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THE SCHENGEN AREA – AS AN ELEMENT OF MANAGING INTERNAL SECURITY IN A EUROPEAN DIMENSION

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Among the numerous integration endeavours undertaken to date, the European Union is slowly but consistently also implementing the process of opening internal borders, linking this with the reinforcing of its external borders. In this way, an area covering the majority of the EU Member States and several affiliated countries within which it is possible to travel without border controls was created. This area is called the Schengen Zone or the Schengen Area¹. As aptly noted by one of the researchers on the role of EU borders (including of the processes of the elimination of border controls) [...] *This process did not boil down only to a simple delegation of functions, but –constituting a material part of the European structure – consisted in the 'creation' (in a territorial and functional sense) of borders of a specific type. Although from a formal and legal point of view the EU borders remained inter-state borders, at the same time they 'became' the borders of a specific, one-of-a kind economic and political community*². When searching for the sources of the idea which materialised in the form of a group of several dozen European countries that have abolished internal border controls, one should first and foremost point to the agreement reached at the Conference of the Heads of State or Governments of 9

¹ The *Schengen Zone* and the *Schengen Area* are not officially defined terms. In practice, they are read as the territories of the countries, treated jointly, between which border controls on the common borders have been eliminated, thus creating conditions for the crossing thereof at any time and place.

² M. Trojanowska-Strzęboszewska, *Trzy oblicza unijnych granic. Polityka granic zewnętrznych Unii Europejskiej*, Warsaw 2011, p. 22.

Member States of the European Economic Community (EEC), which took place in Paris on 9-10 December 1974³. It was here that it was decided to commence the building of a so-called "Citizens' Europe". During the Paris summit the Belgian Prime Minister at the time, Leonard C. Tindemans, was tasked with preparing the concept of the further development of the idea of European integration. The final report prepared by the team under his leadership contained, among other things, a fragment devoted to bringing Europe closer to its citizens; *no one wants to see a technocratic Europe. (...) Europe must be close to its citizens*⁴. The introduction of a "passport union"⁵ was also to be helpful in the implementation of the idea of a "citizen's Europe". When in 1981 the creation of the so-called European passport was approved, there was still no favourable climate for the elimination of controls on the internal borders of the territory of the EEC. However, measures were taken to simplify them. Among the proposals which were formulated in connection therewith, one can mention, among other things: the limitation of checks, by making them spot checks; showing only a closed passport, which would be checked by border guards only when they deemed it appropriate; and the setting up of separate posts at border crossings for the EEC citizens. Due to a considerable divergence of views, these ideas were not adopted in the form of a resolution. Only after a more than two-year long period of reconciliation of standpoints, on 7 June 1984, was a resolution adopted which contained the statement that the Member States of the European Communities will strive to reduce the duration and intensity of border checks⁶. Because, for both political as well as technical reasons, the goals set out in the cited document proved impossible to implement within the EC, it was decided to transfer

³ The first reference to the elimination of barriers to the free movement of persons (initially, this only concerned employees) was made in Article 3 of the Treaty Establishing the European Community.

⁴ *Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council* Bulletin of the European Communities Supplement 1/76, p.6.

⁵ It should be noted that no visas were applied with respect to the mutual movement of persons in the EEC Member States prior to the signing of the Maastricht Treaty. The crossing of borders took place on the basis of showing a passport or personal identity card. At the same time the Member States maintained the right to check the identity documents of every citizen at the border.

⁶ See H.C. Taschner, *Tło historyczne wejścia w życie Układu z Schengen oraz jego związek z Traktatem ustanawiającym Wspólnotę Europejską* [in:] J. Beczała (editor), *Układ z Schengen. Współpraca policji i organów sprawiedliwości po Maastricht*. Łódź 1998, p. 28-29.

the co-operation to an inter-governmental level. In the middle of June 1984, a meeting took place in the capital of the German Saarland – Saarbrücken, between the President of France, Francois Mitterrand, and the German Chancellor, Helmut Kohl. During the meeting, an accord was reached which was of the nature of a preliminary political declaration, on the gradual elimination of controls at the Franco-German border.

The meeting in Saarbrücken and its results affected the course of the session of the European Council held in Fontenbleau on 25-26 June 1984. For the purpose of a more expedient implementation of the project of a "citizen's Europe" an ad hoc committee as created at the time, which was chaired by the Italian politician Pietro Adonnino. From the report presented by this body (the so-called Adonnino Report) it followed that the principle undertaking in the creation of a "people's Europe" should be the implementation of the principle of the free movement of persons and ensuring the right of residence⁷. The conclusions contained in the "Adonnino Report" did not, however, evoke the expected activity on the part of the Council or the majority of the Member States. In consequence, on 13 July 1984 based on the earlier agreement from June, the Federal Republic of Germany and the French Republic concluded an Intra-governmental agreement on the gradual abolition of checks at the Franco-German border. The agreement came into force on the very same day. The solutions contained in the Franco-German agreement concerned only the land borders, and their nature boiled down to the fact that: only visual checks of vehicles, which had only to reduce their speed, were carried out at the border; the so-called "green disc", affixed on the front windscreen of vehicles⁸ was introduced, common checks were introduced without their being divided into checks upon entrance or exit. It is worth noting that all of the citizens of the European Communities became entitled to cross the Franco-German border on the terms presented above.

⁷ For more details see the *Report on the Europe of Nations of 29 March 1985*. Bulletin of the European Communities, 1985 no. 3.

⁸ In order to simplify visual checks, citizens of the EC Member States crossing a frontier could affix a green disc of a minimum diameter of 8 cm on their front windscreen. From the legal point of view such a sign constituted a declaration that there were only EC nationals in the vehicle, that there was nothing to declare and that the French exchange regulations (which are no longer in force today) were not being breached.

Moreover, in the agreement it was stated that all personal checks would be abolished for all citizens of the EEC Member States by the end of 1986. This was accompanied by a declaration on the intensifying of measures aimed at combating crime, drug abuse and illegal crossing of the borders. The Saarbrücken Agreement was subjected to severe criticism by the German ministry of internal affairs and the police trade unions. The main arguments raised in these critical addresses were a fear of an increase of crime and the issue of redundancies among border patrol forces.

This gave an impulse to the development of compensatory measures, which were to more effectively prevent and combat various phenomena of a criminal nature which accompanied the freedom of travel. After the Franco-German agreement came into force, Belgium, Holland and Luxembourg directed memoranda to the governments of Germany and France to expand the agreement to cover the already existing passport union linking the Benelux countries⁹. As a result thereof, on 14 June 1985 an Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at their common borders¹⁰ was signed on a river-boat on the Moselle river near the town of Schengen in Luxembourg. The gist of the agreement concluded on 14 June 1985 by the five Member States was the undertaking to implement, as soon as possible, the arrangements constituting the body of the Saarbrücken agreement¹¹. The Schengen Agreement specified two time horizons for the implementation of the goals for which it was concluded. The first was set as 1 January 1986, and the second was set as 1 January 1990. The short-term measures described in Title I of the agreement included: the introduction of visual checks on private vehicles, without requiring such vehicles to stop (while maintaining

⁹ On the basis of the 1960 Convention.

¹⁰ *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, Official Journal of the European Communities of 22.9.2000.

¹¹ This is stated in article two of the agreement which states as follows: *In regard to the movement of persons, from 15 June 1985 the police and customs authorities shall as a general rule carry out a simple visual check on private vehicles crossing the common frontier at a reduced speed, without requiring such vehicles to stop. However, they may carry out more thorough controls by means of spot checks.*

the possibility of carrying out more thorough controls by means of spot checks), the use of "green discs" signalling that the person crossing the border was not violating the rules of the frontier police, the reduction of the time spent on account of the checks on the carriage of persons by road for hire or reward, the setting up of common frontier control points, measures facilitating the movement of residents of area located in the proximity of the common frontiers in order to allow them to cross such frontiers outside the opening times of the crossing points and outside the approved crossing points, measures to unify visa policies, the reinforcing of co-operation between the police authorities with a view to fighting crime more effectively, the fighting of illicit drug trafficking more vigorously, the liberalisation of the controls with respect to road transport, rail transport and waterway traffic. The following were included in the long-term measures (Title II): the abolishing of the controls at the common frontiers and their transfer to the external frontiers, the harmonisation of the laws on immigration, the harmonisation of the law on the transport of drugs, trading in arms and explosives and the rules of registration of travellers in hotels, the tightening of co-operation with respect to visa policies, the obligation to draw up arrangements concerning police co-operation on the prevention and combating of crime, the considering of the adoption of measures improving co-operation in judicial assistance, a change of the manner of customs clearance in road transport and the liberalisation of the customs policies concerning goods transported by travellers, the harmonisation of the regulations relating to indirect taxes¹². The implementation of the above tasks – both the short-term and long-term ones – with a simultaneously assuring a high level of internal security was to a large extent dependent on the effectiveness of the border, police and immigration authorities of the signatory Member States. This in particular concerned the prevention and combating of organised crime and required the introduction of not only legal and organisational solutions, but also expensive technical preparations. This is why the Parties-Member States announced their readiness to fulfil the

¹² See F.Jasiński: *System Informacyjny Schengen*, Wspólnoty Europejskie, 2002 no. 4 p. 66.

obligations arising under the Agreement only on 22 December 1994, not on 1 January 1990 as originally planned. In the end, after the ratification process was completed, the treaty came into force on 26 June 1995. The Schengen Agreement containing only certain general assumptions and principles constitutes a framework agreement to which an implementing convention, known also as the Schengen II Convention¹³, was attached. As Adam Dudzic correctly notes, the agreement of 1985 *referred only to facilitating the crossing of borders (and as such set the main goal of Schengen, i.e. the abolishing of controls at internal frontiers and thus facilitating the free movement of persons in the full scope thereof) (...) whereas the basic goal of the Convention was to ensure the safety and public order in the territory of Schengen and therefore the actual realisation of the freedom of the movement of persons*¹⁴. The draft of the convention was prepared already in November 1989. The unexpected fall of the Berlin Wall and the dynamic process of the unification of Germany caused that prior to the signing of the Convention it became necessary to resolve a number of problems connected with the construction of a system of protection of the Eastern border of the Federal Republic of Germany in its new shape. Work on the treaty was restarted in March 1990. As a result thereof on 19 June 1990¹⁵ an implementing Convention¹⁶ having 142 articles was signed. The positive experiences of the five Member States – creators of the Schengen area – and its open formula initiated the process of its expansion. Italy acceded on 27 November 1990, Spain and Portugal acceded on 25 June 1991, Greece acceded on 6 November 1992, Austria acceded on 28 April 1995, and Denmark, Finland and Sweden acceded on 19 December 1996.

¹³ *Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, Official Journal of the European Communities of 22.9.2000.

¹⁴ A. Dudzic, *Przyjęcie Programu Sztokholmskiego, a przyszłość formuły Schengen w architekturze przestrzeni wolności, bezpieczeństwa i sprawiedliwości UE* [in:] A. Gruszczyk (editor), *Program sztokholmski – implikacje i wyzwania dla Unii europejskiej i Polski*, Centrum Europejskie Natolin, Warsaw 2010, p. 63.

¹⁵ Similarly as in the case of the treaty of 14 June 1985, the depository of the treaty was the government of the Grand Duchy of Luxembourg.

¹⁶ The provisions of this Convention came into force in different years, starting from 26 March 1995 until the turn of 2007/2008. At the turn of the years they came into force in 9 countries, which acceded to the European Union in 2004, including Poland. Controls at the internal borders in these countries were abolished on 21 December 2007, while at airports they were abolished on 30 March 2008.

As of 18 May 1999 the Schengen area was joined also by non-EU countries – Norway and Iceland. The largest expansion to date – covering Poland, the Czech Republic, Estonia, Lithuania, Latvia, Malta, Slovenia, Slovakia and Hungary took place on 21 December 2007. A year later, on 12 December 2008, the Schengen Area was joined by Switzerland. As a result the Schengen regulations practically covered the whole of Western and Central and Eastern Europe¹⁷. At present (2012), the Schengen Area covers the territories of 25 countries. Twenty-two of them are Member States of the European Union, the three remaining ones are affiliated countries. Three EU Member States (Cyprus, Bulgaria and Romania) and one affiliated country – Liechtenstein, are waiting in line to become members. The general principle concerning the acceptance of new countries to the Schengen group is based on the requirement of the full harmonisation of procedures, infrastructure and legislative solutions to the standards resulting from the legal acquis of Schengen. The adaptation process is monitored and assessed by experts from the States Signatories of the Schengen Treaties. As a result of a formal evaluation, the decision on the full application of the regulations of the acquis of Schengen is taken by the Council of the European Union. It specifies, among other things, the dates of the abolition of controls at the internal borders and the assuring of the free movement of persons in accordance with the provisions of Art. 1 of Title III of the Schengen Borders Code. During the course of work on the implementation of the notion of free movement in the territory of the European Union, including also on the Schengen Treaties, it was known that not only positive but also negative effects were associated with the facilitation of the movement of persons between the Member States. Among them particular attention was drawn to the possibility of the growth of criminal threats to public security and public order.

¹⁷ Member States of the European Union - Great Britain and Ireland - do not belong to the Schengen Area. They however apply a part of the legal acquis of Schengen. In March 1999, the United Kingdom asked to cooperate in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the SIS. The Council Decision [2000/365/EC](#) approving the request by the United Kingdom was adopted on 29 May 2000. In June 2000, Ireland too asked to take part in some aspects of Schengen, roughly corresponding to the aspects covered by the United Kingdom's request. The Council adopted the Decision [2002/192/EC](#) approving Ireland's request on 28 February 2002.

Therefore, it was deemed necessary to apply the appropriate equalising measures compensating the anticipated negative effects of the diminishing of control over the movement of persons. As a result, the implementing Convention contains dispositions concerning: the establishment of police co-operation, the creation of the Schengen Information System (SIS)¹⁸. As far as police co-operation is concerned, the scope and principles thereof are regulated by Articles 39 to 47 of the Convention. Pursuant thereto the police authorities shall, acting in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of preventing and detecting criminal offences. However, there are many limitations in this respect. Assistance cannot be provided if this is restricted to the legal authorities and in cases when the provision of assistance were to involve the application of coercive measures. Moreover, information provided as part of police co-operation may be used only as evidence of a criminal offence subject to the consent of the party providing such information. Requests for assistance within the scope of international police co-operation may be made only by the competent central bodies of the State administration. Only in emergencies may such requests be exchanged by specific police authorities¹⁹. In border regions police co-operation may be established and regulated on the basis of separate arrangements, usually concluded between the ministers competent for internal affairs of the Contracting Parties of the Schengen Area. Pursuant to the Convention, when a land border exists, other agreements in the scope of the co-operation in question may be signed. The important elements of police co-operation include: cross-border observation, cross-border pursuit, and the appointment of liaison officers.

Pursuant to the provisions of Art. 40 of the Convention, cross-border observation is divided into ordinary observation and observation in urgent cases. As part of an ordinary observation, the officers of the competent authorities of the Contracting Party, who are keeping under observation in their own country a person

¹⁸ Regulations concerning this system are contained in Title IV of the Schengen II treaty.

¹⁹ In such cases there is an obligation to notify the central administration authorities on the submission of such a request and on the assistance provided in connection therewith.

within the framework of a preparatory investigation, are authorised (on the basis of a request for assistance which has been submitted previously and for which authorisation has been obtained) to continue their observation in the territory of another Contracting Party. The Contracting Party, when granting the authorisation for such observation, may attach detailed conditions thereto²⁰. Observation in urgent cases can be conducted where due to the particular urgency of the case the submission of a request for authorisation is not possible. In such cases the police officers are authorised to continue their observation and to cross the border of a Contracting Party without prior authorisation²¹. As far as cross-border pursuits are concerned, the rules thereof are regulated by Article 41 of the Convention. Pursuant thereto, the relevant officers of the authorities of one of the Contracting Parties are authorised to continue pursuit in the territory of another Contracting Party for the purpose of apprehending a perpetrator of the offences specified in paragraph 4 of Article 41²² or persons assisting in the perpetration of such offences. A cross-border pursuit may also be conducted against a person who is provisionally arrested or sentenced to deprivation of liberty who has managed to escape from the place of custody or detention. The officers conducting the pursuit are obliged to observe the provisions of both the Convention as well as of the internal laws of the Contracting Party in the territory of which they are carrying out such form of police co-operation (and also the instructions of the competent local authorities). A cross-border may be

²⁰ Such observation may be conducted only in the case of a person who is suspected of committing a criminal offence giving grounds for an application for extradition.

²¹ Observation in urgent cases is admissible if one or more of the following offences have been perpetrated: assassination, murder, rape, intentional arson, counterfeiting of money, armed robbery and qualified receiving of stolen goods, extortion, kidnapping and hostage taking, traffic in human beings, illicit trafficking of narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, illicit carriage of toxic and radioactive materials. Urgent cross-border observation should be ceased in cases where: the other Contracting Party requests so, the request for extradition is deemed unjustified, and the authorisation is not issued within 5 hours from the moment when the border has been crossed.

²² These include: assassination, murder, rape, arson, counterfeiting of money, burglary and qualified robbery and receiving of stolen goods, extortion, kidnapping and hostage taking, traffic in human beings, illicit trafficking of narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, intentional causing of damage with the use of explosives, illicit carriage of toxic and dangerous waste, taking to flight and failing to provide details after an accident which has resulted in death or serious injury, and criminal offences subject to extradition.

conducted only across land borders and is subject to a number of limitations²³. It must be added that the above-mentioned paragraph 9 of Article 41 of the Convention mentioned above states that on the Convention, each Contracting Party shall make a declaration in which it shall define the procedures for implementing and carrying out pursuit in its territory for each of the Contracting Parties with which it has a common border. It is also important that the execution of such declaration cannot be unilateral. It must be consulted with each of the parties concerned to the treaty. The Contracting Parties may, after the conclusion of the relevant agreements, also second liaison officers to the police authorities of the other Contracting Party. As far as SIS is concerned, pursuant to Article 93 of the implementing Convention the purpose thereof is: *to maintain public order and security, including State security, and to apply the provisions (...) relating to the movement of persons, in the territories of the Contracting Parties, using information transmitted by the system*²⁴. The scope of information of the System includes data relating to: persons wanted for extradition proceedings, aliens for the purposes of refusal of entry, persons who have disappeared or who, in the interests of their own protection or in order to prevent threats should be placed in the care of the police authorities, witnesses, persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted, persons who should serve a sentence in a criminal case or persons summoned to appear in order to serve a custodial sentence, persons or vehicles for the purposes of discreet

²³ Officers conducting a pursuit do not have the right to enter private homes and places generally not accessible to the public. They must have the relevant documents necessary for their identification, wear a uniform or other identifying marks and have a marked vehicle. They are obliged to submit a report after every operation carried out. Moreover, they must remain at the disposal of the local competent authorities until all of the circumstances are elucidated (even if the person being pursued was not arrested). The officers are obliged to provide assistance to the relevant authorities of the Contracting Party in the territory of which the pursuit was conducted, assist the inquiry or in legal proceedings subsequent to the arrest.

²⁴ "Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders".

surveillance or specific checks, relating to objects sought for the purpose of their seizure or use as evidence in criminal proceedings²⁵.

As regards the data relating to persons and objects specific categories thereof, which can be entered into the system and be processed therein, have been specified. In respect of persons they include: names, forenames, aliases, false names, the date and place of birth, sex, nationality, information concerning the possession of firearms, whether a given person is an escaped convict or dangerous, the reasons for entry in the SIS and the actions that are to be taken. Article 94 also contains a prohibition on the processing of personal data other than the mentioned data, and, in particular, the so-called sensitive data. The following has been mentioned with respect to data relating to objects:

- stolen, lost or misappropriated: motor vehicles with a capacity of over 50cm³, boats and aircraft, trailers with an unladen weight in excess of 750kg, semi-trailers, industrial equipment, external engines and containers, firearms, blank documents, securities and means of payment (cheques, credit cards, bonds, shares, share certificates);
- stolen, misappropriated, lost or voided: vehicle registration documents and registration plates, issued identity documents (passports, personal identity cards, driving licences, residence cards and travel documents);
- bank notes with registered numbers.

Referring to the substantive scope it is worth noting that the Convention implementing the Schengen Agreement when indicating the categories of the state authorities authorised to enter data and use the SIS information resources does not mention specific authorities of the Contracting Parties, but only their categories²⁶. In the case of direct access, the Convention novated in 2004 and 2005 mentions the following categories of authorities: responsible for border, police and customs checks, as well as for their co-ordination, national judicial authorities, authorities

²⁵ See. L. Widmański, *System Informacyjny Schengen-podstawowy instrument funkcjonowania strefy Schengen*, <http://www.edukacjaprawnicza.pl/aktualnosci/>, Access 20.02.2012.

²⁶ See L. Widmański..., op.cit.

responsible for issuing visas, examining visa applications, issuing residence permits and for the administration of the legal provisions concerning foreigners, and authorities responsible for issuing vehicle registration certificates.

The Schengen Information System is a search-based system. This means that it contains only entries reported by the Member States which appear if a given person (object) to whom the given entry pertains is 'hit'. In 1999, due to the progressing enlargement of the Schengen Area work on a new, more advanced system - SIS II²⁷ - was initiated. The slow progress of work on the technical preparation of this system and the urgent need to connect new Member States of the Schengen Area to the system caused that, based on Portugal's proposal, the concept of a SIS one 4ALL was created as an interim solution. This solution enabled the connection of new users to the functioning SIS 1+²⁸. In 2010, an in-depth assessment of the work on SIS II was carried out by experts from all of the interested entities. On the basis of the results of the review, it is planned that SIS II will be put into operation in the first quarter of 2013²⁹. When discussing the issues concerning the Schengen Area mention should also be made of the Visa Information System (VIS). The acts of law establishing the VIS clearly state that they are the development of the legal acquis of Schengen, including in relation to the affiliated states participating in the co-operation within

²⁷ The second generation SIS (SIS II) is to replace the currently used System (SIS 1+), enabling the connection of all of the new users and the processing of other data in addition to text data, e.g. biometric data (photographs and finger prints). See *Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II)*. Official Journal of the European Union, L 381 of 28.12.2006, Commission Decision [2010/261/EU](#) of 4 May 2010 on the Security Plan for Central SIS II and the Communication Infrastructure, Official Journal of the European Union, L 112 of 5.5.2010, Commission Decision [2008/333/EC](#) of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II), Official Journal of the European Union, L 123 of 08.05.2008.

²⁸ This is currently the largest common data base in Europe, which contains more than 37 million entries. The number of data increases by 3% per month.

²⁹ See the Report from the Commission to the European Parliament and the Council - [Progress Report on the development of the second generation Schengen Information System \(SIS II\) – July 2010 – December 2010](#) /*COM/2011/0391 final*/. In this report one can read also that as a result of the experts' assessments "... areas were highlighted in which the requirements of SIS II had to evolve in line with end-users' needs, taking into account the need to safeguard investments in SIS II made at national level. Several elements of this evolution were significant, not least the need to provide a system about five times the size of the system originally envisaged (from 15-22 million alerts in the initial contract to 70-100 million alerts now required) and yet which still delivers operationally-oriented performance", <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?>, Access 28.02.2012.

the Schengen Area which are not EU Member States UE³⁰. The main goal of VIS is the exchange of data on visas between Member States which have abolished controls on their internal borders and ensure the free movement of persons. The Visa Information System is, in particular, to lead to: better implementation of the common visa policy, improvement of consular co-operation and the process of consultations between the central visa authorities, preventing the trading in visas, simplifying the procedures for applying for visas and facilitating the review of visa applications, facilitating customs clearance at the external border crossings and in the territory of the Member States, facilitating the identification of persons who do not meet the criteria for entry, stay or residence in the territory of the Member States or have ceased to fulfil these conditions, and preventing threats to the internal security of the Member States.

In connection with the performance of the provisions of the Schengen treaty and the Convention implementing the Schengen Agreement, a whole set of legal measures and instruments, the so-called "Schengen legal acquis" was created³¹.

On 1 May 1999, in connection with the coming into force of the Amsterdam Treaty, the legal *acquis* of Schengen was incorporated into the institutional and legal framework of the EU on the basis of the relevant protocol. In the hitherto history of the functioning of the Schengen Area several dozen instances of the temporary reintroduction of border controls have been noted. According to the determinations made by M. Trojanowska-Strzęboszewska³², in the years 2000 – 2003 this solution

³⁰ The Visa Information System between the Member States is being built on the basis of the Council Decision of 8 June 2004. Issues connected with the functioning of this system are regulated by Regulation (EC) No 767/2008 of the European Parliament and of the Council of 8 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas and Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

³¹ See. *The Schengen Acquis as referred to in article 1(2) of Council Decision 1999/435/EC of May 1999*, Official Journal of the European Communities 22.9.2000. For more details see A. Dudzic, *Przyjęcie Programu Sztokholmskiego, a przyszłość formuły Schengen w architekturze przestrzeni wolności, bezpieczeństwa i sprawiedliwości UE* [in:] A. Gruszczak (editor) *Program Sztokholmski – implikacje i wyzwania dla Unii Europejskiej i Polski*, Centrum Europejskie Natolin, Warsaw 2010.

³² M. Trojanowska-Strzęboszewska – speech given at a seminar: *Układ z Schengen wobec nowych wyzwań międzynarodowych – zadanie dla Polskiej Prezydencji w Radzie UE?* Fundacja Batorego, Warsaw 28.06.2011.

was applied 33 times, whereas in the years 2006 – 2010 it was applied 23 times. The countries which most frequently (counting until the end of 2011) temporarily reinstated border controls were: France (12), Spain (9), and Germany (5). The reasons for such actions were primarily: political events or events connected with politics (sessions of the Council of Europe, sessions of the Council of the European Union, G8 summits, visits of heads of state), sports events (mainly competitions of championship level), events connected with crime. The reintroductions of temporary border controls were only sporadically connected with migration. It can therefore be clearly seen that the vast majority of the said cases concerned the activity of the residents of EU Member States. One can thus formulate the conclusion that the Member States did not treat the introduction of controls on the internal borders as an effective tool for dealing with problems associated with migration. As far as the legal grounds are concerned, apart from the implementing convention the issue of the reintroduction of controls is also regulated by the so-called Schengen Borders Code³³. An intense discussion on the reintroduction of controls at the borders, which flared up in 2011, was the result of two events – the crisis associated with the refugees from Tunisia and the decision of the Danish government³⁴. In May over 30 thousand Tunisians escaped after the "Jasmine revolution" over the Mediterranean Sea to Italy (mainly to Lampedusa). The Italians, without the EU's support, decided to grant the refugees the right of temporary stay, which authorised them to travel over the whole Schengen Area. The French deemed this to be a violation of the treaty on free movement within the European Union for the wave of refugees, who wanted to join their relatives already living in the country relatives, surged to France. As a result France introduced border controls which were to stop the wave of refugees. Rome deemed this to be a breach of the treaty. Both capitals called for the reform of the

³³ Regulation (EC) No [562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders \(Schengen Borders Code\)](#), Official Journal of the European Union ,L 105 of 13.4.2006.

³⁴ Denmark's behaviour evoked severe criticism from the European Union. Many experts are of the opinion that it was contrary to EU law as in this case there were no material reasons which would legitimise such behaviour.

system allowing the introduction of temporary controls in the case of similar crises³⁵. In the opinion of the European Commissioner for Internal Affairs, Cecile Malmström, both France and Italy, taking measures intended in their opinion to deal with the wave of refugees acted in accordance with EU law, however, they breach the principles of solidarity and trust between states which constitute the basis of the Schengen Agreement³⁶. As far as Denmark is concerned, on 11 May 2011, the finance minister Claus H.Fredriksen announced the establishing of customs checks of randomly selected trucks and cars³⁷. On 5 July, the Danish government decided to send additional customs officers to the Danish and German and Danish and Swedish borders in order to carry out these checks³⁸. However, the new centre-right government elected as a result of the elections held on 15 September 2011– Prime Minister Helle Thorning-Schmidt in October resigned from the solution introduced by her predecessors³⁹. One of the results of the discussions, which arose in connection with the crisis concerning the control of internal borders, was the adoption on 24 June 2011 in the conclusion of the European Council of the following wording relating to the future of the Schengen treaty: "A mechanism should be introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons. It should comprise a series of measures to be applied in a gradual, differentiated and coordinated manner in order to assist a Member State facing heavy pressure at the external borders. These could include inspection visits and technical and financial

³⁵ In connection therewith, the Italian Prime Minister, S.Berlusconi, and the President of France, N.Sarkozy, sent a letter to the European Commission in which they appealed from amendments to be made to the Schengen Treaty that would give the right to reinstate border controls at the internal borders for a period longer than the currently allowed 30 days.

³⁶ From the formal point of view the steps taken by the Italian and French authorities were in conformity with European Union law. However, I state with sadness that the spirit of the principles resulting from the Schengen Agreement has not been fully respected – said Commissioner Malmström T.Barriga, *Działania Francji i Włoch zgodnie z Schengen*, <http://www.uniaeurpejska.org>/access 27.02.2012.

³⁷ See *Dania przywróci kontrole na granicach* <http://wyborcza.biz/biznes/>, Access 20.02.2012.

³⁸ See D. Duda, *Dania przywraca kontrole na granicach – wyzwanie polskiej prezydencji*, <http://www.uniaeuropa.org>, Access 22.02.2012.

³⁹ See *Dania: Koniec kontroli granicznych*, <http://rp.pl/artykul/26,727566.html>, Access 23.02.2012

support, as well as assistance, coordination and intervention from Frontex⁴⁰. As a very last resort, in the framework of this mechanism, a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules. Such a measure would be taken on the basis of specified objective criteria and a common assessment, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases. This will not affect the rights of persons entitled to freedom of movement under the Treaties⁴¹. At the same time the European Council invited the Commission to submit a proposal for such a mechanism in September. The European Parliament also presented its standpoint by adopting a resolution of 7 July 2011 on changes to Schengen. The parliamentarians objected to the introduction of controls on the internal borders of the EU in connection with the influx of asylum seekers. In the adopted resolution the Eurodeputies recalled that the existing Schengen Borders Code provides for the reintroduction of controls at internal borders only where there is a serious threat to public order or internal security. At the same time, they stressed that an influx of migrants and asylum seekers was not a sufficient ground for the reintroduction of controls. In the cited resolution the Parliament called on the Commission to create a new mechanism of the evaluation of the situation in which decisions of this kind would be adopted in a Community system, by the whole European Union. As a consequence of the above recommendations, on 16 September 2011 the Commission recognised that the special challenges which may threaten the functioning of the whole Schengen Area require a more effective and co-ordinated response. In the area without internal borders every threat to the integrity of any section of this area has direct consequences for the whole Schengen Area and the EU

⁴⁰ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was established by [Council Regulation \(EC\) 2007/2004/ \(26.10.2004, OJ L 349/25.11.2004\)](#). This Regulation was later amended by the [Regulation \(EC\) No 863/2007](#) of the European Parliament and of the Council of 11 July 2007. It was last amended by the [Regulation \(EU\) No 1168/2011](#) of the European Parliament and of the Council of 25 October 2011.

⁴¹ *Rada Europejska 23-24 czerwca 2011 roku – konkluzje*, <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/11/>, Access 29.01.2012.

as a whole. The present system, based on an international mechanism of mutual assessment, in conjunction with the possibility of undertaking, at a national level, of individual decisions on the extraordinary reintroduction of internal border controls, turned out to be inefficient in terms of strengthening the mutual trust between the Member States of the Schengen Area and the protection of the freedom of movement in the area without border controls. Therefore, steps should be taken to strengthen the management of this common area and to ensure appropriate support to the Member States which may come up against critical situations. Being guided by the above assessments, the Commission adopted two legislative motions aimed at improving the management of the Schengen Area and defining the mechanism of taking decisions at a European level in order to protect common interests. As far as the improving the management of the Schengen Area is concerned, it was decided that the tools for monitoring and eliminating obstacles, which currently exist, are ineffective. The principal goal in this area should be the transformation of the current approach based on an inter-governmental mechanism of mutual assessment, into the management of the Schengen Area at EU level. In this context it was noted that thanks to announced and surprise inspections in a given Member State conducted by teams appointed by the Commission, with the participation of experts from other Member States and the Frontex agency, it would be possible to verify the application of the Schengen⁴². Another new element which was proposed within the framework of improving the management of the Schengen Area was the Schengen health check. It was to be carried out two times per year in the Council and in the European Parliament in the form of a debate on the functioning of the Schengen Area. Such a debate would be carried out on the basis of a review presented by the European Commission. In the case of the mechanism of taking decisions at a European level for

⁴² In the report prepared after each visit all discovered shortcomings would be specified and clear proposals concerning remedial actions would be formulated, setting the deadlines for the implementation of the individual actions. As a result of subsequent actions, the given Member State would then have to prepare an action plan specifying the manner of the implementation of the said recommendations.

the purpose of protecting the common interests, the Commission came to the conclusion that:

- The regulations currently in force which envisage the possibility of travelling without a passport to 25 European countries enable the national authorities to exceptionally and temporarily reintroduce border controls in the event of a serious threat to public order or internal security. At the same time, in connection with the fact that these measures affect the whole Schengen Area, the possibility of reintroducing internal border controls should be the subject of a transparent, cohesive and effective discussion at the European level.
- Within the framework of the new system, the decision on the reintroduction of internal border controls in exceptional situations (such as large sports events or high-level political meetings) would be taken on the basis of a motion submitted by the European Commission and supported by a "qualified majority" of experts from the European countries. The reasons (if any) for taking such a decision would remain unchanged⁴³. The inspections would then be possible basically at the designated borders throughout a renewable period of 30 days.
- The Member States could still continue to take unilateral decisions on the reintroduction of controls in urgent situations requiring immediate action, however, not longer than for a period of five days, and the decision on each prolongation would be taken at the EU level.
- In the case of serious transgressions in the scope of the application of the provisions of Schengen, such as the failure of a Member State to fulfil the obligation of properly protecting a section of the EU's external border, the Commission, the Member States and Frontex or other agencies such as Europol or the European Asylum Support Office may provide support. If, however, despite the use of the support measures such serious transgressions were to persist, it would be possible to take a decision on the temporary reintroduction of internal border controls. Such ultimate measure would be adopted at the EU level, thus it would be possible to

⁴³ At present this measure is indispensable in order to prevent a serious threat to public order or internal security.

avoid unilateral decisions of the individual Member States and to a uniform approach to the protection of common interests⁴⁴.

In the scope of perfecting the manner of managing the Schengen Area, the European Union also sees the necessity of improving the system of managing the movement of travellers at the internal borders. Therefore, on 3 November 2011 the Commission adopted a communiqué in which it presented proposals of solutions with the use of modern technologies which were to make life for aliens frequently travelling to the EU easier and improve the system of monitoring the nationals of third countries who cross borders. Each year the borders of the EU are crossed by approx. 700 million citizens of the EU and of third countries. It is assumed that in the future this number will be considerably higher, and the number of passengers at European airports may increase by as much as 80%. If the border control procedures are not modernised in due time, this may signify greater delays and longer queues for travellers. With such an intensive traffic the occurrence of gaps and inefficiencies in the control systems is unavoidable, therefore the initiative regarding "intelligent borders" is to enable persons who travel regularly to cross them quicker, and at the same time strengthen security at the external borders. The mentioned initiative assumes the implementation of:

- A system for monitoring entries and departures, consisting in the registration in an electronic data base of the time and place of entry, as well as the duration of approved short stays. It would replace the existing system of stamping passports. These data would be made available to border control and immigration authorities;
- A programme for registering travellers, which will enable entry into the EU of specific groups of frequent travellers from third countries (persons travelling on business, family members, etc.). Such persons would be subject to prior checks in accordance with the border crossing rules with the use of automatic gates⁴⁵.

⁴⁴ See *Bezpieczniejsze Schengen*, http://ec.europa.eu/polska/news/110916_schengen_pl.htmaccess, Acces 15.01.2012 r.

⁴⁵ This would speed up the crossing of borders for 4-5 million travellers and would lead to investments in modern automatic border control systems (e.g. based on biometric passports) at the main border crossing points.

The atmosphere of a crisis in the area of internal border controls clearly affected the inclusion of new countries into "Schengenland". In the summer of 2011, Finland and Holland blocked the adoption of a decision on the accession of Bulgaria and Romania to the Schengen Area, despite these countries' having met the technical requirements for membership⁴⁶. Doubts were notified earlier also by Germany and France. In October Finland withdrew its veto against the enlargement of the Schengen Area with Bulgaria and Romania, providing that two consecutive reports of the European Commission concerning judicial matters and internal affairs would be positive. However, in September 2012, the ministers of internal affairs of the EU Member States decided that Romania would not gain access to the Schengen Area. In their opinion the country is too unstable politically. Bulgaria also suffered from this decision because its membership in the Schengen Area is tied with Romania's accession thereto⁴⁷. The blocking of the accession of both countries falls into the increasing importance of immigration issues and a very careful approach of some of the EU Member States to the idea of the free movement of persons, which is connected with, among other things, social concerns pertaining to the uncontrolled influx of immigrants. This standpoint is transposed into the carrying out and initiating of actions aimed at making the Schengen Area better supervised and managed.

Recapitulating, it should be noted that from the point of view of a national of one of the Member States of the Schengen Area or a national of the EU the functioning of the Schengen Area causes that he/she has the right of free movement and stay in the territory of another Member State without any special formalities. No border controls are carried out on the borders between the States co-operating within the Schengen Area, however, controls can be carried out in the territory of a Member State, e.g. in the area of the internal border. However, it is not a border

⁴⁶ Positive opinions on the readiness of Bulgaria and Romania to join the Schengen Area were already issued by the European Parliament and a group of experts assessing the fulfilment of the technical requirements for access to the Schengen Area.

⁴⁷ Talks on the accession of Bulgaria and Romania to the Schengen Area have been postponed to the next meeting of the ministers of internal affairs which is to be held in October 2012. However, it is not to be expected that these countries will be accepted earlier than in 2013.

control (as a result of which persons may be permitted or refused entry). The purpose thereof is primarily the combating of cross-border crime and control of security. The elimination of borders controls at the internal borders of the Member States of the Schengen Area also resulted in the introduction of increased controls of the legality of the stay of aliens. The free movement of persons within the Schengen Area without internal border controls is one of the greatest achievements of the EU. The benefits associated therewith can be divided into two packages: operational and strategic.

The operational benefits include: facilitation of travel and transport resulting from the possibility of crossing borders not at designated border crossings but any place, the reduction of the time and increasing of the comfort of travel and transport thanks to the elimination of very time-consuming procedures due to the limited capacity of border crossings, checks on entry and exit, the limiting of the number of documents necessary to travel, the reduction of the budgets designation for border protection systems, and the creation of new solutions within the framework of building the so-called "intelligent borders".

Among the strategic benefits one can mention: the creation of conditions facilitating and inspiring contacts between the nationals of the Member States, the increasing of the level of internal security through the tightening of co-operation between police forces and the harmonisation of procedures with respect to the combating of various manifestations of criminal activity, the harmonisation of the visa and asylum granting procedures, supporting the integration processes connected primarily with the freedom of conducting economic activity, employment, residence, study, etc.

All that has been presented above warrants the conclusion that the existence of the Schengen Area has materially strengthened and made the process of the Community management of internal security more effective. The hitherto, more than 25-year-long history of the development of the Schengen Area shows that the solutions applied have proved that the enlargement of the area of freedoms does not

have to be associated with a reduction of the level of security, and that the barriers which appear may well serve substantive reflections on the improvement of its functioning. This is linked to the acknowledgement of the idea and practices of Schengen as one of the basic factors contributing to the development of the EU⁴⁸.

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Abstract

This article is an attempt at showing the most important elements of the creation of the Schengen Area and the perfection of the mechanisms of managing this great European project in the context of the internal security of the Member States implementing it. During the course of work on the implementation in real life of the idea of free movement in the territory of the EU, including also on the Schengen Treaties, it was known that the facilitation of the flow of persons between the Member States has not only positive, but also negative consequences. Therefore, it was deemed necessary to apply the appropriate instruments compensating the envisaged threats to internal security, among other things, by: the establishment of police co-operation and the creation of the Schengen Information System. After a presentation of the mechanisms of the functioning and evolution of these instruments, the article presents actions taken in connection with the crisis regarding the reintroduction of border controls in 2011. Among other things, plans of undertakings aimed at strengthening the mechanisms of managing the Schengen

⁴⁸ According to the results of social surveys which were presented in Brussels by the Office of the European Ombudsman, the right to free movement has been regarded as the most important for EU citizens by 48% of the inhabitants of the EU participating in the survey. This was followed by access to EU institutions (33%) and the possibility of filing claims concerning the violation of citizen's rights (32%). See *Swoboda poruszania się najważniejszym prawem dla 48% obywateli UE*, http://biznes.onet.pl/swoboda_poruszania_sie, Access 30.10.2012.

Area and ensuring appropriate support to the Member States which may face critical situations have been characterised. In the conclusions ending the article it has been indicated that the free movement of persons within the territory of the Schengen Area without internal border controls is one of the major achievements of the EU and a list of the operational and strategic benefits related thereto has been presented.

STREFA SCHENGEN – JAKO ELEMENT ZARZĄDZANIA BEZPIECZEŃSTWEM WEWNĘTRZNYM W WYMIARZE EUROPEJSKIM

Abstrakt

Artykuł jest próbą ukazania najistotniejszych elementów procesu tworzenia strefy Schengen oraz doskonalenia mechanizmów zarządzania tym wielkim europejskim projektem w kontekście bezpieczeństwa wewnętrznego krajów które go realizują.

W trakcie prac nad wcielaniem w życie idei swobodnego poruszania się po terytorium UE w tym także nad układami z Schengen zdawano sobie sprawę, że z ułatwieniami w przepływie osób pomiędzy państwami członkowskimi wiąże się nie tylko pozytywne, ale i negatywne skutki. W związku z tym uznano za konieczne zastosowanie odpowiednich instrumentów kompensujących przewidywane zagrożenia dla bezpieczeństwa wewnętrznego m.in.: ustanowienie współpracy policyjnej oraz utworzenie Systemu Informacyjnego Schengen. Po ukazaniu mechanizmów funkcjonowania i ewolucji tych instrumentów w dalszej części artykułu ukazano działania związane z kryzysem w zakresie przywracania kontroli na granicach w 2011 r. Scharakteryzowano m.in. projekty przedsięwzięć mających wzmocnić mechanizm zarządzania strefą Schengen oraz zapewnić odpowiednie wsparcie państwom członkowskim, które mogą stanąć w obliczu sytuacji krytycznych. W ramach konkluzji zamykających opracowanie wskazano na to, że swobodne przemieszczanie się w obrębie obszaru bez kontroli na granicach wewnętrznych jest jednym z największych osiągnięć UE i ukazano listę wiążących się z tym korzyści operacyjnych i strategicznych.