official date of the removal of internal border checks, there remained much uncertainty as to the future duties assigned to the personnel traditionally in charge of these tasks. It should be noted that the border guard lobby was in fact a central actor in putting the security issue forward in the last months before the abolition of internal checks. For countries such as Germany or the Czech Republic, where borders are now exclusively with other member states, border authorities had to be fully reconverted into other security departments. While in Slovenia, for instance, the majority of border guards were transferred south to the border with Croatia, the new external border of the EU, the German former border patrol was incorporated within the federal police force. This is the case for a majority of member states, but not for all. For example, it should be noted that, in 2000, there were more border guards in the Netherlands than before the lifting of controls on the internal Schengen border.<sup>50</sup>

The question then arises as to the necessary training that these reconverted border guards should have received, but this issue was not part of the Schengen evaluations. Border guards and police authorities perform different tasks and do not work on the same basis. While the former are supposed to oversee all movement from and within a country, the latter should insure internal security by preventing and locating potential threats. However this should not be done in a systematic way by controlling every single individual. Mentality is a crucial aspect. The view that any foreign national entering the country may be a potential unwanted alien cannot be changed overnight.

These practical examples show that although removed from their original location, scattered security checks are still taking place within the whole Schengen territory. This in turn raises questions as to the legitimacy of the basis of such checks and the criteria for deciding which car or individual should be checked. Austria for instance has a law empowering agencies responsible for public security to ascertain an individual’s identity if it is reasonable to assume

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<sup>46</sup> “Austrian police check Czech drivers even after Schengen”, *Prague Daily Monitor*, 21 January 2008 (retrieved on 22.02.2008 from <http://www.praguemonitor.com>).

<sup>47</sup> Jacek Sonta, public communications director for the Polish border patrol interviewed by DW-World.de in “Polish Border Guard: We’re ready for Schengen challenge”, *Deutsche Welle*, 29 November 2007 (retrieved on 22.02.2008 from <http://www.dw-world.de>).

<sup>48</sup> “Policja w Görlitz nie odpuszcza Polakom”, *Gazeta*, 8 February 2008 (retrieved on 22.02.2008 from <http://miasta.gazeta.pl>).

<sup>49</sup> “Czech police carry out first check after Schengen enlargement,” *Ceskenoviny*, 29 January 2008 (retrieved on 22.02.2008 from <http://ceskenoviny.cz>).

<sup>50</sup> Kees Groenendijk, “New borders behind old ones: Post-Schengen controls behind the internal borders and inside the Netherlands and Germany”, in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In search of Europe’s borders*, The Hague: Kluwer Law International, 2003, pp. 131-146.

from the circumstances that the individual concerned has just crossed the internal border.<sup>51</sup> When an Austrian policeman states that cars that are suspected of transporting refugees are specifically targeted and given that the Czech police patrol locations where migrants tend to gather, the issue of discrimination is bound to arise. To what extent does the non-European, foreign-looking population become the main target of such controls?

## 2.2 Enhanced police cooperation: Joint centres

Police cooperation at the European level has been envisaged from the outset in the framework of the Schengen regime, as it is considered an essential complementary measure to the lifting of internal borders. In the event that control at the external border would fail, some form of control needed be provided in order to restrain the mobility of potential criminals especially in border areas, where the law enforcement authority is not as clearly defined. While the SIS aims to further the exchange of information among member states, a more practical approach was also provided in order to address the security risk created by the fact that in principle, law enforcement intervention has to stop at the internal border. Under the CISA, European police services are invited to collaborate in order to prevent and pursue punishable offences.<sup>52</sup> However, police forces can only act on the basis of well-founded suspicion of crime. The establishment of efficient cross-border solutions has therefore been regarded as a priority.

The Hague Programme (the second multi-annual programme on Freedom, Security and Justice)<sup>53</sup> also invited “the Commission to bring forward proposals to further develop the Schengen-acquis in respect of operational cross border police cooperation, and in its Declaration on combating terrorism of 29 March 2004, it had instructed the Council, among other things, to examine measures in the area of ‘cross-border hot pursuit’ and called for further development of the legislative framework.” A proposal for a Council decision on the improvement of police cooperation between member states of the European Union, especially at the internal borders,<sup>54</sup> was however overwhelmingly rejected as member states did not wish to see this prerogative fall outside of their competence.<sup>55</sup> Today, the modalities for police cooperation therefore remain in the bilateral sphere leading to numerous discrepancies and differences in interpretation.

The example of France is a good case in point as it has concluded a number of agreements with bordering countries, creating 10 border cooperation centres where officers from Italy, Spain or Germany collaborate with French policemen. This model was hence followed by the EU-9<sup>56</sup> and

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<sup>51</sup> Paragraph 35(1) Z 6 Austrian law on security police as reported in the Police Cooperation Handbook.

<sup>52</sup> Article 39(1) of the CISA reads: “The contracting parties undertake to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences, in so far as national law does not stipulate that the request has to be made and channelled via the judicial authorities and provided that the request or the implementation thereof does not involve the application of measures of constraint by the requested Contracting Party. Where the requested Police authorities do not have the power to deal with a request, they shall forward it to the competent authority.”

<sup>53</sup> European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C53/01, 03.03.2005.

<sup>54</sup> Commission proposal for a Council decision on the improvement of police cooperation between the member states of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement, COM(2005)317final, Brussels, 18.07.2005.

<sup>55</sup> See for instance the French Senat resolution (n°61 2005-2006) on this proposal 08.02.2006 (retrieved on 22.02.2008 from <http://www.senat.fr>).

<sup>56</sup> Peter Hobbing, *Integrated border management at the EU level*, CEPS Working Document No. 227, CEPS, Brussels, 2005.

border patrol cooperation between Poland and Germany has been enhanced in view of the abolition of borders with the opening of a new joint institution in the bordering town of Swiecko in December 2007.<sup>57</sup> A cross-border police cooperation agreement between Slovenia and Austria was signed in August 2007 whereby joint patrols can operate up to 10 kilometres beyond the border on both sides, a distance which is increased to 30 kilometres when operating alone in the other country. Joint interventions and joint surveillance operations are provided for through bilateral agreements depending on the level of cooperation each member states wishes to develop with its neighbour and the level of intrusion it allows within its territory. A catalogue of such diverse European operational cooperation measures is listed in the Schengen police cooperation handbook.<sup>58</sup> They cover an impressive range of prerogatives such as arrest, delegation of public authority from a foreign state, cross-border threat prevention, etc...<sup>59</sup> As a result, it is considered that these agreements go beyond the limits of classical assistance and achieve a significant 'quantum leap' in police cooperation.<sup>60</sup>

Among other policy priorities, the Hague programme emphasises police operational cooperation based on trans-border networks for information exchange. Such information exchange may take place for instance through the SIS, which was considered a key tool for its facilitation.<sup>61</sup> Consequently, intelligence-based joint police interventions rely on a European instrument. The actual performance of these operations, however, remains an exclusively national competence. On the whole, it is difficult to determine which rules and guarantees apply to joint interventions. As a European code of conduct is still missing, one can wonder to what extent such interventions are really non-discriminatory.

### 2.3 National requirements for identification papers and documents

The abolition of border checks does not affect the existence of identity checks within a country, which are still permissible. Few travellers in general and EU citizens in particular are aware of the fact that notwithstanding the absence of border checks, they may be requested to produce identification within the Schengen area. The Schengen Borders Code explicitly allows the member states to impose an obligation to carry such documents.<sup>62</sup> With respect to EU citizens and their families, the right of entry in and exit from the territory of a member state is subject to their holding a valid identity card or passport.<sup>63</sup> Over the past years, it has been a common trend to extend the application of such an obligation to include nationals. Today, there are very few member states in which identity cards are not compulsory for nationals.

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<sup>57</sup> "Polish border guard: We're ready for Schengen challenge", *DW-World*, 13 February 2008 (retrieved on 22.02.2008 from <http://www.dw-world.de>).

<sup>58</sup> Schengen Police Cooperation Handbook (10694/07) from the General Secretariat of the Council of the European Union, 08.02.2008 (accessible on <http://www.statewatch.org/news/>).

<sup>59</sup> Hobbing, op cit.

<sup>60</sup> *Ibid.*, p. 173.

<sup>61</sup> For an analysis of the Hague programme in particular on the sections for strengthening security see *Security versus Freedom?*, by T. Balzacq and S. Carrera (eds), Aldershot: Ashgate, 2006, p. 18.

<sup>62</sup> Article 21(c) Schengen Borders code: "The abolition of border control at internal borders shall not affect: (...) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents."

<sup>63</sup> Articles 4 and 5 of Directive 2004/38/ EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For an analysis of this Directive see S. Carrera, "What does Free Movement Mean in Theory and Practice in an enlarged EU?", *European Law Journal*, 11, 2005.



The notifications of individual national requirements on documents were published in the *Official Journal* in January 2008.<sup>64</sup> They are summarised in a table in Annex 1. At a minimum, non-nationals (EU citizens and third-country nationals alike) are required to have photographic identification. Other requirements include a residence permit, proof of lawful entrance on the territory or documents justifying the aim of the visit. As shown in the notifications, each country has developed its own set of requirements. Furthermore, the question arises as to what exactly constitutes a proof of lawful entry when internal border checks are no longer performed. At present, different documents are required in each member state and the circumstances under which these documents are to be requested also differ. A 2005 judgment of the European Court of Justice, however, ruled<sup>65</sup> that it was discriminatory<sup>66</sup> to impose an obligation on third country nationals to carry an identity card or passport when nationals are not faced with the same obligation.

Regarding third country nationals, Article 22 of the CISA<sup>67</sup> introduces an additional provision requiring all aliens to “declare themselves” to the competent authorities in each of the Schengen States whose territory they enter. Each Schengen State has the option to require that the declaration be made upon entry or within three working days of entry. As for the obligation to carry identity documents, these obligations do not follow a single pattern. The fact that each national body of legislation refers to different procedures, timeframes and documents<sup>68</sup> makes it difficult for a newcomer to comply with the requirements. Finally, the issue of proportionality arises, in view of the additional burden that such a practice represents. Indeed, the CISA imposes an obligation on hotels and establishments providing accommodation to register the name, citizenship and ID number of all foreign citizens<sup>69</sup> including nationals of other contracting states. Consequently, various administrative layers are thereby applied on the individual.

In practice, the effect of the reinstatement of a national obligation to carry an identity card and to report to national authorities when entering a country implies a shift in the controlling of borders from a specific geographical location to the whole national territory. Identity checks performed in the context of border controls are therefore converted into an obligation to carry identification documents and other administrative requirements at all times within the national territory. Such requirements may be verified through checks performed at the discretion of each member state. Furthermore, the complexity and diversity of each relevant national provision

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<sup>64</sup> Notification under Article 37 of the Schengen Borders Code, OJ C 18/03, 24.01.2008, p. 15.

<sup>65</sup> Case C-215/03, *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie*, 17.02.2005, paragraph 2 of the ruling states : “It is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law.”

<sup>66</sup> Article 49 EC provides for the freedom to provide services and is a specific expression of the principle of equal treatment as provided for in Article 12 EC.

<sup>67</sup> Referred to in Article 21(d) of the Schengen Borders code: “The abolition of border control at internal borders shall not affect (...)the obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.”

<sup>68</sup> For the compilation of national legislation, see OJ C 18/04, 24.01.2008, p. 25.

<sup>69</sup> Article 45(1)a CISA reads: “The Contracting Parties undertake to adopt the necessary.

measures in order to ensure that: the managers of establishments providing accommodation or their agents see to it that aliens accommodated therein, including nationals of the other Contracting Parties and those of other Member States of the European Communities, with the exception of accompanying spouses or accompanying minors or members of travel groups, personally complete and sign registration forms and confirm their identity by producing a valid identity document.”



make it difficult for non-nationals, including EU citizens, to be informed of their obligations when travelling to another member state. In practice, these various administrative strata give rise to a proliferation of boundaries coupled with a lack of transparency in the implementation of such obligations.

### **3. Mobility and borders after the 2007 December enlargement**

On the night of the 20 December 2007, there were great celebrations along the border between the old and new Europe. This is understandable in view of the political significance of such an event in the EU integration process. This subsection focuses not so much on the political message that was delivered, but rather on the way in which it was perceived by the populations concerned. While most people living along common borders were enthusiastic about the practical advantages brought by this historical change, some expressed concern about the loss in security and the increase of criminality it might trigger. The governments of the EU-15 have in fact often used this argument to justify a strengthening of law-enforcement cooperation in the face of this perceived threat. We first present an overview of the local reactions and attitudes subjecting them to available data, in order to assess the observed impacts on mobility.

#### **3.1 Reactions and attitudes of local communities and authorities**

A recurrent observation is that the change was not as spectacular as would have been expected according to official positions. Indeed, even before the removal of borders, checks were not performed in a particularly stringent way, with border guards only giving a cursory glance at the document that was submitted to them. In fact, it appears that they were only checking if people were in actual possession of such documents, although one can argue that this really depended upon the direction in which you were travelling: border guards in the EU-9 were generally tolerant while controlling the freedom of movement of their compatriots were soon to enjoy. For a vast majority of travellers, however, this meant the end of lines and queues on their way to work, shop or visit.

The picture is not so felicitous, however, when looking at the situation in bordering areas. Citizens close to the border have been attempting to reinforce their security by buying special devices and weapons. The press has also publicised two reports citing opinion polls according to which 60% of Germans agreed that open borders were an invitation to crime and more than 75%<sup>70</sup> of Austrians opposed it on the same grounds. It seems therefore that local communities have reacted in an increasingly defiant way in view of these processes.

A case reported by the German press may be used to illustrate some of the responses of the local population to the perceived threats created by the opening of internal borders. Prior to this event, criminality was an issue of concern in the German region of Oberlausitz, which shares a border with the Czech Republic. Fearing an increase in criminality with the lifting of borders, the inhabitants had planned to organise a self-defence patrol which would take over the tasks of the former border patrols.<sup>71</sup>

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<sup>70</sup> "Hope and fear as Schengen expands", BBC News, 22 December 2007 (retrieved 22.02.2008 from <http://news.bbc.co.uk>).

<sup>71</sup> "Hinter Gittern", *WeltOnline*, 17 December 2007 (retrieved on 22.02.2008 from <http://www.welt.de>).

### 3.2 Relationship between fears, perceptions and real numbers

In the months before the abolition of borders, German media extensively reported the concerns voiced by the federal police about an increase in criminality. One police trade union in particular took part in demonstrations, arguing that crime gravitated towards open borders.<sup>72</sup> However, fears that the opening of borders would lead to an increase in criminality have proved to be unfounded according to the German police spokesperson.

As regards immigration figures, according to Reuters which interviewed representatives of the relevant services,<sup>73</sup> German, Austrian, Polish and Czechs authorities have not experienced any increase in the irregular migration figures in the month following the removal of common borders. In the case of Poland, there was even a 50% decrease in the number of irregular entrants in the three following weeks. In Germany, while the tabloids have played up the concerns expressed by police trade unions and cited somewhat inflated figures, a spokesperson from the Federal Ministry of the Interior announced that the irregular migration figures were in fact lower than reported by some media, the reasons why the figure remained high being that there was an increase in controls at the border.<sup>74</sup>

Of course, it is still too early to be able to compare and reconcile conflicting statistics. Nevertheless, when considering the figures available for the first months of 2008, it should be kept in mind that the increase of arrests of third country nationals may be explained by the higher number of police officers deployed along the border. It is a known fact that more offences can be detected when controls are intensified.

### 3.3 The perspective of a potential traveller

In view of the short period of time that has elapsed since the removal of borders, it is difficult to gather extensive information concerning the specific problems encountered when exercising the new freedom of movement. The European Citizen Action Service (ECAS), an NGO that runs on behalf of the Commission a service addressing mobility issues in the EU,<sup>75</sup> has not received any complaints in relation to problems encountered by individuals at the border. SOLVIT, the Commission service in charge of addressing internal market issues, reports having received only one complaint.<sup>76</sup>

Various factors can be put forward in this context. It appears that most citizens of recently enlarged countries wanting to move had already migrated before the actual removal of physical borders. According to ECAS latest report,<sup>77</sup> the influx of citizens from acceding countries took place long before these joined the EU, as was also the case in the preceding enlargement. The

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<sup>72</sup> “Once volatile, crossing is opening with a whisper”, *The New York Times*, 20 December 2007 (retrieved on 22.02.2008 from <http://www.nytimes.com>). The author argues that these protests were partly caused by the fact that following the opening of borders, German policemen were facing redundancy or transfer.

<sup>73</sup> “Pas de déferlante de clandestins dans l’est de l’espace Schengen”, *Reuters*, 20 January 2008 (retrieved on 22.02.2008 from <http://www.lepoint.fr>).

<sup>74</sup> As of 11 January 2008, there had been 425 irregular entrants in Germany, according to a spokesperson of the Federal Ministry of Interior (quoted in the Migration News Sheet of February 2008).

<sup>75</sup> Citizens Signpost Service (accessible at: [http://ec.europa.eu/citizensrights/front\\_end/index\\_en.htm](http://ec.europa.eu/citizensrights/front_end/index_en.htm)).

<sup>76</sup> Merely the Hungarian SOLVIT has received complaints as regards Austrian traffic restrictions at the border with Hungary in order to tackle increase traffic, which in effect limits the right to move between the two countries.

<sup>77</sup> “Who’s afraid of the EU’s latest enlargement?”, ECAS report, January 2008.

abolition of borders has therefore very little impact on the migratory trends of the nationals of these countries. The few cases relating to problems encountered in the enjoyment of free movement were in fact brought up by the press and it is important to point out that most of them concerned problems occurring to third country nationals. This category of persons is, because of a lack of information, less inclined to make use of the above-mentioned services.

One particular case will be mentioned as it raises a number of significant issues and shortcomings regarding the Schengen enlargement preparation. This concerned three Turkish students in Poland who three days after the lifting of borders decided to visit relatives in Germany. Beforehand, they took care to ask immigration authorities whether their visas allowed them such a trip. Upon receiving a positive answer (according to Schengen rules, a visa delivered in one Schengen state is valid for other Schengen states) they pursued their objective. They were soon to be disappointed by the German police who stopped them and returned them to Poland where they faced expulsion to Turkey.<sup>78</sup> This situation perhaps reveals the fact that the Polish immigration authorities were not aware of the fact that visas granted before the full application of the Schengen *acquis* were not considered valid for the whole of the Schengen territory.

Most worrying are the feedback received from Czech and Polish citizens. At the border between Poland and Germany, it seems that German police authorities are using minor offences in order to justify the arrest and control of Polish cars. It has been reported that they go as far as to control the level of first-aid kit products which have to be carried in cars in Germany. Moreover, it appears that only Polish cars are targeted for such searches. In the Czech Republic, the Ministry of interior has been informed of repeated police checks taking place a couple of kilometres from the border. Most travellers complaining have pointed out that the checks performed were often much more thorough than those occurring before the lifting of internal borders. As a result, travelling between the two countries can sometimes take longer than before the 21 December 2007. Though not systematic, controls occur rather frequently.<sup>79</sup> Such statements should however not be considered as reflecting a bleak situation as there have been relatively few complaints. Since establishing a website allowing the collection of complaints,<sup>80</sup> the Czech Ministry of interior has only received 20 reports. Any cases of this type should however be addressed and not be overlooked.

#### 4. Conclusion

During the past three years, the abolition of internal border checks within the Schengen common area has been framed as a key priority within the enlarged EU. As two months have now elapsed since the lifting of land and sea border controls, this paper addresses some of the implications and weaknesses emerging from this process. Nevertheless, one cannot overlook the fact that this challenging operation has on the whole been successful. In fact, such an achievement represents a significant de-securitization project when considering the obstacles and resistance that it has at times encountered. Today, few are still opposed to the application of the Schengen regime in an enlarged Europe, while the feedback from the population is overwhelmingly positive.

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<sup>78</sup> “Deutsche Gründlichkeit”, *Süddeutsche Zeitung*, 31.01.08 (retrieved on 22.02.2008 from <https://ssl.sueddeutsche.de>).

<sup>79</sup> A man wrote that in 20 crossing of the Czech-Saxon border, he was checked 9 times.

<sup>80</sup> Police checks on the territory of neighbouring countries, Notice for travellers 21.01.2008 (accessible at <http://www.euroskop.cz>).

However there is evidence that the debate regarding mobility within the EU needs to be kept under review. The constructed nexus between crime and open borders has had a significant impact on the freedom of movement and the liberty and security of individuals exercising it. In fact, the abolition of internal land and sea borders seems to have prompted the emergence of new forms of control. The reorganisation of border patrols, together with the emphasis on enhanced police cooperation and finally the obligation to comply with complex administrative requirements have in effect led to a multiplication of alternative, functional borders. These are not only spatially scattered and diversified in terms of authorities, but they are also mainly subject to national discretion. The Europeanisation process of the freedom to move seems therefore to have been weakened by the enlargement of the Schengen area.

The practical cases shown in the last section demonstrate that in the process leading to the abolition of border controls, the emphasis put on security issues encouraged member states to address the supposed security deficit at national level. While there has been a general feeling of mistrust as to the extent of preparedness the EU-9 had achieved in implementing the Schengen *acquis*, the discussion essentially revolved around whether or not they were capable of attaining a level of cooperation in Justice and Home Affairs matching that of the EU-15. This had a number of consequences. Firstly, the potential traveller was led to understand that movement within the Schengen area would no longer encounter border checks, while controls over his/her movements might still occur. Being stopped several kilometres from the official border by police forces does not appear questionable, as it has been stated repeatedly that the security deficit created by the Schengen enlargement needed to be offset by special policing measures. Police controls and spot checks are now increasingly considered common. Secondly, from the aspects evoked in this paper, it seems obvious that the main victims of such developments have been the citizens of the newly acceding countries and third country nationals whose situation is today difficult to assess. The absence of visibility of these new forms of control coupled with the absence of protection and remedies available to third country nationals,<sup>81</sup> makes their situation today within the enlarged Schengen area most worrying.

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<sup>81</sup> Evelien Brouwer (2008), *The Other Side of the Moon, the Schengen Information System and Human Rights: A Task for National Courts*, CEPS Working Document No. 288, CEPS, Brussels, April.

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## Annex 1.

### The possibility for a Member State to provide by law for an obligation to hold and carry papers and documents pursuant to Article 21(c)<sup>a</sup> Provisions applying to non-nationals<sup>b</sup>

Country	Document <sup>c</sup>	Obligation to
Belgium	Residence permit, establishment permit or other residence document	Produce upon request of any official of the competent authority
Bulgaria	Identity card or passport	Be in possession and carry
Czech Republic	Travel document (Proof of identity)	Produce upon request of Police officer
Denmark	Passport or travel document	Produce to public authorities
Germany	Valid passport or travel document	Produce, hand-over and temporarily give-up
Estonia	Reference to national legislation	
Greece	Passport/other travel document guaranteeing return to country of origin and doc justifying aim of the trip	Be in possession and carry
Spain	Documents proving identity and legal situation in Spain	Produce when required by authority
France	Papers or documents with which they are authorised to travel or stay in the territory	Produce upon request of officials from the judiciary policy
Italy	Identity card	Produce upon request of police officers
Cyprus	Identity card	Produce upon request of police, registry authority, authorised by the director of migration and civil registry department
Latvia	Personal identification documents	Carry only within the frontier zone (2km from the state border line)
Lithuania	ID documents	Have and carry
Luxembourg	Residence permits	Carry at all times
Hungary	Travel documents, residence permit or documentation suitable for the identification	Produce upon the request of the authorities
Malta	Passport or other relevant documentation	Legally, to produce at point of entry; in practice at all times
The Netherlands	Proof of identity	Produce to officials responsible for border control and supervision of foreign nationals

Austria	Passport (valid travel document)	Possess when entering and leaving the country
Poland	No specific regulation	
Portugal	Residence permit, identity card or passport	Carry in a public place, a place accessible to the public or subject to police surveillance
Slovenia	Photographic identity and permit demonstrating they have entered and are residing in Slovenia legally	Produce at the request of a police officer
Slovakia	Valid travel document including if required a visa, an identity card or a residence permit	Carry
Finland	Valid passport	Produce upon request to border check authorities or the police when entering and staying
Sweden	Passport or other document demonstrating right to reside in country	Produce upon request of a police officer or a coastguard when there is reasonable ground for assuming that the alien has no right to reside or other special reasons for control
Romania	Residence permit which states duration and purpose of stay	Carry and produce upon request to the competent authority
Iceland	Passport or other identity document recognized as a travel document	Produce upon request to the police
Norway	Proof of identity and of lawfulness of presence	Produce upon request to the police

<sup>a</sup> As compiled in the Notification under Article 37 of Regulation (EC) No562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) 2008/C 18/03, p.15, 24.01.2008.

<sup>b</sup> EU citizens as well as third country nationals.

<sup>c</sup> Literally quoted from the notifications.



## **Annex 2. Interviews conducted in February 2008**

Claire Damilano, Legal Officer, ECAS

Jurij Daneu, Assistant to MEP Mihael Brejc (EPP-ED/Slovenia)

Danny De Temmerman, European Commission, DG JLS

Sarka Machotkova, Unit for Coordination of Schengen Cooperation, Ministry of the Interior of the Czech Republic

Monika Moßhammer, European Commission, DG JLS

Robert Rybicki, European Commission, DG JLS

## About CHALLENGE

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The familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. **CHALLENGE** (Changing Landscape of European Liberty and Security) is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the **CHALLENGE** project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The **CHALLENGE** network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life; assessing new vulnerabilities (e.g. the ‘others’ targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).
- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

### The CHALLENGE Observatory

The purpose of the **CHALLENGE** Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network’s activities, please visit the **CHALLENGE** website ([www.libertysecurity.org](http://www.libertysecurity.org)).

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