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THE SCHENGEN CHALLENGE AND ITS BALKAN DIMENSIONS

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CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs acquis on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders. *The aim of this programme is to help establish a better balance between civil liberties and security in an enlarged Europe.*

This project will lead to a series of policy recommendations that will promote cooperation in EU JHA in the context of an enlarged Europe as well as institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. *There are two key issues:*

First of all, to prevent the distortion of the agenda by “events” – some items are being accelerated and other marginalised. This risks upsetting the balance, carefully crafted by the Finnish Presidency, between freedom, security and justice. The current ‘threat’ is that security issues, at the expense of the others, will predominate after the catastrophic events of 11th September. These have resulted in a formidable political shock, which served as a catalyst to promote certain initiatives on the political agenda, such as the European arrest warrant, and a common definition of terrorism. The monitoring of items, which could be marginalised and the nature of the institutional/political blockages that could distort the Tampere agenda, is our priority.

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- Judicial co-operation leading to the development of a European Public Prosecutor
- Strengthening of Europol, particularly in the field of serious trans-frontier violence and moves towards a more federalised policing capacity

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds.

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Introduction

The subject of this paper is undoubtedly of paramount importance for a number of Central and East European countries. The image of a “Schengen Fortress” in statu nascendi is disappointing even for those who are enthusiastic about the accession of their countries to a unified Europe. There is a widespread fear – rational or not – that cross-border human contacts and travel possibilities from East to West will become more difficult than they were in the years following the fall of the Berlin Wall. The same feeling can be detected even in the Balkans, where certain countries also show symptoms of the “Schengen Fortress”.

How to define the Balkans?

Instead of entering into semantic and geopolitical debates, let me use – only for the purposes of the present report – a simple list of the following countries: Romania, Slovenia, Croatia, Yugoslavia (Serbia-Montenegro), Bosnia-Herzegovina, Macedonia (F.Y.R.O.M.), Albania and Bulgaria.

This list makes it possible for me to avoid the rather dubious task of defining the “Balkans”. Moreover, from the point of view of the Schengen problematic, the real issue is in fact to name those countries that are seriously concerned by the common visa policy of the Schengen countries including, inter alia, Greece, which is also geographically situated on the Balkan Peninsula.

Visa-free countries and countries under visa-obligation: reasons and imperfections of the distinction

The crucial issue of the future of free trans-border movement depends largely on whether a country belongs or not to the group of countries whose nationals can enter the territory of the Schengen countries without a visa. One of the basic “achievements” of the Schengen cooperation is that there is now a common list of “visa-free” and “visa-obligated” countries (even if some minor exceptions exist).

Which are the countries whose nationals are exempted from the obligation of obtaining a common Schengen visa before entering the territory of a member of the Schengen cooperation?

The answer can be found in the Council Regulation N°539/2001, 15 March 2001. According to this document, the following countries of the sub-region should be considered as being in a visa-free relationship with the European Union: Bulgaria, Croatia and Slovenia, whereas nationals from Romania (temporarily), Albania, Bosnia-Herzegovina, Federal Republic of Yugoslavia (Serbia-Montenegro) and the Former Yugoslav Republic of Macedonia still need a visa to enter the Schengen area.

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The position of Romania is ambiguous: the country is in fact mentioned on the list of the visa-free countries, but the date of entry into force of this provision concerning Romania “shall be decided subsequently by the Council ... on the basis of the report ... [based on] undertakings ... on illegal immigration and illegal residence, including repatriation of persons ...”. A first report was presented in the summer 2000. Politically, this means a real advantage for Bulgaria and a definite encouragement for Romania, both figuring on the visa “black list” in the previous document N°574/1999, adopted on 12 March 1999¹.

How are these lists of countries made up?

The motivations can be read in regulation N°539/2001: § 5. “The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union’s external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity.”²

It striking to notice that this explanation no longer contains the criteria listed in a previous draft³, which, besides making reference to the relative ease of falsification of travel documents, the validity of contracted re-admission agreements and information about national police and immigration policies, made a very controversial allusion on the alleged relationship between certain types of crimes and nationals of certain countries. As a matter of fact, the actual definition itself also leaves room for manoeuvre that leads to a quasi total discretion to the European Union (or more precisely the Schengen countries), mixing political and legal considerations, facts, expectations and acts of encouragement.

How to satisfy the common visa criteria? Which countries satisfy it?

In reality it is not so much the existence of a visa-obligation in itself that is felt problematic but rather the fact that the material as well as procedural conditions of granting visas could hamper the economic and cultural relations between individuals of two neighbouring, but diverging countries, with respect to the visa-regime. Another disappointment is due to the fear that a foreigner may always be perceived as a “potential (illegal) immigrant”, as Schengen cooperation emphasises the will to fight against illegal immigration. This aspect is clearly highlighted in a number of documents. *The Common Manual and Common Consular Instructions*⁴ stipulates, for instance, that the main issues to be borne in mind when examining visa applications are:

... the security of the contracting Parties and the fight against illegal immigration as well as other aspects relating to international relations. Depending on the country concerned, one of these may take precedence over the other, but at no stage should any of them be forgotten.

¹ Council Regulation (EC) N°574/1999 of 12 March 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders.

² Council Regulation (EC) N°539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.

³ 500PC0027 document of the Commission, issued 28 February 2000.

⁴ Decision of the Executive Committee of April 28 1999 on the definitive versions of the Common Manual and Common Consular Instructions (SCH/Com (ex(99)13)

The purpose of examining applications is to detect those applicants who are seeking to immigrate to the territory of the Contracting Parties and set themselves up there, while entering on grounds such as tourism, studies, business or family visits, as a pretext. Therefore, it is necessary to be particularly vigilant when dealing with “risk categories” in other words unemployed persons, and those with no regular income.

Furthermore, this aspect has been reinforced by the perception that the common criteria, as established on the experts’ and decision makers’ tables, will hardly be able to take into consideration the realities in the poorer parts of the world and especially the infrastructural gap between the developed parts of Europe and some Balkan countries.

The question could be reformulated as follows: Can an average person from Central and Eastern Europe satisfy the Schengen entrance criteria?

In order to answer to that question, a look at the common Schengen visa criteria seems necessary.

The recently amended *Common Manual and Common Consular Instructions*, mentioned above, enumerates the following visa criteria:

The applicant

- a) should have a valid travel document,
- b) must not be on the ‘alert list’ or pose any risk to security or international relations,
- c) should present, “where necessary”, documents supporting the purpose and the conditions of the planned visit,
- c) should have guarantees of means of return and means of subsistence.

As the *Common Manual and the Common Consular Instructions* stipulates, the supporting documents shall cover the purpose of the journey, the means of transport and return, the means of subsistence and accommodation. The first one could be in particular, a letter of invitation, a summons or an organised trip and the second could be, a return ticket or currency for petrol or car insurance. As proof of subsistence, the following means can be presented: liquid cash in convertible currency, travellers cheques, cheque books for a foreign currency account, credit cards or any other means that guarantee funds in hard currency, all being proportionate to the length and purpose of the visit and to the cost of living in the Schengen states. As supporting documents regarding accommodation, a hotel reservation, a lease or a property title can be required. If the alien is hosted by a national, *a priori* checking (personal identity, address, family ties etc.) or the issuing of certificates or the presentation of public documents could be required. Other documents can also be asked for, relating, inter alia, the proof of ties with the country of residence or the proof of the social and professional status of the applicant.

The applicant’s good faith should also be checked by the consular officer: In order to do so, “the mission or post shall check whether the applicant is recognised as a person of good faith within the framework of local consular cooperation. Checks shall [however] be reduced where the applicant is known to be a *bona fide* person” or, in case of groups, if “a reputable and trustworthy body is able to vouch for the good faith”.

On the whole, the administrative officer’s discretion is therefore quite large. However, the *Common Manual and the Common Consular Instructions* emphasises its concern about eventual deep links between inhabitants and officers: “In order to avoid ‘habits’ being formed

which could lead to a decline in the level of vigilance, the officers responsible shall be rotated on a regular basis.”

Can nationals from the visa-obligated countries of the Balkans satisfy these conditions?

Even if these conditions can be met in the abstract, it is highly possible that some social strata, for example, farmers, may not be in possession of credit cards, cheque books etc. The inadequate conversion rate of home currency, the weak financial background of some small, local savings banks and insurance companies or the under-financed character of certain professions, the high rate of unemployment, (due to, amongst others, damages caused by war), could also hinder the agreement of the visa officer to deliver a visa.

On the other hand, the nature and the depth of the information needed for the deliberation on visa applications shall imply a very deep control of the private sphere of the individual, that could bring to mind Orwell’s vision “*Big Brother*”. Citizens of Romania will discover with astonishment the reappearance of some types of control of their contacts with foreigners that they already knew under the Ceausescu era.

The intrusion into the private sphere required by the Schengen system should not only be analysed *per se*, but also from the point of view the *Charter of Fundamental Rights of the European Union*, adopted at the Nice Summit of December 2000, which Article 8 stipulates:

Article 8: Protection of personal data

1. Every person has the right to protection of personal data concerning himself or herself
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been recorded concerning him or her and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Is there a complete coherence between this article and the Schengen rules on collecting information for a visa decision?

The *list of alert of persona non grata* is an instrument in use in most countries. As a symbol of European solidarity and as an instrumental tool of the Schengen cooperation, the territorial validity of being *non grata* is extended to whole Schengen territory. This has a hard consequence for third country nationals. If there should be no discussion on the legitimacy and usefulness of such geographical extension for serious crimes, the same effect should not be applied to petty administrative infractions. Otherwise, one could hardly understand the proper implementation of the right proclaimed in Article 49 § 3 of the Charter of Fundamental Rights: “*The severity of penalties must not be disproportionate to the criminal offence.*”

Flexibility in the application of the Schengen system and its eventual impact on the concerned Balkan countries

Despite of the apparent rigidity of the list of countries, certain elasticity can be detected in the system of the Schengen cooperation. Even the dichotomy of visa-free and visa-obligated countries can admit *ex lege* that certain territories enjoying a special status within the state

have a specific regime, which can either be beneficial or detrimental. The list of these entities can be found in the Council Regulation (EC) N°539/2001⁵.

According to this document, even if China is on the list of countries under visa-obligation, inhabitants of Hong Kong and Macao special administrative units reserve the right to enter without any visa. Inhabitants of the Palestinian Authority (many of them are not only refugees, but *de jure* Israeli citizens, as Palestine has never been proclaimed or recognised as an independent state, certainly not by Schengen countries) are under visa-obligation, whereas Israeli passports are visa-free.

This example shows that despite of the *a priori* mandatory distinction between visa-free countries and countries under visa-obligation and despite the principle of the prohibition of discrimination on grounds of nationality implying the impossibility of any distinction between nationals of the same state, the Schengen regime knows certain derogations from this rule.

The introduction of Limited Territorial Validity (LTV) visas makes it possible for a state to grant a permit of entry to someone not fulfilling the criteria of the common Schengen visa if this state considers it important to allow his presence for humanitarian or national political considerations. In this case, however, that person is not entitled to enter another Schengen country. National visas (visas for long or national visits – NV) are issued for longer validity than three months with the same geographic restriction and their conditions are regulated by the states in their sovereign capacity. (The 1990 Schengen Convention recognised in Article 14 the possibility of passports whose validity would only concern a part of the national territory. However, the *Common Manual and the Common Consular Instructions* stipulate “limited territorial validity may not apply to a territory smaller than that of a contracting party.”)

The *Common Manual and the Common Consular Instruction* lists the special passports whose holders can have access into the issuing country and transit access into other Schengen countries without any visa. For instance, the Greek green-coloured “alien's identity card” issued by Greek authorities to third country nationals but of Greek origin, and the beige-coloured “special identity card for persons of Greek origin”: this document is issued to Albanian nationals of Greek origin and is valid for three years. This card is also issued to spouses and descendants of Greek origin, regardless of nationality, provided there is official documentation of some kind to prove their family ties. Another example is the French practice to issue a special residence certificate only to Algerians.

It is not by chance that some candidate countries to the European Union are also thinking of the establishment or the recognition of analogous preferential ties with their national minorities living in neighbouring countries.

Special Problems for Peoples of Balkan Countries

The importance of family and linguistic factors cannot be underestimated in the foreign travels of nationals of Balkan countries. An important part of their journeys abroad concerns a neighbouring country either because of small purchases or for the promotion of family ties. Due to the fact that Schengen is definitely heading East, its procedures will not only be an obstacle to tourism but also, and especially, to the legitimate will of trans-border contacts coloured by ethnic or linguistic affiliations. This is the reason why Schengen is of greater

⁵ Council Regulation (EC) N°539/2001 of March 15 2001 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.

importance for the Balkan countries than their relationship and travel opportunities to the actual Schengen members. Therefore, the sooner the circle of participating countries is enlarged, the better. Furthermore, this will be the only way to ensure a real Schengen border with the neighbouring states.

The progressive adaptation of the Schengen principles by candidate countries will soon have an impact on the contacts that the Hungarian minority in Romania, Ukraine and Yugoslavia have with Hungary; similarly for the Croatian minority in Yugoslavia, the German and Slovak minority in Romania and so on.

This problem deserves more attention than one would think at first glance. It should also be kept in mind that both minority-related Conventions of the Council of Europe contain pertinent dispositions⁶ on this matter and bilateral treaties are often even more explicit in this field.

It is certainly true that Schengen documents and *inter alia*, the *Common Manual and the Common Consular Instructions* refer to “family ties”, “local situations” and so on, which can be considered as a theoretical basis for a more elastic implementation of the common principles. However, if Schengen decision-makers do not pay deserved attention to the problem, minority issues may implicate a number of tensions between countries and within the countries themselves. Furthermore, it can also emerge as *conflict of norms* and a challenge to the principle *pacta sunt servanda*.

The amount of the fee for the visa and the required minimum sum of hard currency were calculated on the basis of fees and subsistence minima⁷ in the Schengen countries. The rigid application of the method of calculation will mean that the entry into the Hungarian territory for instance will be *quasi-impossible* not only for unemployed persons but also for teachers, nurses, physicians, pensioners amongst others.

The institution of Limited Territorial Visas cannot provide an adequate solution to this problem, as the text of the *Common Manual and the Common Consular Instructions* stipulates “LTVs are issued by *way of exception*. The conditions under which this type of visa is issued shall be carefully examined on a case-by-case basis”. The Schengen Contracting Parties will

⁶ Framework-convention for the Protection of National Minorities in Europe:

“Art. 17(1): The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other states, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.”

“Art. 18(2): Where relevant, the Parties shall take measures to encourage trans-frontier co-operation.”

European Charter for Regional or Minority Languages:

“Art.14: trans-frontier exchanges

The Parties undertake:

a) to apply existing bilateral and multilateral agreements which bind them with the states in which the same language is used in identical or similar form, or if necessary, to seek to conclude agreements, in such a way as to foster contacts between users of the same language in the states concerned in the fields of culture, education, information, vocational training and permanent education;

b) for the benefit of regional or minority languages, to facilitate and/or promote co-operation across borders, in particular between regional or local authorities in whose territory the same language is used in identical or similar form.”

⁷ According to the *Common Manual and the Common Consular Instructions*, the possessed daily minima sum should be 151 FRF or 1500-2000 BFR or 50 DM depending on the destination.

therefore hardly use and abuse the possibility to issue LTVs, as this would not be in line with the principles and objectives of Schengen. Given that the *number of LTVs being issued will most probably be small*, it would be difficult to envisage an automated procedure for informing the other Contracting Parties⁸.

Conclusion

From the point of view of the effects of Schengen on citizens, Balkans countries can be divided into two groups.

Apparently, the Schengen cooperation has no negative effect – either at present or in the future – on the circulation of citizens of *Slovenia, Croatia and Bulgaria* because they are on the list of the countries whose nationals can stay in all Schengen countries for three months without any visa.

However, *Yugoslavia, Macedonia, Bosnia-Herzegovina, Romania and Albania* are countries whose nationals are and will be concerned in a negative way. Even if *Romania's* performance was credited by the Commission in the report adopted at the end of June 2001, the Council has not yet approved the Commission's proposal on the definite characterisation of Romania as a visa-free country. Nevertheless, as it was shown above, Greece lobbied successfully in order to preserve the preferential destination of Albanian citizens of Greek origin: they can enter without major problems in Greece.

All these issues explain the *intensity of brainstorming* and legislative activities in a number of future and potential Schengen countries in order to maintain as much as possible the present levels of contacts with neighbouring countries, often with a special, but not exclusive regard to kin-nationals, in order to avoid the a *mechanic extension* of the existing Schengen rules, that would have a *negative effect* on human contacts as well as on bilateral relationships of neighbouring countries if only one of them is a full member of the Schengen cooperation. Moreover, Schengen cooperation may also *challenge the proper implementation of conventions on minority protection* of the Council of Europe. Thus it is high time to *incorporate an adequate corresponding mechanism* into the Schengen documents.

⁸ Authors' emphasis.

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