# The Adoption of the Schengen and the Justice and Home Affairs *Acquis*: Two Stumbling Blocks on the Way to Successful Enlargement?

*By Lora Borissova*
**Suggested Citation:** Lora Borissova, *The Adoption of the Schengen and the Justice and Home Affairs Acquis: Two Stumbling Blocks on the Way to Successful Enlargement?*, 3 German Law Journal (2002), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=211
*[Editors' Note: Lora Borissova's article was originally intended for publication in the November issue of German Law Journal. Due to no fault of the author, an editorial error resulted in the exclusion of the article from last month's issue. The Editors' apologize for any inconvenience this error may have caused the author and the Journal's readers.]*

## A. INTRODUCTION*

[1] The crucial importance of European Union's (EU) enlargement process to Central and Eastern European Countries (CEECs) (1) from a political, economic, social, and geo-strategic perspective inspired much debate over the last decade. Our objective in the current study is to demonstrate the enforcement of two categories of interdependent legal provisions (Title IV and the Schengen *acquis*) by the applicant countries in the process of their accession to the EU. The analysis comprehends the latest Commission Strategy Paper and Regular Reports on the progress towards accession by each of the candidate countries, issued on 9th October 2002 and the results of the last Justice and Home Affairs (JHA) Council.

[2] The Treaty establishing the European Communities (TEC) (2) comprises, on the one hand, a Title IV: Visas, Asylum, Immigration and other policies related to the Free Movement of Persons. A Schengen Protocol is, on the other hand, annexed to the TEC and to the Treaty on European Union (TEU). (3) The legal provisions issued on the basis of both texts are complementary (4) and constitute a part of the *acquis communautaire*, which has to be fully implemented by the CEECs, as they will form the future external border of the EU, which should prevent illegal immigration from further east.

## B. THE BEDROCK…

[3] The objective, laid down in the article 2 of the TEU seeks "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime". The importance of this objective was underlined at the Tampere European Council of October 1999 which gave a new impetus to the developments in the JHA field. September 11th modified the geopolitical world *conjoncture* and the European attitude towards immigration and security issues.

### *I. Title IV Acquis*

[4] According to the provisions of Title IV (TEC) "Visas, Asylum, Immigration and other Policies related to Free Movement of Persons" diverse types of measures are required "in order to establish progressively an area of freedom, security and justice". (5) Free movement of persons is a postulate that is linked to security considerations. The suppression of EU internal border controls (regardless the nationality of persons crossing the borders) corresponds with the reinforcement of the external border controls. In this sense, there is an urgent need for an operational EU visa common policy and a coherent EU immigration policy.

[5] With regard to the decision-making process, described in article 67, Title IV, although included in the first Community Pillar, requires unanimity during the first five years following the entry into force of the Treaty of Amsterdam (a period going to 1 May 2004). This procedure is delaying the prompt adoption of necessary measures with all the undesirable implications for the candidate countries that we shall analyse later. The TEC provides for an opportunity for the Council to modify the rules after May 1st 2004, by imposing qualified majority voting. A stimulating controversy resides in inquiring the conceivable unwillingness of the future Member States, whose accession is expected in 2004, to change the status quo in this field.

[6] According to article 68, §2, the European Court of Justice "shall not have jurisdiction to rule on any measure or decision taken pursuant to article 62, §1 relating to the maintenance of law and order and the safeguarding of internal security". (6) The rationale behind this provision could be justified by the sensitive character of security and immigration issues, which have long been part of states' *pouvoirs régaliens*. At this stage, one could speculate on the frequency of this article's future application by the CEECs after their accession to the EU in cases of excessive inflows of third-country nationals.

[7] It is important to mention that Title IV represents a part of the *acquis communautaire* that the applicant countries have to adopt completely. Moreover, the CEECs are supposed to adopt and implement the required provisions before the enlargement and are not allowed to apply for transitory periods. The status quo for the current Member States is less rigorous since flexible arrangements have been made regarding, on the one hand, the United Kingdom and Ireland, and Denmark, on the other. (7)

*II. The Schengen Acquis*

[8] The rationale of the relationship between the abolition of internal border controls with the harmonisation of external border controls has been made explicit with the adoption of the Schengen Convention in 1985 and the Schengen Implementing Convention of 1990. Both fundamental documents, along with the following Accession Protocols and Agreements, Decisions and Declarations adopted by the Executive Committee and acts adopted by the organs upon which it has conferred decision-making powers, constitute the Schengen *acquis*. (8)

[9] With regard to the current Member States, the Schengen area comprises 13 members. The UK and Ireland are not members for the time being, (9) while Denmark, although signatory of the Convention, could opt for the enforcement or not of every new decision based on the *acquis*.

[10] The generally accepted meaning of article 8 of the Schengen Protocol (despite some divergent interpretations) is that applicant countries, contrary to the UK and Ireland, cannot be allowed partial participation in Schengen. (10) They are required to fulfil the requirements of the *acquis* upon their accession, without being allowed to benefit from any transitory periods. In the latest Strategy Paper, the European Commission declares that "full application of the Schengen *acquis* necessitates a process in two stages". (11) During the first stage, by date of accession, applicant countries are supposed to enact the JHA *acquis*. They will need to have achieved a high level of border control. It is only then that the second stage of the procedure will take place, consisting of substantive lifting of internal border controls between the old and the new Member States.

[11] The position, referred to above, merits two important, in our view, considerations.

[12] The first one is related to the expansion of the legislative initiatives in the JHA field, requiring doubling the efforts of the candidate countries, which are required to adopt and implement the *acquis*. (12) This rapidly evolving *acquis* constitutes a new hurdle for the CEECs towards enlargement. Instead of making the comprehensive adoption and implementation of the required measures mandatory even before accession (which clearly appears as an unattainable objective for the majority of the candidates), the EU could opt for a prioritisation of some parts of the *acquis*. The provisions of this "core *acquis*" should include the most essential measures to be implemented upon accession, which would allow applicant countries to concentrate their efforts and will give them the needed time to do it efficiently. (13) Otherwise, there is a risk of setting a long-term "grey zone" between accession and full application of the Schengen *acquis*, which could result in ineffective border security and eventually make the envisaged integrated management of the EU external borders infeasible. (14) Unfortunately, the latest regular reports of the European Commission on the progress towards accession by each of the candidate countries do not present precise indications in this direction. (15) This "omission" is strengthened by the introduction of a safeguard clause in the future Accession Treaties.

[13] The second consideration is relevant to the general safeguard clause, which should go beyond general economic questions. (16) In this context, one could presume the inclusion of such a clause in the JHA area because of the difficult and politically sensitive issues (particularly where the freedom of movement of persons and the consequences of the suppression of internal borders are concerned). This assumption is not empirically proven, because the Commission asserts that the implementation of the primary Schengen provisions in a two-stage procedure "eliminates the need for any separate safeguard mechanism". (17) The Commission proposes to maintain the safeguard clause for other non-Schengen components in the area of freedom, security and justice (for instance the principle of mutual recognition in judicial co-operation matters). The non-inclusion of a safeguard clause for all Schengen-related matters attests the clear eagerness of the Commission to encourage candidate countries to undertake a comprehensive enactment of the Schengen rules upon their accession. Therefore, the lack of a separate safeguard mechanism to the relevant *acquis*, confirms that the task that applicant countries face is difficult. They will not be able to re-target their efforts classifying the priorities because of the obligation to implement fully the *acquis*. Paradoxically, the non-acceptance of precautionary measures would not generate a relaxing effect in the CEECs, but rather recall the question of a thorough and prompt enactment of the JHA *acquis*.

## C. …AND ITS INTEGRATION INTO THE LEGAL ORDERS OF THE APPLICANT COUNTRIES

[14] As it has been demonstrated, the *communautarisation* process described above has to be carried through in the

https://doi.org/10.1017/S2071832200015662 Published online by Cambridge University Press

applicant countries by means of implementing the large arsenal of legal rules in the JHA field. The adoption of the *acquis* in this area is a pre-requisite before the accession of the CEECs, which are compelled to participate (unlike the UK, Denmark and Ireland in the framework of Title IV and the UK and Ireland as regards Schengen). Therefore, issues of legal, geopolitical, economic and structural order deserve to be discussed.

*I. Some Legal Remarks*

[15] From a legal point of view, the unanimity rule required during the first five years (article 67 TEC) for the adoption of decisions on the subject does not urge the Member States to move forward swiftly. Consequently, the *acquis* stemming from the decision-making process is adopted partially, which inhibits the elaboration of a uniform and coherent common policy. Thus, the candidate countries are obliged to transpose the *acquis* in their internal legal orders at the pace of adoption of the latter by the Member States. The considerable number of recent initiatives, the evolving character of the JHA *acquis*, coupled with the late start of the CEECs regarding their preparation for accession, prevent these countries from creating a homogeneous framework in the area of justice and home affairs.

[16] In this context, the applicant countries have to demonstrate their ability to cope with the constant alterations of the *acquis* and to react with rigour and celerity. Moreover, this part of the *acquis* is considered extremely important because of the recent events and the fears of propagation of terrorism. Considering the arguments mentioned above, one could be once more struck by the incompatibility stemming from the demands made on the candidate countries for rapid implementation and the non-enforcement of the JHA *acquis* by certain current Member States.

*II. An Efficient Control of the External Borders…*

[17] Article 6 of the Schengen Convention (18) settles the obligations of the Member States in the area of control and surveillance of the external EU borders. Border authorities have to be vigilant and exercise an equally stringent control all along the frontiers. The latest regular reports and the recent Communication of the Commission (19) attest the considerable advancement achieved by the applicant countries in the transposition of the JHA provisions and the progress at legal and institutional level. The documents emphasise on necessity to modernise the infrastructure and equipment in order to produce an efficient border management strategy. (20)

[18] The participation of the candidate countries in Schengen is particularly awaited by their European partners, since their accession will shift the EU external borders far to the East. The applicants should not any more be transit countries for cross-border criminal structures but reliable guardians of the EU external frontiers. In order to serve as the new buffer states and to ensure efficient border controls, candidate countries have to conform to the high standards of border security. In this respect, border control, as provided for in the Schengen Convention, brings up a controversial issue, which is the participation in the common visa policy.

*1) …which requires the adoption of the common visa policy*

[19] The common visa policy suggests the introduction of a common list of countries whose nationals require a visa for the Schengen territory, a common visa format and common rules for issuing these visas. (21) The future members of the EU should adopt Regulation No. 539/2001 of March 15th 2001, (22) listing all third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. It is a very sensitive measure in geopolitical terms and, to certain extent, contrary to the concept of *relations de bon voisinage*, which is a component of the first political Copenhagen criterion.

[20] The introduction of Schengen visas for nationals of adjoining states, exempted previously from such a requirement, is, as already stressed, a particularly controversial and politically uncomfortable decision for the CEECs. Governments are reluctant to go along with this requirement, which might bring the risk of creating new divisions in Europe, of clashing with national feelings of citizens of third countries (Kaliningrad would become an enclave between new Member States), of generating new minority conflicts, and of discouraging free movement of persons and freedom of entrepreneurship in regions that often lack vital investment. This observation concerns borders between Poland, Belarus and the Ukraine; between Slovenia and Croatia; between Bulgaria and Macedonia; and between Romania and Moldova. (23)

[21] Governments of candidate countries have to demonstrate their political will to ensure efficient border controls. Besides the introduction of visas, they have to commit themselves to fight against illegal immigration, organised crime, trafficking in human beings, money-laundering, trade with illicit substances and works of art, notwithstanding that some of these matters are provided for in Title VI (TEC) and consequently governed by an intergovernmental *modus operandi*. In this respect, one could mention the recent agreement for improving the regional co-operation in the fight against illegal immigration between Slovenia, Croatia, Austria and Italy. (24)

*2) …which enjoins efforts at structural and operational level*

[22] The transition from military border staff to professional modern border staff has been a difficult, and not yet achieved, undertaking. Moreover, numerous other problems, such as shortage of trained staff, equipment functioning, and corruption, have to be resolved in the meantime. The surveillance operations need to be reinforced along the eastern borders, which traditionally had less stringent control in the past. By means of improved implementation of the JHA rules and thorough co-operation with neighbouring States and Member States of the EU, applicant countries could improve their compliance with the requirements of the *acquis*.

[23] Therefore, the common joint activities already conducted by the Member States and the ten CEECs at the EU external frontiers had a considerable impact on the evaluation of the measures of border control. The operation which was held between 29 September and 8 October 2001 was carried out in co-ordination with and the support of Europol and resulted in the interception of 1530 illegal immigrants. (25) Such undertakings are expected to establish an effective collaboration between Europol and the candidate countries even before their accession. Furthermore, it is essential to point out the importance of the EC funds, which through PHARE and other Community programmes, increase the operational capacity of the border guards. Such funding contributes to the accomplishment of judicial and administrative reform in the candidate countries and assists with the training of competent and non-corrupted civil servants.

*3) …which presupposes the conclusion of readmission agreements*

[24] The readmission agreements, together with the common visa policy, are another useful instrument, which elaborates the Community immigration policy by creating a buffer zone along the EU external borders. In this sense, such agreements facilitate the readmission of persons residing without authorisation in a Member State to their own country. (26) The Seville European Council of 21 and 22 June 2002 underlined the importance of the readmission agreements as a measure to combat illegal immigration. (27) Last but not least, the EU Green Paper on a Community Return Policy on Illegal Residents brings some proposals in view of the elaboration of a common readmission policy. (28)

[25] The last JHA Council also discussed the benefits of having readmission agreements with non-EU countries obliging them to take back their nationals who are residing illegally in the EU. (29) In the perspective of their accession to the EU, candidate countries are required to conclude readmission agreements between themselves and with third countries, including their neighbours. The requisite measures in this field are fundamental, as the applicant countries will become the external borders of an enlarged EU. Each candidate has to conclude a readmission agreement with all other applicants, as well as with the EU. The readmission clauses with the candidates (except Poland, which has the only agreement to be concluded between all the Schengen States and a third country) have been comprehended in a number of bilateral agreements (concluded between individual Member States and applicants), because of the lack of sufficient harmonisation of the common immigration policy.

[26] The CEECs have to enact the EU standard of "safe" third countries and readmission agreements provide the legal basis for the return of asylum seekers and irregular immigrants to these countries. (30) A recent IOM's research on return to the CEECs shows that returning third country illegal migrants is not an effective solution, since the applicant countries do not have the necessary experience and resources to return the migrants to their countries of origin. (31) That is the reason why some transit countries argue that readmission agreements are useful only if such agreements exist with the countries of origin. Therefore, governments of candidate countries need to negotiate readmission agreements with some countries known to generate asylum seekers. One could interpret this undertaking as a "transfer" of responsibilities of present applicants to future candidates in the East, declaring their willingness of becoming members of the EU in the foreseeable future.

## D. CONCLUSION

[27] The recent Communication from the Commission "*Towards Integrated Management of the External Borders of the Member States of the European Union"* clearly indicates that candidate countries will not become full members of Schengen area upon accession. Therefore, it appears crucial to establish a precise scope of the JHA *acquis*, which has to be imperatively adopted upon accession by the CEECs. Establishing an accurate definition of the rules to be enacted could allow them to concentrate on the priority issues and to deal with some sensitive issues, such as the institution of visas. We consider it fundamental to advocate a rapid application of the basic freedoms provided for by the Treaties (notably free movement of persons) and of the JHA *acquis* (with the proven interdependence between the abolition of controls at internal borders of the EU for all persons regardless their nationality and the controls carried out at the external borders of the EU) after the accession of the candidate countries to the EU. This would prevent them from feeling second class citizens. This confers a single, in our view, opportunity to make a success of this unique enlargement and to aspire to a prosperous enlarged Europe.

* This paper is being written in the framework of and thanks to the Interuniversitary Attraction Pole P5/32 (Liège, Ghent, Brussels, Paris), initiated by the Belgian State, Prime Minister's Office, Science Policy Programming.

(1) Cyprus, Malta and Turkey are the other applicant countries, Cyprus and Malta are invited to accede to the EU in 2004 and the Turkey is not yet negotiating.

(2) In its consolidated version since the Treaty of Amsterdam.

(3) Protocol integrating the Schengen *acquis* into the framework of the European Union. See, *infra* Section B. for an analysis of the *acquis*.

(4) The aspiration to establish an Internal Market with free movement of persons in the EU goes together with the issue of a security deficit requiring stronger control at the EU external borders.

(5) Article 61, Title IV (TEC).

(6) Article 68, §2, Title IV (TEC).

(7) A Protocol annexed to the Treaty states that Title IV and secondary legislation based on it or international agreements made pursuant to the Title or related Court of Justice case law are not binding for the United Kingdom and Ireland. Both are entitled to carry our border controls on entry. The Protocol on the position of Denmark postulates that the country is not bound by Title IV provisions and, contrary to the position of the UK and Ireland, envisages no opting-in clause.

(8) For the definition of the Schengen *acquis*, refer to the Council decision 1999/435/EC of 20 May 1999, OJ (2000) L 239/1.

(9) However, they are allowed a partial opt-in in the Schengen mechanisms, without obliging them to abolish their border controls. It is important to note that Iceland and Norway, which are members of the European Economic Area, and whose integration helped to resolve the problems with the Nordic Union, whose other members have become members of the EU, also participate as associated partners.

(10) "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 States candidates for admission". See article 8 of the Schengen Protocol.

(11) "Towards the Enlarged Union " Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, Brussels, October 9th 2002, COM (2002) 700 final, p. 28. Hereafter called "Strategy Paper."

(12) As professor Monar notes it:" There is no other example in the history of EC/EU integration process of an area of previous loose intergovernmental co-operation only having made its way so quickly to the top of the Union's political and legislative agenda." Jörg Monar, "EU Justice and Home Affairs and the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies," *ZEI Discussion Paper* p. 3, C91 (2001).

(13) An issue regularly mentioned in academic debates and tenet. See, Jörg Monar's article, *op. cit.* and Monika Sie Dhian Ho & Eric Philippart, "JHA and Enlargement: a Plea for a Core Acquis Test," The European Policy Centre, Brussels, October 25th 2001.

(14) *See*, Monica Den Boer & Gilles de Kerchove, "Schengen *Acquis* and Enlargement," *in The European Union and the International Legal Order: Discord or Harmony* 315-329 (Vincent Kronenberger ed., 2002).

(15) The Commission underlines that each country's Schengen Action plan has allowed them to structure the necessary key actions and to advance in their implementation (several sectors have been mentioned: administrative and judicial capacity in the context of border management, fight against fraud, corruption, money laundering and organised crime) but clear attestation of a strict core acquis text is missing. *See*, Strategy Paper, p. 18.

(16) *See*, Strategy Paper, p. 25. The safeguard clause would allow the Commission to determine the necessary protective measures. Such a clause has been present in previous Accession Treaties, for instance the ones with Austria, Finland and Sweden. The extension of the clause would cover different policy fields which could "have an impact of the good functioning of the internal market in a very large sense." *See*, Uniting Europe, No. 204, October 14th 2002. Moreover, the duration of its validity should be two years and not one, as in the last enlargement.

(17) *See*, Strategy Paper, p. 27.

(18) *See*, Schengen Convention of June 14th 1985. This Convention forms a fundamental part of the Schengen *acquis* published.

(19) Communication from the Commission to the Council and the European Parliament "Towards Integrated Management of the External Borders of the Member States of the European Union," Brussels, 7 May 2002, COM (2002) 233 final.

(20) Refer, for instance, the latest Regular Report on Poland's Progress towards Accession. SEC (2002) 1408, Brussels, October 9th 2002.

(21) The fundamental principle of common visa policy is provided for by article 9 of the Schengen Implementing Convention of 1990. The three elements are dealt with in further legal instruments.

(22) Council Regulation (EC) NO 539/2001 of March 15th 2001, modified on December 7th 2001, OJ L 81 of March 21st 2001, p. 1.

(23) Refer, for instance, to the latest Regular Report on Poland's Progress towards Accession, which notes on p. 118: "Further efforts are required with respect to visa policy. The most difficult aspects of achieving full alignment with the EU visa *acquis* remain to be tackled". See this document, *op.cit* note 20.

(24) Declaration adopted on 1st October 2001. See Agence Europe, 4th October 2001.

(25) *See*, *Uniting Europe*, n° 162, 24 October 2001.

(26) Two recommendations of the Council of 1994 and 1995 presented the guiding principles and the necessary readmission clauses to be provided for in such agreements. After the entry into force of the Amsterdam Treaty, these clauses were updated and a decision was adopted to incorporate them in all Community agreements and in all agreements between the European Community, its Member States and non-member states.

(27) *See*, Presidency Conclusions – Seville, 21 &22 June 2002, §30&34.

(28) EU Green Paper on a Community Return Policy on Illegal Residents, Brussels, April 10th 2002, COM (2002) 175 final.

(29) The Commission has just proposed to the Council a mandate to negotiate such agreements with Algeria, Turkey, Albania and China. Agreements are currently negotiated with Russia, Morocco, Sri Lanka, Pakistan, Hong Kong, Macao and the Ukraine. *See*, European Report, October 19th 2002, IV.3.

(30) *See*, European Parliament, *Migration and Asylum in Central and Eastern Europe,* at: www.europarl.eu.int/workingpapers/libe/104/summary_en.htm. In this sense, the last JHA Council on 15 October declared that from the moment an EU candidate country signs its Accession Treaty, asylum applications lodged by its nationals will be rejected. See European Report, October 19th 2002, IV.3.

(31) IOM's Comments on the EU Green Paper on a Community Return Policy on Illegal Residents, International Organisation for Migration, p.21.