



Chapter 14

Freedom of movement inside 'fortress Europe'

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Introduction

Much attention has been focused on those seeking to enter 'fortress Europe' – whether the concept is understood to refer only to the EU Schengen countries or to include non-EU Schengen countries, the United Kingdom and Ireland, or the countries which joined the Union in May 2004. Yet internal mobility within 'fortress Europe' is at least as worthy of consideration.

The rise of freedom of movement rights in Europe – now codified with the legal category of European Union citizenship – represents a startling reversal of the historical tradition of state sovereignty. States have historically been defined in terms of insiders (citizens) and outsiders (foreigners). The new supranational rights supersede this traditional distinction by reducing or even removing the ability of European states to discriminate between their own citizens and those of other EU member states. Borders within the European Union still matter, but the remaining barriers to freedom of movement within 'fortress Europe' are practical rather than legal, and even they are rapidly disappearing.

Exceptions to the European free movement regime still exist – such as the case of individuals deemed to pose a significant threat to public health or public security. But the rights of free movement have now been extended to virtually all European citizens, even though there will be a

phase-in period for workers from most of the new accession states. By contrast, third-country nationals – citizens neither of the host state (first country) nor of another EU Member State (second country) but of a non-EU state – continue to be denied freedom of movement rights within the Union, despite the efforts of the Commission and some national governments to extend them the same rights as those enjoyed by EU citizens.

Exceptions to Schengen also continue to exist, as with special events such as the European soccer cup, for which Portugal in 2004 (just as Belgium and the Netherlands in 2000) was granted a temporary exemption on the requirement to abstain from checking the identification of individuals crossing Portuguese borders. On the whole, however, the picture that emerges for freedom of movement within Europe is one of a continent in which Europeans can move about freely, and in which state borders (though clearly not the borders between ‘fortress Europe’ and the rest of the world!) have lost most of the significance they once possessed. This paper lays out the development of the Schengen system and places it within the context of European Union citizenship.

Signing Schengen

On 14 June 1985, in the Luxembourg town of Schengen, representatives of Belgium, Germany, France, Luxembourg and the Netherlands agreed to eliminate border controls between their countries. The agreement was signed on the same day that the new European Commission, headed by Jacques Delors, released its White Paper entitled *Completing the Internal Market*, which laid out the single market program and inspired the Single European Act and the Maastricht Treaty. The signing ceremony occurred on a ship anchored on the Moselle River at the point where the borders of West Germany, France and Luxembourg meet. To add to the symbolism, the boat sailed through the waters of the three countries following the signing. The Belgian secretary of state for European affairs affirmed that the ultimate goal of the agreement was ‘to abolish completely the physical borders between our countries’ (United Press 1985). For Luxembourg’s minister of foreign affairs, the agreement marked ‘a major step forward on the road toward European unity’, directly benefiting the nationals of the signatory states, and ‘moving them a step closer to what is sometimes referred to as “European citizenship”’ (United Press 1985). Schengen was an example of the ‘two-speed Europe’ that some regarded as the best way out of the institutional paralysis resulting from the Community’s expansion to ten members. Faced with resistance on the part of three of

the newer Member States – Denmark, the UK and Greece – five of the original six pushed ahead with plans to eliminate border controls. Italy was not invited to join because of fears of inadequate policing of the long Italian coastline, while Ireland opted not to join in order to stay in the Common Travel Area that it shared with the UK.¹

Following lengthy preparations, the five Schengen states signed an implementing Convention on 19 June 1990, agreeing to remove internal border controls while coordinating control at external borders. Under the supervision of the Joint Supervisory Authority, an independent body established in Brussels and composed of representatives of the national data protection authorities, this coordination was to be achieved largely through the use of the Schengen Information System (SIS), a database shared by all Schengen states. SIS would contain information on persons and on stolen or missing vehicles and objects such as identity papers.²

As discussions on implementation continued, Italy signed the Agreement on 27 November 1990, while Spain and Portugal joined on 25 June 1991. Whereas Spain and Portugal were soon judged to have met the conditions for effective border control, Italy was not. Meanwhile, proposals to incorporate the Schengen policies into the Maastricht Treaty failed. Incorporation into the Treaty would have given the Community institutions (Commission, Parliament, Court) roles in the Schengen *acquis*; without incorporation, Schengen continued as an inter-governmental bargain. Originally intended to be an interim arrangement leading to the complete abolition of border controls within the EU, the Schengen laws and regulations had continually expanded. Yet extending Schengen to all Member States was blocked by the diplomatic impasse between Spain and the United Kingdom over the status of Gibraltar (Handoll 1997). Nevertheless, more states joined: Greece agreed to join on 6 November 1992, following its ratification of the Maastricht Treaty, while Austria signed the Schengen Agreement on 28 April 1995.

Full implementation of the Schengen Treaty began in July 1995 with the removal of internal border controls between six of seven Schengen states: Germany, the Netherlands, Belgium, Luxembourg, Spain and Portugal. France invoked internal security and decided to use the safeguard clause of the Treaty, allowing the temporary continuation of passport controls on its borders with Belgium and Luxembourg (but not with Germany and Spain, which were opened). An important aim of these controls was to check the importation of drugs, notably from the Netherlands.³

Meanwhile, Greece had not yet adapted its legislation, while Italy and Austria were judged to have not yet completed the physical preparations needed for secure controls at external borders. This judgement reflected the worry, especially on the part of Germany, that large numbers of

migrants were entering Europe illegally across the Italian and Austrian borders, and that the Austrian and Italian authorities had not done enough to stop them. Before a settlement was reached in July 1997, Austria threatened to block the Amsterdam Treaty if it continued to be excluded from Schengen (BBC News 1997). In order to comply with Schengen external border control conditions, Austria deployed over 6,500 new personnel along the external border, bought new technical equipment, and laid down the SIS IT infrastructure (Karanja 2002).⁴ This satisfied Germany and the other Schengen states, and Austria, together with Italy, fully joined Schengen on 1 April 1998 (*European Report* 1997). Meanwhile, Greece finalized the necessary legislation in 1997, but it took another two years to prepare all necessary procedures, and the full implementation of the Schengen *acquis* took place from 1 January 2000 for land and sea borders and 25 March 2000 for air borders (Hellenic Republic 2004).

The Treaty of Amsterdam incorporated the Schengen arrangements into the *acquis communautaire*, the body of community law, upon its entry into force on 1 May 1999. The Council replaced the Schengen Executive Committee, the Schengen secretariat staff moved to the Council's general secretariat, and new Council working groups were established to deal with Schengen. Furthermore, the Council decided which of the Schengen rules would be incorporated into the *acquis communautaire*, and hence be susceptible to control by Community institutions (Commission, Parliament, Court) and form part of the legal rules which countries seeking EU membership must adopt into their own national legislation.

Denmark, Finland and Sweden signed the Schengen Agreement on 19 December 1996. At the same time, the Schengen states signed a cooperation agreement with the non-EU members of the Nordic Passport Union (Norway and Iceland) giving them observer status (though not voting rights) on the Schengen Executive Committee. Though acts continue to be adopted by the EU Member States alone, they apply to Iceland and Norway as well, and their application is vetted by a committee composed of representatives from the Icelandic and Norwegian governments and members of the European Council and the Commission (Commission 2004a).

On 1 December 2000, the Council decided on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway. The Council decided that, as of 25 March 2001, the Schengen arrangements would apply to these five countries of the Nordic Passport Union.

The United Kingdom and Ireland remain outside Schengen. The UK requested in March 1999 to participate in police and legal cooperation in

criminal matters, the fight against drugs, and the Schengen Information System. The Council's approval was achieved only on 29 May 2000 because the dispute between Spain and the United Kingdom regarding Gibraltar delayed the process. Ireland also asked to participate in the Schengen Information System on 16 June 2000 and on 1 November 2001. On 28 February 2002 the Council adopted a decision on Ireland's request which took effect as of 1 April 2002 (Commission 2004a).

The Schengen states now include Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Italy, Greece, Luxembourg, the Netherlands, Norway, Portugal, Spain and Sweden. On 19 May 2004, the Commission agreed to allow Switzerland to join the Schengen treaty within three years (Government of Switzerland 2004).

The Schengen system will ultimately apply to all new Member States, but full participation in it will be based on a two-step process: 'The new Member States will first need to achieve a high level of external border control upon accession whereas the lifting of internal border controls with current Member States will take place only at a later stage, subject to a separate decision by the Council' (Commission 2001).

Schengen measures

Schengen's key measure is the removal of checks at common borders, replacing them with external border checks. This main measure has led to a number of related ones:

- a common definition of the rules for crossing external borders;
- separation in air terminals and ports of people travelling within the Schengen area from those arriving from countries outwith the area;
- harmonisation of the rules regarding conditions of entry and visas for short stays;
- coordination between administrations on surveillance of borders (liaison officers, harmonisation of instructions and staff training);
- the definition of the role of carriers in the fight against illegal immigration;
- requirement for all non-EU nationals moving from one country to another to lodge a declaration;
- the drawing up of rules for asylum seekers (Dublin Convention);
- the introduction of rights of surveillance and hot pursuit;
- the strengthening of legal cooperation through a faster extradition system and faster distribution of information about the implementation of criminal judgments; [and]
- the creation of the Schengen Information System (SIS). (Commission 2004a)

Each of these deserves separate attention, though let me simply note here the Council's formulation: 'Free movement within the territory of the Schengen States is a freedom which as a counterpart requires not only the strengthening of the common external borders and the administration of third country nationals, but also enhanced co-operation between law enforcement authorities of Schengen states' (Council 2003b).

The Commission's resources for coordinating these measures remain paltry: the Justice and Home Affairs DG has a unit devoted to citizenship, racism and xenophobia, the Charter of Fundamental Rights, and the Daphne program (designed to combat violence against children, young people and women), and another unit devoted to free movement of persons, visa policy, external borders and Schengen, along with other units. In 2002, the unit devoted to free movement of persons, visa policy, external borders and Schengen had just seven officials, in addition to three bureaucrats seconded from Member States. Created as a separate DG in 1999, the entire Justice and Home Affairs DG has just 180 officials.⁵ It has been growing fast, but its small size reflects the fact that cooperation on the Schengen *acquis* developed through inter-governmental coordination, first outside the Community altogether and then, with the Amsterdam Treaty, within the Council.

Customs cooperation

The goal of removing all barriers to the free movement of persons is accompanied by the same goal with regard to the free movement of goods. Thus it is instructive to examine European customs cooperation to draw parallels with the free movement of persons. On 11 February 2003, the European Parliament and the Council adopted an action program for customs in the Community, entitled Customs 2007 (Council 2003a). The program is scheduled to run from January 2003 to December 2007 and is intended to ensure that the customs administrations of Schengen states:

- (a) carry out coordinated action to ensure that customs activity matches the needs of the Community's internal market...;
- (b) interact and perform their duties as efficiently as though they were one administration and achieve equivalent results at every point of the Community customs territory;
- (c) meet the demands placed on them by globalisation and increasing volumes of trade and contribute towards strengthening the competitive environment of the European Union;
- (d) provide the necessary protection of the financial interests of the European Union and provide a secure and

safe environment for its citizens; [and] (e) take the necessary steps to prepare for enlargement and to support the integration of new Member States. (Council 2003a)

Furthermore, the common customs policy 'shall continuously be adapted to new developments in partnership between the Commission and the Member States in the Customs Policy Group, composed of the heads of customs administrations from the Commission and the Member States or their representatives' (Council 2003a). This goes beyond the level of mutual aid specified in the Conventions on Mutual Assistance between Customs Administrations: Naples I of 1967 and Naples II of 1998.⁶ Thus the Commission and the Member State customs administrations have established regular interactions so that they may indeed work together as efficiently and effectively as a single administration which achieves equivalent results throughout the Community customs territory, and meet the other aims specified by the Parliament and Council.

In order to achieve these goals, the Commission and the Schengen states agree to ensure the smooth functioning of a number of communication and information exchange systems:

- (a) the common communications network/common systems interface (CCN/CSI) ...;
- (b) the data dissemination system (DDS);
- (c) the new computerised transit system (NCTS/NSTI);
- (d) the information system on the integrated tariff of the Community (TARIC);
- (e) the information system for transfer of origin stamps and the transmission of transit stamps (TCO/TCT);
- (f) the European customs inventory of chemical substances (ECICS);
- (g) the European binding tariff information system (EBTI/RTCE);
- (h) the tariff quota surveillance management system (TQS);
- (i) the inward-processing relief system (IPR);
- (j) the Unit values system;
- (k) the Suspensions information system; [and]
- (l) other existing IT Community systems in the customs area to ensure their continuity.⁷

Each of these systems is necessary to maintaining an efficient common customs policy. For example, the European Binding Tariff Information (EBTI) system is a key instrument for implementing the Common Customs Tariff and is intended to simplify procedures for importers and exporters to get the proper classification of the goods. Customs

authorities of the Member States issue importers and exporters with Binding Tariff Information in advance, so that they know the tariff classification of the goods they intend to import or export. Such BTI is introduced into a database run by the Commission and is legally valid in all Member States, regardless of the Member State which issued it (Commission 2004b).

Overall, the Parliament and Council allocated €133 million to the Commission for the implementation of the Customs 2007 programme for the period 1 January 2003 to 31 December 2007 (Council 2003a). This is in addition to the funds that the Member States will devote to carrying out their duties under the Schengen *acquis*.

Recognizing that within 'the framework of the creation of an area of freedom, security and justice, the free movement of goods, persons and capital leads to a reassessment of control measures within the European Union', the Council in October 2003 resolved, among other things, to define a strategy for customs cooperation within the framework of the creation of an area of freedom, security and justice, based on the following aims:

- (a) to consider new forms of cooperation, including the examination of the need for common analysis in the fight against cross-border organised crime and to protect citizens and the economy and to consider a common approach to training among their customs administrations...;
- (b) to take practical steps towards implementing these new forms of cooperation, such as to: improve operational cooperation; ensure an effective role at the external borders of the European Union; consider the creation of a permanent Operational Coordination Unit which will support the JCO; ensure an institutional approach based on cooperation between customs, police and other relevant border agencies; further develop Third Pillar IT systems...;
- (c) to improve and make more flexible the existing cooperation process, mainly by means of new or improved legal mechanisms and a structured and measurable approach to sharing good practice, so as to meet the expectation of an effective approach to seizing illicit goods and combating cross-border organised crime throughout the European Union; and
- (d) to enhance public confidence in customs, by demonstrating tangible results through customs cooperation and ensuring an increased awareness of customs role in relation to law enforcement.⁸

Key here is the determination to extend to all EU Member States the lessons learned from the Schengen *acquis*. Of course, Articles 29 and 30 of the Treaty on European Union (as amended at Amsterdam) already provide for closer cooperation among the customs administrations of the Member States in order to contribute to the creation of an area of freedom, security and justice for Union citizens. But this has yet to result in practical developments, as the language of the Council resolution cited above indicates.

Coordination on visas to third countries: the United States

All the pre-accession EU Member States except Greece (i.e. Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Sweden, Spain and the UK) have a waiver agreement with the United States. Conversely, only one of the new member states, Slovenia, has a waiver agreement. The other nine new members (i.e. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland and Slovakia) do not. The new Member States, particularly Poland and the Czech Republic, have suggested that they would invoke the solidarity clause of the Schengen Convention. This could mean that all Schengen states would be required to act uniformly, requiring visas from US citizens. Rather than seeing the solidarity clause invoked, the European Commission prefers to negotiate with the US that all the new Member States can join the visa waiver as a bloc when they join Schengen, expected in 2006 (*EU Observer* 2004b). Greece has not invoked the clause 'in order not to create major trouble for other member states', according to Jonathan Faull, Director General of the Commission's Justice and Home Affairs DG. He also suggested that the reciprocity clause would be amended to 'introduce some flexibility' (*EU Observer* 2004a). This highlights the continuing tension between Member States which face different requirements for persons and goods leaving for third states, yet must agree on common requirements for persons and goods arriving from those third states.

Citizenship

The free movement of both people and goods can be conceptualized through the lens of European Union citizenship. The key right of EU citizenship, which was formally introduced in the Maastricht Treaty of 1992 (although its core precepts had characterized the development of

European integration since the 1950s) is free movement of persons (Maas 2004). The development of Schengen came about not merely because of economic calculations – though the desire to reap the economic benefits of increased mobility no doubt played a role – but because of the political value to creating a borderless Europe in which European citizens can travel freely.

Since the Schengen program can be situated within the development of EU citizenship, it can also draw criticism from those who disagree with the project of creating European citizens. The key source of opposition to the rights of EU citizens is found within populist parties. Thus, in the 2002 election campaign in the Netherlands, populist Pim Fortuyn campaigned to re-introduce border controls within the EU, a perspective shared by the French far-right party Front Nationale (Gollnisch 2002). Similarly, the Austrian Freedom Party is opposed to freedom of movement for new EU citizens from the accession states, a perspective shared by the Danish People's Party.⁹ In addition to the positions of populist political parties, there also exist religious pressures to back out of the Schengen agreement, although they too remain marginal. Thus, for example, the Greek Orthodox Church warned in its 1997 Easter encyclical, read out in all Greek Orthodox churches during Easter services, against the threat that the Schengen agreement poses to 'our Orthodoxy' (cited in Fokas 2000).

Conclusion

The project to abolish completely the physical borders between European states formally commenced with the signature of the Schengen Agreement by representatives of Belgium, Germany, France, Luxembourg and the Netherlands on 14 June 1985, the same day that the Commission released its White Paper entitled *Completing the Internal Market*, which laid out the '1992 program'. Over the past 19 years, the Schengen *acquis* has grown to include almost every Western European state, and plans are well underway to ensuring that the entire European continent will become borderless. This striking development has not proceeded without problems, as the challenges to coordinating the customs and immigration regimes of 13 and more member states are significant. Furthermore, there remain significant issues surrounding the free movement of third-country nationals, individuals who are not citizens of EU Member States. For Europeans, however, the development of rights of free movement has been remarkable. This chapter charted the development of the Schengen *acquis* and discussed some of the remaining issues and

tensions, before arguing that the project of eliminating border controls between the European states flows from the development of European Union citizenship.

Notes

- 1 There are generally no passport controls within the Common Travel Area (which includes the Isle of Man and the Channel Islands in addition to Ireland and the UK), although Ireland has at times instituted controls on crossings from Northern Ireland. Over two-thirds of journeys leaving Ireland have Britain as their destination, so the Irish government calculated as too high the cost of leaving the Common Travel Area in order to join Schengen.
- 2 Article 94 of the Convention contains a detailed list of categories of data that can be stored in the system. Data on persons may include: (a) surname and forenames, any aliases possibly entered separately; (b) any specific objective physical characteristics not subject to change; (c) first letter of second forename; (d) date and place of birth; (e) sex; (f) nationality; (g) whether the persons concerned are armed; (h) whether the persons concerned are violent; (i) reason for the alert; (j) action to be taken. Sensitive information (e.g. concerning racial origin, political, religious or other beliefs, or information concerning a person's health and sexual activities) may not be entered. The purposes for which alerts may be entered are given in Articles 95 to 100. An alert for a person may be entered in the SIS for the following reasons: arrest for the purpose of extradition (Article 95); to determine the whereabouts of a missing person, of minors or of persons whose detention has been ordered by the competent authorities (Article 97); arrest for the purpose of appearing in court, either as a suspect or a witness, or at the request of the judicial authorities in connection with a criminal investigation or for the purpose of serving a custodial sentence (Article 98); discreet surveillance and specific checks, conducted for the purpose of prosecution in connection with a criminal offence, averting a threat to public safety or national security (Article 99); in the case of aliens, refusal of entry to the Schengen area pursuant to a decision taken by the competent administrative or judicial authority subject to national laws, a decision based on the danger posed to national security and public order or a decision based on the fact that the alien concerned has contravened national provisions governing entry and residence (Article 96). Data on objects may include: (a) motor vehicles with a cylinder capacity exceeding 50 cc which have been stolen, misappropriated or lost; (b) trailers and caravans with an unladen weight exceeding 750 kg which have been stolen, misappropriated or lost; (c) firearms which have been stolen, misappropriated or lost; (d) blank official documents which have been stolen, misappropriated or lost; (e) issued identity papers (passports, identity cards, driving licences) which have been stolen, misappropriated or lost; (f) banknotes (suspect notes). (Joint Supervisory Authority 2004)

- 3 There continue to be regular news reports of (mostly North American) students and tourists caught with marijuana on checks on the Amsterdam to Paris Thalys trains.
- 4 The article mentions that the Austrian authorities claimed to have spent 3 billion Austrian Schillings preparing Austria for Schengen implementation. But this seems highly unlikely, since that corresponds to €218 million.
- 5 Source: http://europa.eu.int/comm/dgs/justice_home/freemovement/wai/dg_freemovement_en.htm (last accessed 3 March 2005).
- 6 OJ C 24, 23 January 1998, 1. The text of Naples II is also available at <http://europa.eu.int/scadplus/leg/en/lvb/l33051.htm> (last accessed 3 March 2005)
- 7 Ibid. Chapter II, Article 5 § 1.
- 8 Council resolution of 2 October 2003 on a strategy for customs cooperation, OJ C 247, 15 October 2003, 0001-0003.
- 9 In the 2001 elections, the Dansk Folkeparti, a populist party with an anti-immigration platform, took out full-page newspaper advertisements with a caption reading 'Do you really want to open our borders to 40 million Poles?'

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