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POLICY BRIEF 5

Securing External Frontiers in a Union of 25

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Background

Physical boundaries have been one of the ways in which political entities have typically defined their sovereignty. Border controls and the defence of the integrity of national territory are thus natural consequences of this commonly recognised principle. The European Union has in some ways broken that mould by attempting to shape a new political decision-making landscape in which sovereignty is shared among its Member States. The resulting redistribution of responsibility among 25 states and the Union is an ongoing political process in which national interests and aims do not always converge. Furthermore, the Union's institutions have only limited and explicitly specified "sovereign-shared" powers.

The issues surrounding internal frontiers date back to the preparation and adoption of the Single European Act on July 1, 1987. But while the removal of internal frontier controls has met almost complete success when it comes to the movement of goods, services and capital, achieving the free movement of persons has proven to be much more difficult. (A draft Convention on the crossing of external borders, though finalised, has never been signed).

At the core of the difficulty lies a simple yet compelling fact. States rely on national border controls for their own security. If they are to loosen—let alone surrender!—this measure of control, a trustworthy and effective compensatory mechanism must be set up to tighten controls at the Union's external borders. Nearly two decades since the 1985 Commission White Paper on the subject, the fundamental issues have in some ways remained the same—while the challenges to the state (particularly in the areas of drugs, trafficking of all types, international crime, and terrorism) seem to have grown exponentially.

Discussion

The Schengen "Experiment" and the Single European Act

In the face of significant scepticism about easing internal frontier controls, France, Germany, Belgium, the Netherlands and Luxembourg signed the Schengen Agreement on June 14, 1985. The initiative was conceived of as a sort of "laboratory" for testing a variety of technical and legal ideas for speeding up the removal of internal controls throughout the Community. On June 19, 1990, the Schengen Group, enlarged to include additional Member States, signed an Implementing Convention incorporating all measures into a single legal instrument.

Meanwhile, the attempt to reconcile issues such as national sovereignty; domestic interests; requirements for security; and different political and administrative cultures, while withholding shared and/or supplementary powers from the Union's central institutions, continued to delay the implementation of the movement of persons components of the Single European Act. Nonetheless, with the Act, a journey without return had begun in the form of linking politically the abolition of internal border checks on persons and the necessity of strengthening controls and surveillance on the Union's external borders.

The Treaty of Maastricht took tentative steps towards addressing the difficulties that arose from this fundamental impasse by introducing provisions on cooperation in the field of rules governing the crossing by persons of the external borders and the exercise of controls thereof, in the newly-established "Third Pillar," but that arrangement quickly showed its limits. The Treaty of Amsterdam tackled the issue more directly by establishing common measures and procedures, particularly in article 62 (common rules on control and surveillance, common visa policy and the right to travel for third country nationals). Protocols to the treaty acknowledged the special position of the United Kingdom, Ireland, and Denmark, as well as that of Norway and Iceland, two countries associated with Schengen while not part of the Union. With these protocols in place, the immediate implementation of enhanced co-operation among States which were parties to Schengen commenced. On May 1, 1999, all legal and operational aspects of the Schengen acquis were integrated into the EC Treaty. Most of the acquis (the parts relating to the crossing of external borders by persons) became part of Title IV of the EC Treaty (first pillar), while other measures, such as police and judicial co-operation, were incorporated into Title VI (third pillar).

The Schengen acquis, already implemented by some Member States since March 26, 1995, underwent a metamorphosis. From an inter-governmental instrument drawn up in the form of a Convention under international public law, it became fully incorporated into the EC Treaty and took its place within the Union's institutional framework. From that point onwards, the European Parliament, the Council, the Commission, and the Court of Justice could proceed to play their proper roles in the relevant matters.

From "Theory" to Practice

As one would expect, legally agreeing to common rules and procedures on the control and surveillance of external borders has led neither to the uniform organisation of work nor to the uniform implementation of rules and practices on controlling external borders. Some national authorities have continued to interpret rules and practices differently and to operate without guaranteeing "equivalent" levels of protection at all external borders. Gaps in both theory and practice have thus translated into the uneven implementation of rules by Member States, a reality at times augmented by instances of mutual suspicions and antagonisms.

Nonetheless, the effort continues to deepen and intensify. The ten new EU Member States were required to agree to apply the Schengen/EC/EU acquis on external borders from the date of accession in all aspects except those directly linked to the absence of controls on persons crossing internal borders. (Those controls are to be lifted only following a unanimous Council decision based on a thorough monitoring and assessment process.)

The "Renewed" Relevance of External Border Controls

The relevance of external borders, and the importance of more integrated management of the Union's external borders, began to gather momentum again in 2001, in large part for four mutually reinforcing reasons:

- The need to guarantee a high level of security in view of and after the enlargement of the EU;
- The need to pursue the fight against “imported” organised crime, especially in the field of illegal immigration and human trafficking;
- The need to neutralize, in a coordinated way, terrorist risks in the post-September 11 environment; and
- The need to reinforce mutual trust between and among Member States who had already lifted their internal border controls. (A lack of trust might have meant, conceivably, the re-introduction of internal controls.)

These concerns resulted in significantly increased activism among Member States. For instance, the Belgian Presidency proposed defining a “European management concept on border control” in preparation for the Laeken European Council. Accordingly, it offered to organise in a systematic way the various proposals already tabled by Member States, including legislation, practices, evaluations, studies, meetings of practitioners, high impact operations, and even “blue helmet frontier guards for crisis situations”. Indeed, the European Council of Laeken of 14/15 December 2001 invited the Council and the Commission to “examine the conditions in which a mechanism or common services to control external borders could be created...” Furthermore, JHA Commissioner Antonio Vitorino declared that “the lack of a clearly asserted common vision and common policy on external borders entails major political and strategic risks ... [and that] European solutions are the only solutions to these trans-national questions”. The urgency of the issues at hand was reflected further in a May 2002 Commission Communication proposing the integrated management of the European Union’s external borders, an effort that culminated in a proposal to establish a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Elements of and Requirements for an Integrated Border Strategy and the Establishment of a European Agency for External Borders

A coherent and integrated “border strategy” would encompass four distinct but interrelated levels of measures:

- The first level would consist of activities in and agreements with countries of origin and transit, with a particular focus on consular cooperation (the issuing of visas).
- The second level would refer both to bilateral and Union cooperation with neighbouring countries.
- The third level would seek to ensure border security by carrying out effective checks at the authorised crossing points as well as surveillance between them.
- The fourth level would focus on activities inside the territory of the Member States when there are grounds for investigation and law enforcement.

The 2002 Commission Communication focused mainly on the third level, and so did the Member States. Under the Spanish Presidency, they endorsed a “Plan for the Management of External Borders” intended, *inter alia*, to improve the coordination of national and joint operational activities. These activities had started with the creation of an External Borders Practitioners’ “Common Unit”. The pace of activities, however, had increased with the creation of several specialised *ad hoc* Centres (one each for land borders, air borders, risk analysis, and training and two for maritime borders—for the Eastern and Western parts of the Mediterranean) as the result of an Italian feasibility study on the establishment of a European Corps of Border Guards. The activities of these Centres include training, risk analysis, land borders, sea borders centres and, finally, general research support.

For its part, the Commission had suggested structuring the common policy around five components:

- A common body of legislation;
- A common and operational coordination and cooperation mechanism;
- A common integrated risk analysis capability;
- Convergence on staff training and inter-operational equipment; and
- Burden-sharing between the Member States and the Union.

With regard to the first component, in May 2004, the Commission put forward a proposal on a "Community Code on the Rules Governing the Movement of Persons across Borders". The proposal aimed to restructure, clarify, and develop the existing rules and practices in the field of external borders. (Chapter 2 of Title II of the Schengen Convention and its "Common Manual on External Borders", along with the "Catalogue of Best Practices and Recommendations on External Borders and Removals", had already anticipated this. These documents set out these matters in considerable detail and the Schengen Evaluation Group had been monitoring the implementation of common rules.) The "Code" also integrated recent decisions and proposals addressing specific border-related issues, such as the obligation to stamp travel documents at external crossing points or on establishing a specific regime for local border traffic.

The integrated border management's four other components were incorporated into the November 20, 2003 proposal to establish a European Agency for the Management of Operational Co-operation at the External Borders. Member States reached political agreement in May 2004, but formal adoption is still pending. The Commission's aim is to make the Agency operational as early as next year.

Meanwhile, concerns about the Common Unit's adequacy in meeting the rising challenges has grown, fuelled by its apparently loose organisation; its situation as a sub-group of a Council working party; the absence of day-to-day monitoring; the lack of capacity to respond immediately to emergency situations, and related reasons. In response, the Greek Presidency at the European Council in Thessaloniki, on 19/20 June, 2003, promoted the idea of a more pro-active, permanent and comprehensive structure in the form of an Agency. The new body would be under the political control of the Council but would not be authorised to carry out border checks. Instead, it would do the following:

- Coordinate and evaluate the different activities of the Centres, the pilot projects and the joint operations--and even start operations on its own initiative;
- Assist Member States in dealing with circumstances requiring increased attention;
- Carry out risk analyses, ensure a systematic flow of information, and follow up on the development of research;
- Assist in developing common training core curricula for border guards;
- Enhance cooperation with third countries;
- Take a significant first step toward burden-sharing by assisting those Member States that face disproportionate expenses in dealing with third country nationals and bear exceptional pressures in the control and surveillance of their external borders; and, finally,
- Provide assistance with joint removals of third country nationals who are subject to an individual expulsion order.

Several of the tasks to be performed by the Agency deserve further comment. These are training, risk analysis, burden-sharing, joint return operations, and cooperation with third countries.

Training

The training centre in Vienna has already developed common standards for the basic training of first, second and mid-level officers and has set up a permanent network

composed of national academies for border guards. Three training modules are of particular importance:

- Taking into account and "levelling" out national customs and administrative rules as they intertwine with common Community rules;
- The development of immersion training programmes in different Member States in order to give guards specific legal and linguistic knowledge before joining multinational teams in joint operations;
- Shaping the personal behaviour of border guards to observe the human dignity and basic rights of border crossers, to develop a professional and welcoming attitude toward the "client" (border crossing people), and to refrain from humiliating treatment in words or acts.

Risk analysis and assessment

The risk analysis centre in Helsinki has developed a common integrated risk analysis model that is flexible enough to be used for global reports but can also be tailored for the analysis of specific target groups or territories. The risk analysis reports can in turn stimulate and plan with greater precision the kinds of joint operations that need to receive priority. Conversely, when border guards in a specific locality become aware of repetitive criminal behaviour (for instance, the discovery of recurrent and similar types of forged documents or a repetitive modus operandi of human traffickers) an information chain can be immediately established to start a rapid risk analysis. If the circumstances demand it, this could be followed by joint operational decisions. In other words, risk assessment should trigger joint action when weaknesses are identified, in particular if the latter are of a structural nature.

Burden-sharing

Burden-sharing has two aspects: operational and financial. The Agency will clearly provide operational support to Member States in need. It is not clear, however, whether this concept takes fully into account the variable geographical realities of Member States. Once all internal controls are lifted, the human and financial responsibilities of Member States without external land and sea borders will decrease dramatically. At the same time, Member States with long and difficult external borders will experience greater responsibilities and will be discharging these responsibilities in part on behalf of all Member States. It may be difficult to imagine a direct monetary contribution from one Member State to another. As all Member States benefit from the effective and efficient management of external borders, the case for consistent institutional support of the Union both in terms of financing and equipment is therefore compelling. This would, however, give rise to the question of how Member States and/or the Commission would control this support.

There are temporary solidarity instruments in place in the form of a lump sum of about €960 million for the period 2004-2006 for seven of the new Member States, aimed at financing better control of their external borders, and the ARGO programme. A more progressive financial framework would thus be required for 2007-2013. Such financing might also take into account such other areas in need of common action, such as the setting up of common consular offices (see below).

Tellingly, the need for greater integration and financial cooperation on these matters is also envisioned in the new Constitutional Treaty. It provides for "the gradual introduction of an integrated management system for external borders" (Article III-166), and promotes the principle of solidarity and the fair sharing of responsibilities, including financial ones, between the Member States (Article III-169).

Organising joint return operations

The tasks of assisting with and identifying best practices with regard to travel documents and the removal of illegally present third country nationals apparently fall outside the core mandate of the authorities responsible for the control of external borders. Cases of detention in international transit zones seem to be the only exception to this rule. Since the Agency's activity is limited to the provision of training and seminars, and a return policy is not within the Agency's mandate, one must raise the question of the rationale for such a decision.

Co-operation with third countries

Strengthening and systematising the dialogue with third countries on migration and asylum is recognised as a key component of the European Union's external relations. Similarly, operational cooperation and practical working level arrangements with third countries are also necessary, not only in order to enhance security, but also in order to create a smoother system of managing borders and help anticipate potential problems before they become critical. This is a particularly relevant issue in the area of trading and trafficking in human beings. (Similarly, close contacts and arrangements with the various international and inter-governmental bodies, including EUROPOL, can also facilitate better controls and surveillance.) The negotiation of wider agreements with third countries will require a strong push from EU bodies, leaving to the Agency the task of finalising and carrying out the operational side, including the offering of training assistance and technical aid outside the Union.

Conclusion and Next Steps

Establishing an area without any internal border controls on persons may be conceivable only in connection with an efficient integrated external border management regime. Such a proposition draws legitimacy from its necessity while its effectiveness depends upon equal levels of commitment from all Member States operating within a single structure. Putting it differently, it is not enough to talk of common external border controls if every country minds primarily only its own interests.

The Constitutional Treaty authorises the European Union to take any measure necessary for the gradual establishment of an integrated management system for external borders. "Gradual" implies that Member States should not jump immediately to the creation of a European Corps of Border Guards--even if such a corps might eventually be an appropriate answer for sharing fully the responsibility to secure all external borders. While such a step might be opposed by many Member States (in large part, on the grounds of sovereignty and national traditions), it might not be an inappropriate target for a future new EU strategy.

Tactically, applying an integrated management approach to the most pressing border control issues (in areas where common action is most needed) might pave the way to informed political discussions about such a target. At first, such efforts might follow the model used in the establishment of Schengen, whereby the more reticent Member States can refrain from an active immediate participation. One thing is certain: More effective border controls are a political project that will be driven by needs, evidence of success, and growing habits of cooperation.

Challenges for Policy Makers and Points for Discussion

- Better and more comprehensive organisation of responsibilities at external borders yields measurable security and efficiency benefits. This is particularly the case since criminal organizations now traffic both in people and in various types of

unwanted and dangerous goods. Several services operate at the borders: border guards, customs authorities, police and immigration officers, transport and (sometimes) judicial authorities, etc. The Agency should thus prioritise the facilitation of links between these official bodies. In this regard, it might start by inviting national authorities to do the same within their own internal organisation and by suggesting good practices for cooperation across fields of competence.

- The issue of common standards in the interpretation and application of rules deserves greater and more forceful institutional attention if mutual confidence among member states is to be secured and reinforced. Current measures are weak. The peer-review mechanism of the Schengen Evaluation Working Group (which has taken over the tasks of the former Standing Committee on the Evaluation and Implementation of Schengen) does not include unannounced visits. Moreover, the checks for 25 countries take place every two to three years (at best), the conclusions are neither totally autonomous nor immediately operational, and the membership of the evaluation team constantly changes. A permanent pool of "*multinational external border inspectors*", composed of border guards, customs officers, police agents, EUROPOL, CEPOL, Commission and Council civil servants, and (possibly) intelligence services, selected and detached by the Member States, could provide stronger assurance that Member States are fully meeting their obligations. This corps of inspectors could intervene upon the request by a Member State, by the European Institutions or on its own initiative. In some ways, it could be conceived as a virtual body, ready to be activated within 24 hours. Furthermore, the reports and conclusions of this corps of border inspectors could be regarded as confidential or secret, being addressed directly to the competent Council bodies, to the Commission and to the Member States individually, although procedures regarding infractions would follow Community law (some parallels with OLAF could be valuable here).
- The control of maritime borders is an issue where a pressing need exists and the creation of an operational EU multinational body with a legal capacity for action should be considered. The horrors of human trafficking and deaths in illegal sea crossings are by now familiar, but there are other types of smuggling and illegal activities that are also problems on the EU's coasts. The current array of responses includes liaison officers, one-time operations, joint working teams at ports, and common rules. These are useful tools but they are subject to legal and technical limits. Joint operations have encountered language problems, differences in operational methods and, above all, legal difficulties due to the limited tasks that officers of one Member State are authorised to carry out on the territory of another Member State.

Establishing a "*EU multinational coast guards corps*" could address many of these issues, particularly since, unlike with land borders, most maritime controls would be carried out outside national ports. Such a body would share a common staff and procedures, a common hierarchical structure and operational command, common training and use of languages, common use of both fixed and mobile infrastructure (such as radar and satellites), common prerogatives of public authority irrespective of the officer's nationality, and the authority to apprehend a person and hand him/her over to the competent national authorities. Such an effort would share and reduce national and Union costs. It could also be a first step in the more politically complicated project of creating a European corps of border guards whose work and authority would complement national teams. Officers of interested neighbouring third countries could also be invited as observers to familiarise themselves with rules, practices and technologies.

- Visa issuance and consular co-operation are the first level of control in a comprehensive control system. There are signs of progress in this regard. These include a common visa policy; a planned recast of the Common Consular Instructions would also be welcome. New proposals concerning the security of travel documents (including biometric identifiers), and the new Visa Information System, and the Schengen Information System (SIS II)—when they become operational—will also help.

However, the day-to-day implementation of visa policy by 25 consular and diplomatic representations requires far greater attention. Proposals for common administrative structures and joint visa offices date to the action plan of February 2002, but they continue to meet resistance. Moreover, the sharing of costs for the premises, the implementation of biometrics on the visa sticker and the distribution of the tasks for the consular staff in a multinational team are rather complicated issues. Clear political guidance and a EU budget line could accelerate the integration of the consular/diplomatic visa sections, at least in third country capitals of particular interest. Fulfilling these two conditions could then pave the way to *common consular offices* and an authentic “Union visa”. Such a visa would be issued by a virtual Union body composed of national diplomats and civil servants who share decision-making authority on whether to issue or refuse a visa. Such a system could offer significant cost savings, improve the integrity of the entire visa-issuing process, and eliminate “visa shopping”.

- The new Union must work within its limits. Creating more secure borders is not about building a fortress or new walls. It is about making clear common rules and practices for legally crossing the EU external borders. Thus, transparency, public awareness, quality and speed of service, and protecting the confidentiality of travellers should be high priorities. If it is to enhance border controls through a common approach, this new Union has to be more accessible and attentive to citizens’ needs and concern.