



What about the Neighbours?

The Impact of Schengen along the EU's External Borders

Joanna Apap and Angelina Tchorbadjiyska

Abstract

Over the last few years, the EU's discourse concerning border controls has presented a paradox – on the one hand, the EU promotes good neighbourly relations, while on the other hand it emphasises the need to strictly implement the Schengen *acquis* on border controls and visa regimes. The main underlying obstacle to a good and open partnership between the EU and the candidate states, and in turn between the enlarged EU and its neighbours, is a lack of trust towards the EU's neighbours: Do they have the same standards? Do they apply the same controls? Do their police and border guards function in the same way? One major challenge now for neighbours such as Ukraine, Moldova and Belarus is how to convince the EU that they can be good partners in fulfilling the objectives of Schengen and protecting the EU's interest with respect to who comes in and out of its external borders.

From the point of view of human contacts and cross-border cooperation, the problem of a strict application of Schengen will mainly affect those persons living along the border between the EU and its neighbouring states. Nevertheless, with respect to trade and freedom of movement within the enlarged EU in general and between the EU and the neighbouring states, the issues caused by an overly stringent application of Schengen rules will be felt beyond the border regions.

The two main questions on which this working paper is centred are:

- To what extent can there be flexibility in implementing Schengen rules to prevent marginalising the new EU neighbours as a result of fears about 'threats' moving westwards across borders?
- What can the EU neighbours do in the short, medium and long term to promote trust and to one day hope to come off the Schengen 'negative list' with respect to freedom of movement?

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THE IMPACT OF SCHENGEN ALONG THE EU'S EXTERNAL BORDERS

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JOANNA APAP AND ANGELINA TCHORBADJIYSKA

1. Historic introduction and defining the problem

The Commission Communication to the Council and the European Parliament of 11 March 2003, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, recognises in its opening statement that:

The EU has a duty, not only towards its citizens and those of new Member States, but also towards its present and future neighbours to ensure continuing social cohesion and economic dynamism. The EU must act to promote regional and sub-regional co-operation and integration that are preconditions for political stability, economic development and the reduction of poverty and social division in our shared environment.

The EU should aim to develop a zone of prosperity and a friendly neighbourhood – a ‘ring of friends’ – with whom the EU enjoys close, peaceful and co-operative relations... To this end, Russia, the countries of Western NIS and the Southern Mediterranean should be offered the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms).

This Communication certainly makes a very positive statement of intent on behalf of the EU with regard to its relations not only with those candidate states that acceded on 1 May 2004 but also with regard to their neighbours.

The enlargement of the European Union has created a new external EU border on the eastern part of the continent. For both practical and symbolic reasons, the management of this border will have a profound impact on relations between the EU and the non-EU parts of Europe.

Although EU policies should be fundamentally consistent to produce the desired result, one can observe a distinct lack of coherence and coordination among three principal areas of EU policy, namely external relations, enlargement, and justice and home affairs.

First, looking at EU foreign policies such as the common foreign and security policy (CFSP), one can see an attempt to maintain a certain degree of openness towards the countries neighbouring the enlarged EU. These declarations, however, are contradicted by the dynamics of the enlargement process, where the strict application of the Schengen *acquis* concerning border controls and visa regimes is required from candidate countries. Their willingness to implement all restrictive border provisions is considered to be one of most important indicators of their readiness for membership. Furthermore, and in contrast to the stance taken *vis-à-vis* current EU member states, this appears to be a non-negotiable issue.

The underlying reason for the position taken by the EU lies in the domain of EU home affairs policy, which is strongly influenced by widespread fear of uncontrolled immigration from beyond the EU territory and criminal activity by foreigners among the societies of member states. Restrictive immigration controls, manifested in particular in the form of visa regimes at external borders, are seen as a necessary response to those fears and determine the nature of external borders.

These fears result in a paradox: new member states are expected to introduce ‘hard’ Schengen borders that could negatively affect these countries’ relations with non-EU neighbours, while at the same time the expected advantage of lifting border controls between old and new member states, along with the

freedom of taking up employment, will be delayed for several years after accession. This consequence will not only have a negative impact on future EU neighbouring countries, but it will also produce a sense of *second-class membership* among new members. The EU's position is generated by a dual fear on the part of current members: fear of immigration from non-candidate countries (the citizens of which are all subject to the visa regime) but also the fear of immigration originating from candidate countries.

Candidate states were asked to fully implement the Schengen *acquis* without sufficient consideration being given to the maintenance of stable geo-political relations in the region. In the 1990s, the previous walls that had divided Europe since the end of the Second World War ceased to exist. One was the boundary between the bloc of socialist states and Western Europe. The other, far less frequently mentioned, was the heavily guarded border between the USSR and Moscow's satellite countries. With an overly stringent implementation of the Schengen *acquis* by the new EU member states, however, we may risk building new walls between the enlarged EU and the newly independent states (NIS) as well as Russia.

As a result of the complex forces that brought down these walls in the early 1990s, a unique area of liberalised movement of persons was sought in Central Europe. It was not a full free movement of persons as the expression 'liberalised movement of persons' may imply: individuals still required a special voucher in addition to their passport and preferably a letter of invitation to present at the border, or a simplified pass in the case of the residents of the border regions. Yet these documents were relatively easy to obtain, which facilitated a substantial movement of persons in the region.¹

The citizens of the states that became candidates for membership of the EU were granted the possibility to travel to the EU without visas (with the initial exceptions of Bulgarian and Romanian citizens).² On the other hand, inhabitants of countries such as Russia, Ukraine or Belarus have been able to travel to Central and Eastern Europe without major difficulty. The 'open-borders policy' (which was in actual fact a controlled open-borders policy) was a part of a wider strategy of maintaining good relationships with neighbouring countries as pursued by the governments of the Central European states. The West has encouraged such regional and bilateral cooperation since the fall of the Berlin Wall. This policy stance is generally seen to have played a significant role in preventing destabilisation in the region, as occurred after the First World War in Central and Eastern Europe, and as happened in the Balkans in the 1990s. The open-borders policy has affected thousands of ordinary citizens on both sides of the border and has significantly contributed to efforts to overcome the historical legacy of prejudice, stereotypes and resentment. Among the numerous examples one may single out the difficult and blood-stained relationships between Poland and Russia, between Poland and Ukraine, and between Hungary and Romania. Open borders have also fostered the contacts of national minorities with their native countries, such as the Byelorussians in Poland or the Hungarians in Ukraine (Trans-Carpatia), Yugoslavia (Vojvodina) and Romania.

The EU accession of Central European states such as Poland, Hungary and Slovakia has to a certain extent led to the disappearance of that specific area of liberalised movement of persons, unless acceptable flexible approaches to implementing the Schengen *acquis* can be found. As EU candidate countries adopt the Schengen *acquis*, they have already had to impose visas on citizens of neighbouring countries that are not in line for EU membership in the context of its enlargement. From the point of view of human contacts and cross-border cooperation, the main problem of a strict application of Schengen will mainly affect those persons living in the border regions – as in the case of those residing along the borders between Ukraine and Poland, Ukraine and Slovakia, Ukraine and

¹ This view has been confirmed by various interviewees based in Brussels from DG External Relations (DG RELEX), DG Enlargement and DG Justice and Home Affairs in the European Commission as well as high-level personnel in missions in Brussels from Poland, Hungary, Romania, Slovakia and Ukraine.

² Nationals of Romania and Bulgaria can now travel to and within the Schengen zone without visas but still require visas for travel to the UK and Ireland.

Hungary, and Ukraine and Romania. These individuals and others residing and working in the border regions will be the first to be affected by the extension of the Schengen regime to new member states.

The strict application of the Schengen border regime in general and visa policy in particular will directly affect and reinforce the growing socio-economic and psychological gap between the two parts of Europe. It will also adversely affect national minorities, such as Hungarian minorities living in the states neighbouring Hungary, whose nationals now require a visa to enter the enlarged EU. With regard to Hungary and its neighbours, the nationals of Ukraine and Serbia, including Hungarian minorities who do not possess a Hungarian passport, will eventually be subject to the Schengen visa regime to enter Hungary (with the exception of nationals from Romania and Slovakia). These persons already require a national visa from Hungary in order to cross the border.

For the first time since the end of the cold war, the EU will border an area that has essentially different political, economic and social systems. The imposition of restrictive principles for crossing the borders will contribute to widening these gaps, which will be detrimental to the European Union as a whole.

2. General overview of the Schengen *acquis*

The EU has imposed a fixed set of rules on new members, laid out in some 3,000 pages of the Schengen *acquis*.

Freedom of movement – one of fundamental rights of EU citizens – is suffering various obstructions. Sixteen years since the signing of the Schengen Agreements in 1985, there are still visible and hidden barriers to the free movement of persons.

Schengen was expected to facilitate the free movement of persons in the Schengen zone. Before one can gain access to the Schengen area, however, various conditions need to be fulfilled by the nationals of countries that are subject to the visa regime. A lack of transparency and barriers to access to information persist in the granting of Schengen visas.

The Amsterdam Treaty, which came into force on 1 May 1999, attaches a Protocol on Schengen to the EC and EU Treaties that in effect provides for the insertion of the Schengen Agreement 1985, the Schengen Implementing Convention 1990 and the decisions of the Executive Committee made under the two agreements into the EC Treaty insofar as they involve borders and third country nationals. The same Protocol provides for moving into the Third Pillar of the Treaty on European Union those provisions of Schengen relating to policing and criminal judicial cooperation.

The initial Schengen Agreement of 14 June 1985 created a framework for the abolition of border controls on persons and goods between participating states. It was supplemented by the Schengen Implementing Agreement 1990, which set out the detailed provisions on the abolition of border controls between the participating states, the application of controls at the common external border of the participating states, provisions on division of responsibility in respect of asylum³ and provisions on police cooperation. The creation of the Schengen system arose from an economic pressure not least from the transport industry to remove obstacles to cross-border trade within the European Union (Bigo, 1996). It was foreshadowed by the European Commission's White Paper on the Completion of the Single Market (Papademetriou, 1996).

The Implementing Agreement entered into force in September 1993 but was not applied in any Schengen state (among the European Union member states, only 13 are fully party on Schengen) until 26 March 1995.

³ These provisions were superseded by the Convention determining the state responsible for examining applications for asylum lodged in one of the member states of the European Communities (Dublin Convention) of 14 June 1990 when it came into force in September 1997, and which has been replaced by the Council Regulation establishing the criteria and mechanisms of determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, (EC) No. 343/2003.

Even after that date France maintained border checks on persons moving between France and the other Schengen states. The abolition of border controls was achieved with Greece in March 2000 and the Nordic states in December 2000. The major themes of legal acts in the Schengen *acquis* are:

- uniform visa, common visa policy;
- common consular instructions;
- Schengen Information System;
- SIREN (cooperation over national security databases);
- harmonisation for declarations of invitation, responsibility;
- uniform model of residence permit;
- policy of transfer and readmission agreements;
- extradition;
- removal of obstacles at internal borders;
- computerised consultation of central authorities;
- Schengen mode of organisation in airports;
- common stamps of entry and exit at external borders;
- narcotics – legal cooperation;
- public safety – police cooperation;
- clandestine immigration;
- illicit traffic in weapons;
- stolen vehicles;
- expulsion of minors;
- terrorism; and
- trans-border police cooperation.

As regards movement of persons, the Schengen system is based on three main principles:

1. no third-country national should gain access to the territory of the Schengen states (with or without a short-stay visa) if he or she might constitute a ‘security risk’ for any one of the states;
2. an assumption that entry across one Schengen external border constitutes admission to the whole territory and an assumption (not as high as a presumption in law) that a short-stay visa issued by any participating state will be recognised for entry to the common territory for the purpose of admission (there are explicit exceptions justifying refusal specifically on security grounds); and
3. once within the common territory, the person is entitled (subject again to security exceptions) to move within the whole of the territory for three months out of every six without further control at the internal borders of the participating states.

The main focus of the system is to ensure that persons who are or might be considered unwanted by any participating state are not permitted into the territory. Thus the rules focus on who must be excluded and provide little guidance on who should be admitted. Because the underlying principle of the system is mutual recognition of national decisions rather than harmonisation, the search for legal mechanisms to achieve this has unexpected implications. The lifting of border controls between the states means that positive decisions on the admission of persons are likely to be respected by default – the parties have fewer identity checks when crossing the borders.⁴

The principles of the Schengen system are at present achieved through the deployment of four tools:

1. The **Schengen Information System (SIS)**, which operates in 13 member states and two non-member states (Norway and Iceland), allows the competent authorities of the mentioned states to acquire information regarding persons and property. The implication of having one’s name on the

⁴ But see K. Groenendijk’s presentation on the maintenance of internal checks on persons after the entry into force of the Schengen Implementing Agreement 1990, Article 62 EC and EU Borders, Conference 11/12 May 2001, ILPA/Meijers Committee, London.

SIS list could range from simply having one's documents scrutinised every time one enters the Schengen zone to a blank refusal of a visa. Not all Schengen countries feel obliged to offer a reason for refusing to issue a visa and this is a policy area that is still governed by the principle of sovereignty of each Schengen state. The persons usually included in the SIS database are those who either have a criminal record (even simply defined as a threat to public order) or have possibly been subject to a criminal act, for example, persons whose documents were stolen while visiting or residing in a Schengen country. The Council meeting on 28 and 29 May 2001 confirmed the development of the so-called 'SIS II' by 2006 as a priority.⁵ The second generation of the SIS does indeed bring new technical and investigation facilities, such as additional, new identification materials for the member states.

2. A **common list of countries** whose nationals require visas to come into the common territory for short stays (visits up to three months) and a common list of those excluded from the requirement – the definitive black and white lists were achieved in December 1998.⁶
3. A **common format** and set of rules on the issue and meaning of short-stay visas, which have been established through Council Regulations.⁷
4. **Carrier sanctions**, which have also been established.⁸

As previously mentioned, enlargement will create a new EU external border in the eastern part of the continent. As far as countries such as Ukraine are concerned, the legal basis of EU-Ukrainian relations is the Partnership and Cooperation Agreement (PCA),⁹ which entered into force in 1998. Since the entry into force of the PCA, cooperation in the field of justice and home affairs has been enhanced considerably between the two sides, as can be seen in the EU Action Plan on Justice and Home Affairs with Ukraine adopted on December 2001. Since the events of 11 September, more emphasis has been given on cooperation in the fight against terrorism as well as other forms of organised crime such as those related to drugs, fraud, money laundering, illegal migration and human trafficking.

Relating to the issue of movement of people across borders, a dialogue has started on the issue of visas. Both sides have agreed to cooperate in this field on the basis of the EU Action Plan adopted in December 2001; a scoreboard has been also achieved for the implementation of the mentioned plan.

⁵ See the Commission Communication to the European Parliament and the Council on the Development of the Schengen Information System II COM(2001) 720 final and Council Regulation (EC) No 2424/2001 on the development of the Second Generation Schengen Information System (SIS II) based on Arts. 66 of the Treaty establishing the European Community; see also the Council Decision 2001/866/JHA on the development of the second generation Schengen Information System (SIS II) based on Articles 30(1), 31 and 34 of the Treaty on European Union.

⁶ See the Commission's *Proposal for a Council Regulation amending Regulation No. 539/2001 listing the third country whose nationals must be in the possession of visas when crossing external borders and those whose nationals are exempt from that requirement*, COM (2002) 679, 28 November 2002, Brussels.

⁷ Council Regulation (EC) No. 334/2002 of 18 February 2002 amending Regulation (EC) No. 1683/95 laying down a uniform format for visas, *Official Journal* L 053, 23 February 2002; see also Council Regulation (EC) No. 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form, *Official Journal* L 053, 23 February 2002, as well as the Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas, *Official Journal* L 164, 14 July 1995; and the Council Recommendation of 4 March 1996 relating to local consular cooperation regarding visas (96/c 80/01), as well as 2001/329/EC, Council Decision of 24 April 2001 updating part VI and Annexes 3, 6 and 13 of the Common Consular Instructions and Annexes 5(a), 6(a) and 8 to the Common Manual, *Official Journal* L 116, 26 April 2001.

⁸ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Art. 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

⁹ *Partnership and Cooperation Agreement, between the European Communities and their Member States, and Ukraine*, *Official Journal* L 49/3, 19 February 1998.

Within the Country Strategy Paper (2002-06),¹⁰ concerning border management, it is evident from the text of the document that one of the main aims of the EU is to deal with/limit illegal immigration, the trafficking in human beings and smuggling of drugs, even though one of its goals is to facilitate the movement of people in general. The document advocates a modern border infrastructure and the management of borders, mainly in relation to Russia, Moldova and Belarus.

The first JHA troika (ministers of the member state that holds the presidency and the next presidency, as well as the Commission) with Ukraine was arranged in November 2002. They agreed to focus joint efforts on a limited number of clearly defined crime areas, for instance readmission and migration, money laundering, trafficking in human beings and drugs, border management, sexual exploitation of children and child pornography, as well as corruption.

3. What are possible examples of effective flexibility within the scope of Schengen?

3.1 Previous accessions to Schengen

Spain, Portugal and Greece are interesting cases in the application of Schengen as they outline possible solutions when a country has either a specific geographic position (Spanish protectorates in North Africa – Ceuta and Melilla) or special relations with third countries (Portugal) or simply has problems with the implementation of Schengen and needs to find a temporary solution while the conditions are met. These three cases are presented below:

Spain. In a Declaration attached to the Accession Treaty, Spain negotiated the continuation of the specific arrangements for visa exemptions for local border traffic between Ceuta and Melilla and the two Moroccan provinces that border them – Tetuan and Nador. Moroccan nationals who are not resident in the latter provinces and who wish to enter the territory of the towns of Ceuta and Melilla shall exclusively remain subject to the visa requirement. The validity of these visas shall be limited to these two towns and may permit multiple entries and exits.¹¹

Portugal. The Declaration of Portugal refers to its Visa Waiver Agreement with Brazil. On accession to Schengen, Portugal undertook the responsibility to readmit to its territory Brazilian nationals who having entered the territories of other Schengen countries via Portugal are intercepted in their territory after the legally allowed period for which they were admitted.

Greece. The Accession treaty was signed in 1992, but it was not until 1999 that Schengen was fully operational in Greece. Following several missions and reports, different aspects of the agreement were put into effect in 1997 and 1998. For the period of seven years, however, Greece needed to find a solution to serve its non-Schengen neighbours, preferably without seriously obstructing the cross-border traffic. One of the solutions found was the issuing of visas with limited territorial validity. Such visas are allowed under the Schengen agreement but under certain conditions. Nevertheless, they were used by the Greek authorities as a temporary solution that extended over several years.

3.2 Accession of Central and Eastern European countries

While some EU member states have been allowed certain exceptions in Schengen, the candidate countries were required to implement the Schengen *acquis* in full upon accession.

Moreover, any state acceding to the European Union must accept the totality of Chapter IV on accession. No ‘opt outs’ were be permitted for the new member states following Art. 8 of the Protocol

¹⁰ See the *Country Strategy Paper 2002-2006, National Indicative Programme 2002-2003, Ukraine*, adopted by the European Commission on 27 December 2001.

¹¹ The Schengen *acquis* – as referred to in Art. 1(2) of Council Decision 1999/435/EC of 20 May 1999 *Official Journal* L 176, 10 July 1999, p. 1.

integrating the Schengen *acquis* into the Framework of the European Union, which establishes that “For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all State candidates for admission”.

Accessions to Schengen are based on the concept of ‘two accession dates’.

- first – accession to the EU, by which time the flanking/supportive measures of Schengen that are embodied by the Schengen *acquis* need to be put in place; and
- second – full membership to Schengen, by which time the new member state could participate actively and fully as a Schengen state.

4. Proposed provisions for persons living in border regions

The European Commission has presented two Proposals for a Regulation on the establishment of a regime of local border traffic at the temporary external land borders between member states and on the establishment of a regime of local border traffic at the external land borders of the member states (COM[2003] 502 final).¹²

The purpose of the first proposed Regulation is to lay down rules on the criteria and conditions for establishing a regime of local border traffic at the temporary external land border between EU member states (owing to the two-step Schengen implementation and the temporary maintenance of border controls at the common borders between new member states and between the latter and old Schengen member states). Under this proposal, nationals of third countries subject to visa requirements who reside in areas within 50 kilometres of the EU border would be eligible for special visas that will allow the holder to cross the EU border many times for a stay of up to seven consecutive days and less than three months every half-year. It will be valid for at least one year and can be issued free of charge. This visa will be valid exclusively in the border area of the state that issued it.

The second proposal establishes a regime of local border traffic at the external land borders of the member states and authorises member states to conclude or maintain bilateral agreements with neighbouring third countries for the purposes of implementing the regime. Given that the new member states will not apply all the provisions of the Schengen rules immediately from the date of accession, checks at the borders with current Schengen states and between the new member states themselves will remain in place for a certain period.

As to the current state of play of the proposals, reaching agreement at the Council of Ministers has proved difficult. At the moment there is a partial agreement by the European Parliament.

5. An outsider’s experience – The case of Bulgaria

In September 1995 after a decision of the EU ministers of justice and interior affairs, Bulgaria was subjected to mandatory visa requirements. The justification of this decision was defined as lack of security and the risk of illegal immigration.¹³ The decision placed Bulgaria (and Romania, to which the decision referred as well) in a particularly unusual situation in relation to the other accession countries from Central and Eastern Europe, as such a requirement was not imposed on them. In the space of six years the European Union placed itself in the position of requiring substantial concessions on a wide variety of issues relating to borders and movement of persons as the price for removing the

¹² These two proposals provide for a definition of local border traffic: the regular crossing of the external border of a member state by persons lawfully resident in the border area (restricted to 50km) of a neighbouring third country, in order to stay in the border area of that member state for a limited period (seven consecutive days maximum, and in any case, for no longer than three months within any half-year period).

¹³ European Dialogue, Politics and Current Affairs, No. 1, Jan-Feb 1996 (retrievable from <http://www.europa.eu.int/comm/dg10>).

visa requirement.¹⁴ In this period the Bulgarian government and society as a whole started working on the comprehensive strategy aiming at the ultimate exemption of Bulgarian citizens from the requirement of visas. Ultimately, following the incorporation of the Schengen borders *acquis* into the EC Treaty, a new Regulation on the countries whose nationals require a visa to enter the territory for a short stay and those who do not was adopted by the Council in March 2001 and Bulgaria was removed from the black list.¹⁵

The Commission's report on Bulgaria consists of four main sections:¹⁶

- 1) the legal framework and administrative practices at Bulgarian borders, including visa policy – whether the Bulgarian visa list corresponds to that of the Union, border surveillance, carrier sanctions, sanctions for illegal migration to the member states and sanctions on facilitators of illegal migration to the member states;
- 2) repatriation of Bulgarian nationals to Bulgaria – whether member states are having trouble repatriating Bulgarians to Bulgaria;
- 3) additional measures such as technical equipment at borders and cooperation with Greece, including tour operators; and
- 4) the conclusions of the report.

Looking at the report more closely, in section 1 the Bulgarian report notes the following matters as relevant to the lifting of the visa requirements:

- Bulgaria has introduced new passports that meet the requirements of the EU with regard to safety measures against forgery.
- The facilities for issuing visas at the border have been abolished; criminal sanctions and fines for irregular border crossing and forged documents have been set.
- Concerning sanctions on illegal emigration to the member states, Bulgaria has introduced legislation making it a criminal offence in Bulgaria to commit an offence against the immigration law of any member state, over which immigration laws the Bulgarian government has no control.
- Sanctions have been established on the facilitation of illegal immigration/emigration.
- Bulgaria is aligning its visa policy to that of the EU – it is in the process of introducing visa requirements for Georgians, Russians, Ukrainians and Tunisians. For the moment it is only seeking to maintain a visa-free regime with the Federal Republic of Yugoslavia and Macedonia;
- Staffing and equipment at Bulgarian borders have been provided.

Under section 2, repatriation of illegal residents to Bulgaria, the Commission notes as relevant to the decision whether to maintain or abolish visa requirements that Bulgaria has readmission agreements in force with ten member states and six other states; further readmission agreements are in the process of conclusion. The signing of readmission agreements with each of the member states that seeks such an agreement was of primary importance in the press releases regarding the lifting of visa requirements for the Baltic States. Further, additional readmission agreements are being negotiated with many other countries.

In section 3, additional measures to be taken by Bulgaria are set out. These include more computerised control systems at border posts, an action plan with Greece, more legislation on carriers' sanctions to

¹⁴ See E. Guild (2001), "Moving the Borders of Europe", Inaugural lecture, University of Nijmegen.

¹⁵ See OJ 2001 L 81/1.

¹⁶ See the *Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the regulation determining the list of third countries whose nationals must be in a possession of visas when crossing the external borders and those whose nationals are exempt of that requirement* COM(2001) 61 final, 02 February 2001, Brussels.

provide for penalties on carriers who take persons out of Bulgaria who do not have the necessary documents to enter wherever they are going. Here again is an example of cross-recognition. The Bulgarian government has no control over the documents that may or may not be required by the border officials in another state. Yet they are planning to pass legislation (on the approval of the Commission), that would place sanctions on carriers departing from Bulgaria with persons who are ultimately refused admission to the country of destination. Clearly the Commission has the EU member states in mind, but as is clear from the Schengen *acquis*, it is by no means self evident whether an individual will be admitted by one member state or another in the common territory.

Finally, in section 4 there is a description of an information campaign to Bulgarian citizens advising them of the limits of their new visa-free travel right. An oblique passage refers to working contacts between Bulgarian authorities, the tour operators association and the consulates of the member states. Exactly what is meant is unclear. Nevertheless, officials at the French ministry of foreign affairs indicated that tour operators play a central role in obtaining visas for those using their services. In order to be able to provide their services and reduce loss-making risks, they have developed close links with consular staff in many obligatory visa countries. The degree of reliance that consular staff place on the presentation of visa applications from certain tour operators in preference to others has important commercial consequences for the operators. In the context of local consular cooperation, consular officials exchange information about reliability of tour operators as visa intermediaries.

The result of this report is that since March 2001 Bulgarian nationals no longer require a visa to travel to EU countries.

This effect was achieved not only as a result of legal and administrative reforms undertaken by the Bulgarian authorities but also thanks to certain political decisions. In March 1997 Bulgaria had already unilaterally lifted the visa requirement for EU nationals entering Bulgaria for short stays. At a later stage, simultaneous with the legislative changes taking place, it is worth noting the political consensus reached among all political parties and their concerted effort in the rapid adoption of all necessary legislation. Political leaders played an important role through their meetings with EU counterparts by providing information at the European and member-state levels about the efforts and results achieved by Bulgaria.

6. Conclusions

The perception of EU enlargement among the EU's future eastern neighbours has both positive and negative aspects. Ukraine, for instance, sees itself as threatened with marginalisation from the rest of Europe, while simultaneously envisioning the potential for increased prosperity on the western border of Ukraine, which will lie along the future EU frontier. With this in mind, the repercussions of the events of 11 September and 11 March are potentially double-edged: on the one hand, these events have led to an increase in the rhetoric of mutual cooperation between Ukraine and the EU member/candidate countries and Russia; simultaneously, they have also led to increased calls for a 'Fortress Europe'. In order to raise the level of cooperation along the future EU border, the following steps are necessary:

- Technical aspects need to be adequately prepared, well in advance of applying for accession.
- The cost of visas for EU countries needs to be harmonised.
- The motivation for 'blacklisted' countries (as in the case of Ukraine) to cooperate with the EU needs to be increased.
- The implementation of Tacis/Interreg projects focused on common borders. In this context, it should be noted that the current lack of cooperation between Tacis and Phare projects can prove to be a real obstacle in the development of cross-border projects.

The debate surrounding visa regimes on the future EU border often incorporates such images as a ‘new Berlin Wall’ or ‘a new iron curtain’, which suggest a dominating ideological factor to the issue of visa policy.

The problems of border controls are often directly linked to the question of visa regimes. Yet several other factors play a major role in the problem of the movement of persons across borders. Most significant is the issue of cross-border infrastructure, which needs to be addressed through specific Tacis and Interreg projects. Issues related to the cross-border shadow economy need to be addressed primarily with fiscal tools, rather than with visa regimes. A very strict application of Schengen will affect mainly those persons living in the border regions – as in the case of those residing along the borders of Ukraine and Poland, Ukraine and Slovakia, Ukraine and Hungary and Ukraine and Romania. Those persons residing and working in the border regions will be the first affected by the Schengen regime.

A close inspection of the implementation of the Schengen *acquis*, however, shows that in reality there is scope for flexibility. It is important to keep in mind that inflexible policies, such as the zero-migration policy of the early 1990s, which saw waves of illegal migration bolstered by economic demand, are of spurious efficiency. Hence there is a need to:

- define the exact scope of flexibility for candidate countries in the implementation of the Schengen *acquis*;
- identify the actors responsible for these competencies;
- promote a climate of trust and cooperation between member states, candidate countries and their future eastern neighbours;
- analyse potentially flexible practices and assess the viability of exporting these to other parts of the future border.

Possible models for border practice between the accession states on the new eastern EU border and for Ukraine can be seen in the Greek and Portuguese practices in the issuing of residency permits to Albanian citizens in the Albanian/Greek border areas and to Brazilian nationals, respectively (see section 3). Another possible model is the case of Spain and the protocol annexed in the Schengen *acquis* with respect to the status of citizens of Ceuta and Mellila – which are two North-African protectorates of Spain. This second model can especially be applied for those Ukrainian nationals residing in the border region close to what will become the new Schengen border. Similar to residents of Ceuta and Mellila, these persons can be granted a one-year residence permit by Poland to facilitate their movements on a daily basis across the border. This residence permit will only allow an individual to freely enter Poland if it is issued by Poland, but it would permit the holders of such a permit to travel according to Schengen rules for three months out of six and six months out of 12 in the rest of Schengen zone. Such a residence permit is considered as the equivalent of a visa for travel within Schengen zone, but would bring an additional benefit with respect to travel to Poland.

There is a need to differentiate between the conceptual/political barriers to the free movement of people across the Schengen border and the technical barriers. If trust and political will exist, they will suffice to surmount these conceptual barriers, then solutions can be found on the technical level. The dialogue about trust is currently taking place on three levels: between the future Eastern European neighbours and the accession countries, between EU member states and accession countries, and among EU member states. There needs to be a convergence of these dialogues if the climate of trust between these three groups is to be developed.

Visa regimes must not be viewed as intractable ideological barriers threatening to slice up Europe, but rather a challenge that can be surmounted with the necessary political will and technical innovation. In looking to define more closely what impels the actual dynamic of the implementation of visa regimes, several rationales maybe outlined: EU enlargement, foreign relations, migration policy and economic demands. These rationales are often mutually exclusive. For example, economic demands dictate that it would be good for Ukrainian business to radically simplify (or indeed cancel) the need for EU

businessmen to obtain visas for visiting Ukraine; yet the logic of reciprocity in foreign relations means that such steps could not conceivably be taken without the promise that the EU will eventually consider taking identical measures with respect to businessmen from neighbouring states. It is the dynamic between these various rationales, along with concrete technical factors, that will dictate the effect of visa regimes on the free movement of persons along the future border of the EU.

7. Recommendations

7.1 Recommendations to neighbouring states

The experience of Bulgaria coming off the negative visa list could provide some key strategies for neighbours such as Ukraine, Belarus, Moldova and Russia. Although countries such as Ukraine are not yet EU-candidate countries, the recent developments in EU-Ukrainian relations show that the ‘external relations’ criteria refer to this eventual possibility, especially if Ukraine implements certain reforms. Similar developments could also be considered for the other neighbours.

This, however, is a first step. The actual legal changes require strong political will, trust on the side of all actors and a well-trained administration capable of implementing the adopted acts. The key steps in the legislative field are:

Short term

- unilaterally abolishing visas for citizens of the European Union;
- strengthening controls on all Ukrainian borders – borders and border controls must be introduced with Belarus and Russia with the support and guidance of the European Union; by introducing these borders Ukraine would see a decrease in the difficulties surrounding its western borders;
- establishing joint Polish/Ukrainian patrols along their shared borders;
- signing expatriation/repatriation agreements with EU member states, which will increase trust and confidence towards Ukraine.

Medium term

- improving the quality of Ukrainian passports;
- introducing new (if not existent) criminal offences related to migration; and

Long term

- making a concerted political effort to achieve the removal of Ukraine from the visa black list.

The removal of Ukraine from the black list appears remote today considering the wide divergence between living standards in Ukraine and the EU member states and the sheer size of the country, with a population of 50 million. In the longer term, efforts towards real reforms could make removal from the visa black list serious consideration. This would require the establishment of an effective control system on the external border, so as to eliminate the crossing of the border by persons recorded in the Schengen Information System. It would also be important to put effective controls in place on the Russian-Ukrainian border. Controls on the border, although not directly relevant to the issue of visas, would enhance the growth of confidence in Ukraine and could serve as an additional instrument of to stop illegal immigration from non-EU countries.

7.2 Recommendations to the EU and accession states

The specific recommendations contained in this paper focus on the visa policy of an enlarged EU. Visas are still seen as one of the main instruments for controlling external EU borders.

Another important aspect of border controls is the Schengen Information System. The implication of having one's name on the SIS list could range from simply having one's documents scrutinised every time one enters the Schengen zone, to a blank refusal of a visa. Not all Schengen countries feel obliged to offer a reason for refusing to issue a visa and this is a policy area that is still governed by the principle of sovereignty of each Schengen state. The persons usually included in the SIS database are those who either have a criminal record (even simply defined as a threat to public order) or have possibly been subject to a criminal act, for example, persons whose documents were stolen while visiting or residing in a Schengen country.

The recommendations proposed below can be divided into two basic groups:

The first group includes recommendations for the near future. The assumption here is that because of the political climate in the member states, neither a major amendment of the Schengen *acquis* nor an approach of partial or selective implementation of the *acquis* by accession countries is possible at present. Specific options can be undertaken by the candidate states and the European Union in order to minimise the potentially negative effects on the movement of persons between non-candidate countries and prospective members. These options are based on the premise that the Schengen *acquis* leaves a certain margin of flexibility and adjustment to meet the particular needs at hand.

The second group includes far-reaching recommendations, based on the belief that the Schengen provisions should be modified to better serve the fundamental aim of an open, free and undivided Europe as proclaimed by the European Union.

7.2.1 Solutions within the Schengen *acquis* framework

The recommendations presented below take into account the assumption that the candidate countries will introduce visa requirements on the traffic of persons from the blacklisted states no later than their date of accession to EU membership. Their principal aim is to alleviate the undesirable results of the introduction of the visa regime and enable easier access to visas, so as to remove the major impediments preventing the citizens of Eastern Europe from travelling to Central European countries. The achievement of this goal requires a range of activities and the fulfilment of numerous conditions, as presented below.

a) Upgrading and reinforcement of consular services

More consular staff. In order to process a similar number of persons crossing these borders today, the majority of whom possess single-entry visas, more consular staff will be required in order to provide for smooth cross-border traffic. This point is valid for the current EU countries but particularly for the new member states such as Poland, which has extensive traffic with Ukraine.

The visa procedure for non-EU citizens can be simplified through the establishment of a single EU consulate in non-EU countries.

b) Types of visas that could facilitate the movement of persons – National visas

Before lifting border controls between old and new members. National visas issued by candidate countries prior to accession may be less rigorous, as they do not expose the EU members to any risk. Once the candidate countries become members, border controls will be maintained on the existing internal borders (e.g. Poland-Germany, Hungary-Austria) for some time. The applicant countries will continue to be able to issue national visas on hitherto existing principles, since the citizens of the Eastern European states possessing such visas will not be able to cross the border of the country that issued the visa.

After lifting border controls between old and new members. The national visa will then change its function. In accordance with the Schengen *acquis*, it will only be issued for long-term residence, i.e. for stays of more than three months. It will only entitle the holder to reside in the area of the country

that issues such a visa. Travel to other countries would take place according to Schengen rules and the residence card granted with the national visa will serve as a Schengen visa to travel to other states for a period of not more than three months over six months and six months over a 12-month period. It is technically feasible for third-country citizens holding long-term national visas to cross the internal border, but the risk of sanctions in the event that the authorities learn of the holders of such a visa over-staying in another member state (complete ban on all entry to the EU for several years) should serve as adequate deterrence.

Issuing long-term national visas in large numbers may become one of the main mechanisms to facilitate travel by Ukrainian citizens to accession countries willing to pursue such a liberal policy.

It would comply with the Schengen *acquis*. The implementation of such a policy, however, would require political dialogue with the member countries in order to reassure them of the good will of the new members of the Union.

An important model to look at here is the case of Spain and the protocol annexed in the Schengen *acquis* with respect to the status of citizens of Ceuta and Mellila – two North-African Spanish protectorates. This model can especially be applied for those Ukrainian nationals residing in the border region close to what will become the new Schengen border. Similar to residents of Ceuta and Mellila, these persons can be granted a one-year residence permit by Poland to facilitate their movements on a daily basis across the border. This permit would allow the holder the right to freely enter Poland and to travel according to Schengen rules for three months out of six and six months out of 12 in the rest of the Schengen zone. Such a residence permit is seen as being equivalent to a visa for travel within the Schengen zone and would give additional benefits for travel to Poland. Similar methods have also been adopted by Greece and Portugal (see section 3) and they are fully in compliance with the technical aspects of Schengen.

c) The Schengen visa (allowing the holder to stay in all EU member states)

The key purpose of the visa procedure is to eliminate **the risk of illegal immigration**. In principle, however, the verification procedures contained in the *acquis* are intended to evaluate the risk of immigration in accordance with local conditions.

One example of a practical solution would be to eliminate the interview process (they are not obligatory according to the *acquis*) or to perform an interview only for first-time visa applicants. Practical facilitation could also be provided by the granting of multiple-entry visas valid for one year, which the Schengen *acquis* allows. Given the possibility of issuing a long-term national visa, a visa valid for a period longer than one year (which is permitted by the Schengen Treaty in certain cases), does not appear to be all that important.

Individuals who should be given priority access to these two categories of visas, i.e. the long-term national visa and the multiple-entry Schengen visa valid for one year (allowing a stay of up to six months) may be divided into the following categories of those persons who are:

- a) involved in business activities;
- b) active in culture, science, scholarship holders, students, sports;
- c) visiting their families;
- d) inhabitants of border regions (such visas could become a substitute for the simplified non-visa cross-border movement that occurs in border areas but which would not be compatible with Schengen); and
- e) representatives of local government authorities or activists of non-government organisations (NGO).

Should it prove impossible to introduce small-scale non-visa movement, the issuance of long-term visas is a good alternative for the purpose of maintaining extensive cross-border contacts.

d) Inexpensive visas

Ideally, single-visit visas should be free of charge, with the cost covered by the EU. This would send a strong political signal at a modest price. As a second-best solution, the price of single-visit visas should not exceed €5-10 and multiple-entry Schengen visas and long-term national visas allowing visits for defined periods of time should be in the range of €10-20. The low price is like a declaration of intent: we do not wish to establish barriers or additional obstacles. A simultaneous reduction of prices to the same level by all of the member states could be a valuable and well-received gesture to accompany the enlargement. The recent declaration by Poland that they are planning to issue visas for Ukrainian nationals free of charge is the first signal in that direction.

e) Development and upgrading of border crossings

The EU should invest in the technical infrastructure at border crossings, which should ensure the efficient and speedy crossing of the border. It should also contribute more to the establishment of new border crossings on an external frontier where needed. A properly developed infrastructure of border crossings with an adequate capacity to efficiently manage the movement of persons across the external border will be an important political message.

f) Mutuality on the part of East European states

The quest for ways to alleviate the impact of the introduction of visas ought to be the subject of political dialogue not only of a bilateral nature (by the new members with the individual Eastern European non-candidate states), but also between the Union and the individual countries of Eastern Europe. The dialogue should cover the following issues:

- coordination of mutual measures by each party in visa policy and a civilised introduction of visas, i.e. by giving adequate advance notice and by broadly disseminating the respective information addressed to the people concerned;
- the introduction of mechanisms aimed at reducing the fear of illegal immigration on the part of the countries of the Union, i.e. by increasing the effectiveness of the readmission agreements (with Ukraine for example) and also by signing such agreements with other countries; and
- The introduction of similar non-restrictive mechanisms with regard to citizens of the EU countries travelling to Eastern Europe.

Unfortunately, there is little evidence of enthusiasm as yet among Eastern European political elites for engaging in a dialogue of this kind. The requirement to apply for a visa will be an inconvenience above all for the ordinary citizen, rather than for politicians or affluent businessmen. Even with elite political will, the inefficiency of the state administration may be a major hindrance to the effectiveness of such dialogue. Nevertheless, support for such dialogue ought to be one of the main components of the long-term foreign policy of the Union, and should not remain solely within the competence of the ministries of internal affairs of the individual EU states.

The introduction of visas for the citizens of the newly admitted member countries of the Union by the countries of Eastern Europe remains a virtually unnoticed impact of the introduction of the Schengen *acquis*. Inefficiency of the administration could effectively discourage travels to the East, which even under the present arrangements for visa-free movement are not very frequent. Paradoxically, the decline of traffic in that direction may turn out to be far more painful in the longer term. Such a situation would widen the distance between the neighbouring nations and reinforce their ignorance of one another. In order to avoid this, the possibility of granting support for the development and modernisation of consular services of the Eastern European countries with the assistance of aid programmes should be taken into serious consideration. More importantly, the future Eastern European neighbours of the EU should be encouraged not to reciprocate in kind when the EU accession candidates introduce visas for their citizens. Although such asymmetry might be hard to

accept politically, the European Union's neighbours should recognise that the EU's concerns are legitimate, and that it would be counter-productive to make this issue a contest of political will.

7.2.2 Long-term solutions

At present the European Union does not seem to favour introducing modifications to the Schengen Treaty or any far-reaching changes in the visa policy with respect to the Eastern European countries. There is a need for public debate on this issue.

a) Modification of the visa black list

Citizens of Ukraine must produce a visa upon entering the EU. The possibility of removing the Eastern European countries from the black list in the future should be considered. Their presence on the list is largely caused by the fear of intensive immigration. Such fears were expressed in advance of previous EU enlargements, but with hindsight were discovered to be unfounded. The same fear was evident at the beginning of the 1990s, when the matter of the removal of visas for Central European citizens was discussed in the EU. The experience of the past decade has demonstrated, however, that the fear of a flood of immigration from countries such as Poland or Hungary was completely unjustified.

b) The possibility to obtain a visa on the border

At present, visas are issued on the border only in exceptional cases. The future development of the technical infrastructure of the SIS (introduction of easy-to-use magnetic readers, popularisation of passports with a magnetic code) would allow visas to be issued on the border. That would require the application of readers able to immediately and automatically print visa stickers. Such a possibility could apply to persons who have passed the procedure of visa application before and have a clear record in the SIS. The inspection of passport documents with the use of a reader and the comparison of data upon the person's departure from the EU area would allow an immediate determination of whether the duration of the visit had been exceeded.

This could in time lead to the abolition of visas as such. According to this scenario, a visa would only be issued at the initiative of a person travelling to the countries of the European Union. Its purpose would also be to reduce the risk of refusal of entry and the related losses owing to the travel expenses incurred. A model of universal movement without visas (currently allowing for visits of up to three months) would require advanced SIS technological solutions. Similar to the above-mentioned scenario, the so-called 'traditional visa procedure' could be compulsory upon the first visit.

c) Multiple single-day entry visa

One way to simplify the entry of citizens living close to the EU's future border (e.g. western Ukraine), and at the same time prevent them from staying illegally in other EU countries, is to provide them with a multiple single-day entry visa (MDV). It would be a travel document valid only together with a passport allowing a maximum of (for example) an 18-hour stay in one of these countries. If the person exceeded the duration of stay allowed by the visa, the border guards would retain the MDV and from that time forward the person concerned could only enter the country on the basis of a Schengen visa.

The MDV could work like a credit card, which would facilitate handling and make the clearance procedure quicker. Upon entry to Poland, it would be inserted in a reader machine. If the allowed duration of stay has been exceeded, the machine would withhold the card upon the return. It would limit the possibilities for persons using a document of that type for moving across to the territories of other EU countries, as for example a journey from the area of Eastern Europe to Germany and back within 18 hours is practically impossible. At the same time, such a border clearance regime would enable the individual to maintain small business trade, neighbourly and family contacts, as well as employment in the border zone.

d) A better balance between openness and control

The long-term foreign policy on the part of the European Union should effectively limit the criminal phenomena such as the smuggling of people by organised criminal groups, without isolating the immediate neighbours of the Union at the same time. The demographic situation (the dramatic ageing of society and the fall of the birth rate below the level of simple reproduction of generations) both in the countries of Western and Central Europe, with the resulting implications for the employment markets, pension systems and health care systems, demonstrate clearly that Europe is in need of immigrants.

For this reason, entry to the EU for hundreds of seasonal workers should be legalised. The existing policy involves immense hypocrisy. On the one hand, we pretend to abide by stringent and restrictive laws and on the other we tolerate the existence of extensive areas of shadow economy based on immigrant labour, which is undoubtedly beneficial. Both the immigration regulations and the insurance and tax regulations need to be reconsidered, as they provide the soil in which such criminal activities grow. Although immigration policy is above all a challenge to the 25 EU member states, it increasingly also concerns the future member states, as shown by the experience of recent years.

Undoubtedly, the scenarios presented here require significant investment for the visa-free border control methods to be effective. The new members, on whom the core burden of responsibility for protecting the external borders will rest, will need technical and financial support from the Union. We should also bear in mind, however, that the outlay of capital expenditures involved would be balanced by the decreasing costs of consular services, which are very high at present.

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