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The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

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The EU's Borders: Schengen, Frontex and the UK

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Introduction

This paper is concerned with the relationship of the UK to the framework of immigration control at EU borders. That framework has two main elements: the absence of immigration control at the shared internal borders of Schengen states, and provision for common rules and action in relation to the external border.

The paper begins with an outline of the main elements of the EU's internal and external borders framework, in so far as that is concerned with immigration control (sections 1 and 2, respectively). It goes on to summarise developments in the EU framework prompted by the migration crisis of 2015-2016 (section 3). The position of the UK within the current regime is then addressed (section 4). The implications of this policy area for the June 23 referendum campaign are indicated in the paper's conclusion.

The Schengen zone

Treaty foundations

The origins of the EU's border regime lie in an international agreement between five member states—Belgium, France, West Germany, the Netherlands and Luxembourg—signed at Schengen in Luxembourg on 14 June 1985, to move towards open borders.ⁱ A more detailed 'Schengen implementing convention' was agreed in 1990. Its Title II addressed immigration control, including rules on the crossing of internal borders, control at external borders, and visas.ⁱⁱ The two agreements and the further decisions of the Schengen Executive Committee came to be known as the 'Schengen *acquis*'—in other words, the Schengen rules. The Schengen border-free zone actually came into being on 26 March 1995, once legal and operational pre-conditions were in place.

The EU's Treaty of Amsterdam, agreed in June 1997, put in place a broad set of powers over borders, immigration and asylum matters within the European Community Treaty. Building upon these new powers, a Protocol to the Treaty of Amsterdam—now Protocol 19 to the TFEU—provided for the incorporation of the previous Schengen *acquis* into EU law. When the

Treaty of Amsterdam came into force on 1 May 1999, the Schengen *acquis* concerning immigration control, borders control and visas was classed as falling under the new Article 62 EC. After modifications to the powers and treaty structure by the Treaty of Lisbon (in force on 1 November 2009), the relevant Treaty provision is Article 77 TFEU.

As of 2016, there are 26 states within the Schengen zone, who have agreed to the abolition of internal border controls as between one another. These include 22 of the 28 EU Member States. Ireland and the UK are outside by choice, as a result of arrangements put in place by the Treaty of Amsterdam (see further below in relation to the UK). Bulgaria, Croatia, Cyprus and Romania are in a different position: they are bound by the Schengen *acquis*, but internal border controls have not as yet been abolished in relation to them.

The Schengen zone also includes four non-EU states, by virtue of international agreements. Iceland and Norway joined the zone on 25 March 2001, in order to preserve the Nordic Passport Union with Denmark, Finland and Sweden.ⁱⁱⁱ Switzerland, which has a land border with four EU states, joined the Schengen zone on 12 December 2008.^{iv} Switzerland was followed by Liechtenstein, which has an open border with it, as of 19 December 2011.^v

Internal border controls

The main Schengen rules relating to border controls on persons are now contained in the Schengen Borders Code, as amended.^{vi} The fundamental provision of the Code sets out the general principle that internal borders ‘may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’^{vii}

The Schengen Borders Code provides for the temporary re-introduction of internal border controls in two situations. Firstly, where there is a ‘serious threat to public policy or internal security’ in a Member State, that state may unilaterally re-introduce controls.^{viii} The state in question is obliged to notify the other Member States and the Commission, and to inform the Council of Ministers (as such) and the European Parliament. This procedure should be followed in advance if the threat is foreseen, but may be followed after the fact if the threat was not foreseen.

Secondly, where serious deficiencies in external border control put the ‘overall functioning’ of the Schengen zone at risk, the Council of Ministers, acting on a proposal by the Commission, may decide to recommend the introduction of internal border controls to one or more Member States.^{ix} This may be done for periods of up to six months, to a maximum of two years. This provision was added in 2013, largely in response to a controversy between France and Italy in 2011, when France had sought to block the entry of Tunisian nationals who had arrived after the Arab Spring, and to whom the Italian authorities had issued short-stay humanitarian residence permits.

A related set of provisions, contained in the Schengen Implementing Convention 1990, confer legal rights upon categories of non-EU third-country nationals to cross Schengen internal borders, and to stay in other Schengen states for periods of up to three months.^x The persons who benefit are those who hold a Schengen short-stay visa, or who are exempt from the requirement to hold one, and those with residence permits or long-stay visas issued by one of the Schengen states.

Supporting measures

The practical operation of the Schengen zone is supported by the Schengen Information System. (Its current version is known as ‘SIS II’.) This is an inter-state database containing information about persons and property of interest to state authorities. The reasons for entering information relate primarily to policing and criminal justice matters, including extradition, missing persons, surveillance and the seizure of property.^{xi}

Immigration alerts are also entered on SIS II for third country nationals who are to be refused entry.^{xii} These alerts are mandatory for persons who have been convicted of an offence 'carrying a penalty involving deprivation of liberty of at least one year', or in respect of whom there are either 'serious grounds' for believing that they have committed a serious criminal offence or 'clear indications of an intention' to do so, in the territory of a Member State. Alerts concerning refusal of entry are optional in the case of third country nationals who are subject to a re-entry ban, having been expelled, refused entry or removed from a Member State because of non-compliance with its immigration law.

A further core element in the system is a Commission-led evaluation mechanism established by EU Regulation 1053/2013.^{xiii} This Regulation provides for an annual programme of evaluation of Member State compliance with their obligations under the Schengen *acquis*. These evaluations are based in part on inspections, which include both pre-announced and unannounced site visits to the state concerned. While this mechanism covers all elements of the Schengen *acquis*, it has proven to be especially relevant to situations of migration pressure at the external border.

External borders

The counterpart of the abolition of internal borders within the Schengen zone is common arrangements by Schengen states concerning their shared external border. The principal arrangements of this kind concern Schengen states' obligations as regards the external border, and the Frontex agency.

External border rules

The Schengen Borders Code, referred to above, contains a series of provisions concerning the conduct by Schengen states of border control at the external borders of the Schengen zone. The following may be highlighted in particular:

- As a general rule, external borders may be crossed only at border crossing points and at fixed opening hours.^{xiv}
- All persons crossing the external border should be checked by border guards.^{xv} At present, persons with rights of movement under EU law are subject to a minimum check of their identity, based on their travel documents, and security checks of databases are permitted only on a 'non-systematic basis'; in contrast, 'third country nationals' (i.e., all other persons) should be subject to systematic entry and exit checks.^{xvi} It is likely however that the Code will soon be amended to require, as a general rule, systematic checks on persons with rights of movement under EU law as well, in order to determine whether they pose a security threat.^{xvii}
- Third country nationals' entry is subject to requirements to hold a valid passport or other travel document, to hold a residence permit or (if required) a visa issued by a Schengen state, to justify their intended stay, and to have sufficient means of subsistence. They should not be admitted if an alert has been entered on the Schengen Information System, or they are otherwise considered a security threat.^{xviii}
- Member states should engage in effective border surveillance to prevent unauthorised crossings and cross-border criminal activity.^{xix}

Frontex

The EU arrangements concerning the external border also include the European Agency for the Management of Operational Cooperation at the External Borders. This body, generally known as Frontex, came into existence on 1 May 2005, and is based in Warsaw.

Frontex does not engage in external border operations of its own. Rather, its mandate is to

provide support to Member States in *their* external border control. In practice, Frontex's main operational activities are (1) arranging assistance to 'host' border states by 'guest' officers and vessels from other Schengen states, and (2) organising joint flights for the return to countries of origin of migrants without status.

The legal framework relating to Frontex is contained in EU Regulation 2007/2004.^{xx} Border surveillance operations at sea in which Frontex is involved are governed by obligations set out in the Sea Borders Regulation of 2014.^{xxi}

The EU border regime and the 2015-2016 crisis

The migration crisis of 2015 and 2016, which has mainly involved migrants initially arriving by irregular means in Greece and Italy, has had many implications for the EU border regime. Two are discussed here: the re-imposition of controls at Schengen internal borders, and the increasing role of Frontex.

Re-introduction of internal border controls

Until the summer of 2015, the possibility for Schengen states to temporarily re-introduce border controls had generally been used for three reasons: to limit the entry of political protesters, to control travel to large sporting events, and in the aftermath of terrorist attacks. They had not generally been used to control or to limit migration, whether by EU citizens or nationals of third countries. The exception was the temporary re-imposition of controls by France on entry by land from Italy in April 2011 (referred to above).

It is therefore significant that the events of 2015-2016 have led to internal border controls being re-introduced in several states in response to irregular migration.^{xxii} The first states to take this step were Germany and Austria in September 2015. At the time of writing, they and three other states (Denmark, Norway and Sweden) have had temporary border controls in place for between four and eight months. Three further states (Belgium, Hungary and Slovenia) have introduced controls for briefer periods.^{xxiii}

The response of the EU institutions has had two elements. Firstly, they have accepted the validity of the temporary re-imposition of controls by Member States. In October 2015, the Commission accepted the validity of the controls put in place by Germany and Austria.^{xxiv} More recently, on 12 May 2016, recognising that ongoing difficulties remain with border control in Greece, the Commission and Council authorised the five states currently operating internal border controls for migration control reasons to continue those controls for an initial period of six months.^{xxv}

Secondly, the EU institutions have sought to create the conditions for the normal operation of the Schengen zone. One mechanism has been dialogue with Greece, with the Commission and Council making a series of recommendations to it in February 2016.^{xxvi} Another has been negotiation with Turkey, the centrepiece of which was the 18 March 2016 agreement on migration control between it and the European Council.^{xxvii}

Developments with Frontex

The 2015-2016 migration crisis has had particular implications for Frontex, both in its current operations, and as regards its future role.

At the operational level, the crisis has led Frontex to significantly increase involvement in border control activity in Greece and Italy. Frontex has organised operations with those states for a number of years, most recently under the names 'Poseidon' for Greece, and 'Triton' for

Italy. In the current period, Frontex has been involved in border surveillance, and in screening and registration of arrivals in both countries. It also has a central role in organising and providing staff for return operations from Greece to Turkey.^{xxviii}

Looking to the future, the crisis led to a Commission proposal on 15 December 2015 that Frontex should become the European Border and Coast Guard Agency.^{xxix} This Agency would have an enhanced role, including conducting assessments of the capacity of Member States to meet border control challenges, which could lead to recommendations to the Member State concerned. If those recommendations were not acted upon, or if there was migration pressure at the external border which put the ‘functioning of the Schengen area’ at risk, the Commission would have power to authorise the Agency itself to implement the required measures. In such a scenario, the Member State concerned would be under a duty to co-operate with the Agency.

The Council’s position, set out on 8 April 2016, is less radical.^{xxx} In its version, there should be a ‘European Border Guard Agency’, with ‘Frontex’ retained as its working name. Any decision authorising the Agency to take action in a Member State would however be taken by the Council of Ministers, rather than the Commission. Moreover, the Member State in question would have the express possibility not to co-operate. In that situation, the Council of Ministers could decide, after a Commission proposal, to authorise specified other Schengen states to reintroduce border controls on a temporary basis, just as can currently happen under the Schengen Borders Code. Council authorisation, and the Member State’s right to reject Agency intervention, are also contemplated by the draft European Parliament report on the proposal.^{xxxi} The final legislation is therefore likely to be similar to the Council’s version.

The UK and the EU Border Regime

Throughout the period since the initial Schengen Agreement was signed in 1985, the consistent policy of UK Governments has been for the UK to remain outside the border-free zone. Accordingly, in June 1997, when the Treaty of Amsterdam brought the Schengen *acquis* within EU law, the UK secured a special arrangement which has endured in its essential element to the present.^{xxxii} Under what is now Protocol 19 to the TFEU, the UK is not automatically covered by Schengen rules, or to ‘build upon’ them.^{xxxiii}

The UK does have the possibility to request to participate in parts of the Schengen *acquis*. There are several limitations, however. Firstly, approval of a UK request requires the unanimous approval of the Council of Ministers. Secondly, where such approval is given, it is likely to be coupled with a provision deeming the UK to be bound by subsequent measures in the same area. Thirdly, if the UK decides *not* to participate in a subsequent measure, its participation in the earlier measure(s) is likely to be terminated. Finally, the Court of Justice has ruled that the UK cannot participate in an individual Schengen measure which is closely linked to an aspect of the Schengen *acquis* in which it does *not* participate.^{xxxiv}

In practice, the UK has sought to participate in Schengen provisions concerned with policing and criminal justice, and has been permitted to do so by the other Member States.^{xxxv} That permission extends to access to the Schengen Information System in relation to those matters.^{xxxvi} The UK does not however have access to the alerts concerning refusal of entry. This is a subject on which the current Government has recently raised the possibility of an *ad hoc* agreement, to provide for exchange of equivalent information between the UK and some or all Schengen states.^{xxxvii} Any such agreement would circumvent the restrictions upon the UK participation in the Schengen *acquis* implied by the Schengen Protocol. For that reason, its political and legal acceptability within the EU must be considered an open question.

In the case of Frontex, when the initial Regulation of 2004 was under discussion, the UK sought to opt in to the discussion, relying upon its rights under the Schengen Protocol. That was resisted by the Schengen states within the Council of Ministers, who argued that the UK could not participate, as it was outside the Schengen zone. The Council's view on the point prevailed when the matter reached the Court of Justice of the EU.^{xxxviii}

As a result, the UK is not a full participant in the Frontex system. Instead, the Frontex Regulation makes provision for it in three ways^{xxxix}:

- Frontex is obliged to facilitate operational cooperation with the UK.^{xl} In this context, the Regulation expressly states that the UK may be involved in joint return operations which benefit from Frontex assistance.
- Participation in Frontex operations by the UK may be authorised on a case-by-case basis by the Frontex Management Board, acting by an absolute majority of its members.^{xli}
- A UK representative attends Frontex Management Board meetings, without a right to vote.^{xlii}

In practice, the UK does frequently participate in Frontex operations. This can be seen from the most recent Frontex general report, which shows that, during 2014, the UK was involved in the following Frontex-supported operations: a Schengen-wide airport joint operation; two land, sea and return operations concerning the external borders of Bulgaria and Greece; two sea border operations hosted by Italy; and, a joint return operation for which the UK was itself the lead state.^{xliii}

Conclusion: What are the implications for the referendum?

If the decision in the referendum was to remain within the EU, the key point is that the UK's non-participation in the Schengen immigration arrangements appears to be accepted politically within the EU. That was reflected in the *Decision concerning a new settlement for the UK within the EU*, taken within the European Council meeting of 18-19 February 2016. In the Preamble to the Decision, it was noted that the UK has specific entitlements under the Treaties, and the right 'not to participate in the Schengen *acquis* (Protocol No 19)' was included among them. By implication, Protocol 19 is therefore among the provisions covered by the statement in the Decision that 'The rights and obligations of Member States provided for under the Protocols annexed to the Treaties must be fully recognised and given no lesser status than the other provisions of the Treaties of which such Protocols form an integral part' (Section C, para 4).

The Government must therefore be thought correct in its assessment that the Schengen arrangements are part of the 'special status' of the UK within the EU. In its words, 'the UK has remained outside the Schengen border-free area, which means that we maintain control over our own borders. The UK will not join the Schengen border-free area.'^{xliv}

The UK does *not* though have the freedom to selectively opt in to EU borders measures. In particular, it is an external participant in Frontex, and is unable to access immigration alerts within the Schengen Information System. The effect of the former has been mitigated by the UK's participation in Frontex operations on an *ad hoc* basis. It is less certain however that a way round the lack of access to SIS immigration information will be found.

In contrast, if the decision was to 'leave', it is hard to see any advantage to the UK in this area. It would lose its current possibility to participate in Frontex operations where it considers that to be in its interest. Equally, the chances of an agreement to share immigration data with the Schengen zone states would presumably be even less outside the EU than they are within it.

References

- ⁱ Later published in [2000] OJ L 239/13.
- ⁱⁱ Later published in [2000] OJ L 239/19.
- ⁱⁱⁱ Agreement of 18 May 1999, [1999] OJ L 176/36.
- ^{iv} Agreement of 26 October 2004, [2008] OJ L53/32.
- ^v Council Decision 2011/842, [2011] OJ L 334/27.
- ^{vi} See now EU Regulation 2016/399 [2016] OJ L 77/1. This replaced the Code of 2006, contained in EU Regulation 562/ 2006.
- ^{vii} Schengen Borders Code, Article 22.
- ^{viii} Schengen Borders Code, Articles 25-28.
- ^{ix} Schengen Borders Code, Articles 29-30.
- ^x Schengen Implementing Convention, as amended, Articles 19-21. These provisions do not apply to third country nationals who benefit from the EU free movement of persons.
- ^{xi} Schengen Implementing Convention, Articles 95 and 97-100.
- ^{xii} EU Regulation 1987/ 2006, Article 24.
- ^{xiii} This replaced a member state-led system which had been established in 1998.
- ^{xiv} Schengen Borders Code, Article 5.
- ^{xv} Schengen Borders Code, Article 8.
- ^{xvi} The persons who benefit from this provision are EU citizens, citizens of Iceland, Liechtenstein, Norway and Switzerland, and the qualifying family members of any of these.
- ^{xvii} See COM (2015) 670, 15 December 2015 and Council document 6673/16, 3 March 2016.
- ^{xviii} Schengen Borders Code, Article 6. These rules apply to entry for up to 90 days in any 180-day period. For longer periods, the law of the member state in question will apply.
- ^{xix} Schengen Borders Code, Article 13.
- ^{xx} [2004] OJ L 349/1, as amended. A consolidated version is available at http://ec.europa.eu/dgs/home-affairs/pdf/fr_reg_consolidated_en.pdf.
- ^{xxi} EU Regulation No 656/2014, [2014] OJ L 189/93.
- ^{xxii} Information from European Commission, *Back to Schengen: A Roadmap* (COM (2016) 120, 4 March 2016), Annex I and European Commission document [Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq](#) (consulted on 11 May 2016).
- ^{xxiii} France has also had border controls for security reasons since the terrorist attacks in Paris of 13 November 2015.
- ^{xxiv} Commission Opinion C (2015) 7100 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria, 23 October 2015.
- ^{xxv} COM (2016) 275, 4 May 2016, and Council document 8835/16, 12 May 2016. The decision permits controls by Austria, Denmark, Germany, Norway and Sweden at the land and sea borders directly affected by migration via Greece and the Balkan states.
- ^{xxvi} The Commission's evaluation was adopted on 2 February 2016. It led to a Council recommendation on 12 February 2016.
- ^{xxvii} 'EU-Turkey statement', 18 March 2016, available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.
- ^{xxviii} See European Commission, *First Report on the Implementation of the EU-Turkey Statement*, COM (2016) 231, 20 April 2016.
- ^{xxix} COM (2015) 671, 15 December 2015.
- ^{xxx} Council document 7649/16, 8 April 2016.
- ^{xxxi} European Parliament document PE578.803 (Committee on Civil Liberties, Justice and Home Affairs), 23 March 2016.
- ^{xxxii} The same arrangements apply to the Republic of Ireland, because of its common travel area with the UK. See the separate ILPA briefing paper on that subject.
- ^{xxxiii} This is distinct from Protocol 21, which permits the UK to decide unilaterally to opt in to immigration or asylum legislation other than Schengen rules, or to discussion of proposals relating to such legislation.
- ^{xxxiv} Case C-77/05 *UK v. Council* [2007] ECR I-11501.
- ^{xxxv} See Council Decision 2000/365.
- ^{xxxvi} In relation to UK participation in SIS II, see Council Decision 2015/ 215 [2015] L 36/8.
- ^{xxxvii} See the letter from Immigration Minister James Brokenshire MP to Sir William Cash MP, chair of the European Scrutiny Committee, 10 February 2016, available at [http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/02/Mydocument_\(55\).pdf](http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/02/Mydocument_(55).pdf).
- ^{xxxviii} Case C-77/05 *UK v. Council* [2007] ECR I-11501.
- ^{xxxix} The same provisions apply to the Republic of Ireland.
- ^{xl} EU Regulation 2007/ 2004, Article 12.
- ^{xli} EU Regulation 2007/ 2004, Article 20(5).
- ^{xlii} EU Regulation 2007/ 2004, Article 23(4).
- ^{xliii} Frontex, *General Report 2014*, Annex D.
- ^{xliv} HM Government, *The Best of Both Worlds: The UK's Special Status in a Reformed EU* (February 2016), para 1.22.