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### **Border Regimes and Border Protection in the Enlarged European Union**

*Rapporteur*  
**JUDY BATT**

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**Border Regimes and Border Protection in the Enlarged European Union**

**Report of the Fourth Meeting of the Reflection Group on the “Long-Term  
Implications of EU Enlargement: the Nature of the New Border”**

**Chairman: Giuliano AMATO**

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## **Border Regimes and Border Protection in the Enlarged European Union\***

### **Report of the Fourth Meeting of the Reflection Group on the "Long-Term Implications of EU Enlargement: the Nature of the New Border"**

**Chairman:** Guiliano AMATO

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\* This report reflects the discussion of the Reflection Group on the "Long-Term Implications of EU Enlargement: the Nature of the New Border", set up jointly by the Robert Schuman Centre and the Forward Studies Unit of the European Commission. This report is based in part on two background papers written and presented by Malcolm Anderson and Didier Bigo at the 19 April 1999 meeting in Florence. This report does not necessarily reflect all individual opinions of the Reflection Group members: nor does it correspond to the position of either the European Commission or the Robert Schuman Centre.



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## Summary

- EU enlargement to CEE will shift the Union's external frontier to the east, but where it will finally come to settle remains undecided. Yet the location of the external frontier has profound implications both for the EU's internal development and for its external relations.

- Preoccupation the internal consequences of enlargement for the EU and existing member-states must not be allowed to displace attention to the EU's wider responsibilities and foreign policy objectives. A broader concept of border management is needed, involving active engagement over a wide range of fields with the eastern neighbours. Effective border management depends on their co-operation.

- The issues of migration and crime have to be treated quite separately, as the Amsterdam Treaty recognised.

- The shortcomings and institutional complexity of JHA co-operation, the obscurity of the JHA *acquis*, and the diversity of practices within the Union are a source of damaging contradictions which give rise to confusion, and potentially cynicism, in the CEE accession countries.

- Police co-operation depends on building mutual trust. Cultural stereotypes can be dispelled by closer contacts, especially through training programmes. EU member-states could co-operate in the provision of a joint training programme for CEE.

- The new eastern border is the most demanding to police, and the burden cannot be left to the new CEE member-states alone. New forms of joint and multilateral co-operation in border policing and immigration control are needed.



## Introduction

Borders are inseparable from the entities they enclose. The forthcoming enlargement of the EU entails a shift in the Union's external frontier to the east, but precisely where the external border will finally be is a matter of continuing uncertainty. Yet the location of the external frontier has profound implications both for the future internal development of the Union and for its external relations.

The inclusion of new member-states from Central and Eastern Europe will considerably increase the political, economic and cultural diversity within the Union, raising questions about the feasibility of further political and economic integration. The existing EU institutional framework, already showing signs of strain, will require radical reforms in order to cope with the demands of many more, and more diverse, members. Alternative possibilities are a halt to further integration and the reversion of the Union to a loose association of states; or greater internal differentiation, leading to the formation of a 'core' of states proceeding rapidly towards full monetary and political union, and a heterogeneous periphery of states with more or less long-term transitional "catch-up" arrangements and some permanent "opt-outs" from key aspects of integration.

The inclusion of new member-states from Central and Eastern Europe will transform the nature of the borders, and thus the relations, between new and existing member-states. What had hitherto been a "hard", external EU border will become a "softer", internal one, and this has both positive and negative effects for both sides. On the one hand, greater ease of communications across the border promotes a revival of cross-border trade and commerce, tourism and cultural exchanges with beneficial effects especially marked in the border regions. On the other hand, continuing inequalities raise anxieties on the western side of the border about the relocation of industries and jobs to the lower wage economies of the new eastern member-states, and about the impact on western labour markets of the potential influx of workers seeking higher wages. In the future member-states of Central Europe, there are fears about economic domination, threats to traditional cultures and ways of life, and the potential emigration to the west of their brightest and best educated young people.

Enlargement will bring the EU's external border into direct contact with a range of politically and economically unstable states in Eastern Europe. While the underlying rationale of enlargement is to export stability and security, enlargement in stages threatens to create new dividing lines, and new tensions, between the new CEE member-states and those temporarily or permanently left



out. If the EU is to become the pivot of the future European security order, it will have to develop a common foreign and security policy. This requires the formulation of an agreed and detailed strategy for dealing with the new eastern neighbours, and the will to implement it. This presupposes the existence of common interests and an underlying sense of common identity within the EU, which are elusive even now and are likely to become more difficult to define with the inclusion of several new member-states, each of which has its own particular interests, perspectives and priorities in its relations with the states to the east.

Eastward enlargement is taking place at a time of heightened awareness about the changing nature and significance of borders not only within Europe but globally. The EU's response to the competitive pressures of globalisation has been to deepen internal economic integration, completing the Single Market with the establishment of monetary union. The Maastricht and Amsterdam Treaties have complemented this with the commitment to achieving political union and the creation of an "area of freedom, security and justice" within the borders of the EU. This has had radical implications for the nature of borders: the internal borders of the EU, between the member-states, have lost many of their traditional functions with the implementation of the "four freedoms" of movement of persons, capital, goods and services. But they retain nevertheless a potent symbolic appeal as markers of national territories to which distinct national identities are attached. Language use, cultural practices and education systems are still largely "caged" within traditional nation-state borders. As a necessary concomitant to the increasing "softness" and permeability of EU internal borders, the external border with non-member-states is becoming increasingly "hard" as the place where the key traditional functions of national borders - customs control, regulation of immigration, and security - are exercised.

The definition of "security" itself has undergone change, as the boundary between external and internal security has become blurred. Threats to the security of member-states are perceived less as threats of a conventional military kind and more as criminal threats - mafias, drugs, terrorism, illegal immigrants, traffic in human beings, and environmental pollution. The external border of the EU does not have the traditional role of a military defensive line but one of excluding these undesirable "soft security" threats coming from outside the territory of the Union. Finding an effective common response to these threats while relinquishing some of their traditional sovereign prerogatives at national borders already poses a challenge to the capacity of the member-states to co-operate and to trust each other. Co-operation in the fields of crime prevention, policing, judicial affairs, and the administration of immigration and asylum policy has proved one of the most sensitive aspects of

EU integration for the existing member-states. Yet despite the evident reluctance of some of them, the EU is tending to become a "security community." It is this relatively recent and rapidly evolving dimension of EU integration that is likely to prove a particularly complex challenge as the EU enlarges into Central and Eastern Europe.

This report first assesses the state of play within the EU at present in the field of border management and police co-operation, before going on to consider the problems and prospects for an enlarged Union.

## **Border Management and Police Co-operation in the EU to Date**

The evolution of a common regime for the management and control of the EU's external frontier has been driven by two rather different imperatives: firstly, by the logic of completing the Single Market; and secondly, by mounting alarm at the perceived prospect of uncontrolled waves of economic migrants, asylum-seekers and transnational criminal activity in the wake of the collapse of communism in the east and the Balkans. There has been a seemingly inexorable tendency for the deepening of EU integration, and the enjoyment by its citizens of the associated economic benefits and political freedoms, to be pursued at the cost of creating a "Fortress Europe", confronting the EU's neighbours and would-be future members with ever-higher and more rigid barriers.

The latest phase in this process is the incorporation of the Schengen *acquis* into the EU framework after the Treaty of Amsterdam. This *acquis* consists in the 1985 Schengen Agreement and the 1990 Convention, together with all the decisions and rules which have been adopted by the Executive Committee of Schengen. The objective is to create an area of free movement by removing controls at the common borders of the participating states, with compensatory strengthening of controls at the external border, accompanied by an array of "flanking" measures designed to enhance security within the Schengen area. The most significant flanking measures are:

- strict control of the external frontier according to common rules contained in a Schengen Manual for the External Frontier;
- the exchange of information on prohibited immigrants, wanted persons, stolen vehicles etc.;
- enhanced police co-operation between the participating states;
- measures facilitating judicial assistance and co-operation;



- movement towards a common visa, asylum and immigration policy.

One major problem in incorporating Schengen into the Treaty has been genuine difficulty in discovering the content of the Schengen *acquis*, largely because the Schengen Executive Committee's decisions and rules have not been formally published. This was finally done in April 1999 in order for them to be incorporated into the Treaty, which came into effect on 1 May 1999. An additional problem has been the allocation of the various parts of Schengen across the First (immigration and asylum) and Third (police and judicial co-operation) Pillars of the Treaty. The considerable legal complexity of the system is further exacerbated by the British, Irish and Danish opt-outs. Indeed, the legal complexity of the system and intricate debates about competences and the implications for the institutional balance within the EU have tended to overshadow all else, to the point where the very purpose of co-operation tends to get lost.

There has been a tendency to conflate two quite different objectives: the fight against crime on the one hand, and policies on immigration and asylum on the other. The debate surrounding the incorporation of Schengen into the Treaty was heavily coloured by the increasing salience in many member-states of domestic politics of the issues of rising numbers of illegal immigrants and also of asylum-seekers. In the process, issues of immigration became confused with those of security and crime, and concern to prevent illegal immigration was allowed to override fair consideration of the genuine claims of asylum-seekers. The Amsterdam Treaty explicitly stated that these two policy areas should be separated, but it is in the implementation of EU policy in practice that the greatest difficulties are likely to continue to arise.

Overall, the emphasis has been unduly placed on repressive measures at the expense of humanitarian, liberal values and adherence to international commitments and standards in the field of asylum. Moreover, the high priority given to concerns about crime and immigration has tended to crowd out consideration of the crucial role the border regime plays in external relations and its implications for the development of a common foreign and security policy (the Second Pillar). While the Amsterdam Treaty made welcome progress in transferring competences in the field of visas, immigration and asylum to the First Pillar, the emergent common border policy still suffers from the legally convoluted and obscure *acquis*, institutional fragmentation and poor co-ordination between all three Pillars, and an underlying conceptual incoherence. Underlying these shortcomings can be detected lingering concerns about the implications of a common border policy for national sovereignty.

A somewhat less problematic achievement of the Treaty has been the establishment of Europol. It has now been ratified by all member-states



(including the UK, albeit with an important opt-out concerning the role of the European Court of Justice). It is, however, still in an early stage of development and goes little further than being a European equivalent of Interpol. In essence it is an office for exchange of information, analysis of criminal intelligence and for making suggestions about lines of enquiry to national authorities. At present it seems unlikely to develop into a centrally important instrument in assisting enquiries into complex criminal activities. It has modest resources in terms of professional personnel which are not on the scale of criminal investigation departments of medium-sized European cities. The list of crimes in which Europol may be involved, ranging from financial crime to terrorism, drug-trafficking, pedophilia and arms trafficking, is extremely ambitious and it is difficult to envisage how Europol can make more than a marginal impact on efforts to repress them. The holding of data on individuals and historic data is severely circumscribed for data protection reasons. Europol officials lack police powers and have not yet been invited by national authorities to participate in an advisory capacity in investigations. Finally, although analysis of criminal intelligence is envisaged as a major role, there are serious practical difficulties in transnational sharing of sensitive intelligence.

Effective co-operation between national police forces to date has been characterised mainly by bilateralism and competition between diverse national traditions and systems of policing. There is no unified, concerted common EU approach to policing, and sociological research has found an evident scepticism and lack of commitment among the national police forces of the member-states to the formal commitments of their governments to developing EU police co-operation, including Europol.

Co-operation in border control and in particular in criminal policing presupposes a high degree of mutual trust, respect for and tolerance of different police and administrative cultures, as well as accurate understanding of partners' systems, capacities and particular circumstances. Co-operation in this field to date has exposed the low levels of trust and influence of negative cultural stereotypes among the partners: typically, northern partners have expressed concern about the professional competence and integrity of frontier police in southern Europe, and fears about the spread of mafia-type criminal organisations into northern Europe. The press and TV of the member-states are quick to pick up and dramatise these issues to an anxious public opinion.

Schengen has only now been brought into the treaty framework and is thus very young as an EU policy area. The fact that it existed as an inter-governmental framework of co-operation accounts for its imperfections in terms of institutional checks and balances (the roles of the Court of Justice, the Commission and the European Parliaments) that are the norm in other more

established areas of integration. Vigorous criticism has been voiced in the European and national parliaments about the lack of parliamentary involvement and democratic accountability over the system.

## Problems and Prospects for the Enlarged EU

The difficulties posed for the candidate countries by the pattern of EU cooperation in border control, policing and judicial affairs are of various kinds. The existence of various systems of law enforcement cooperation - Interpol, Europol, other multilateral systems and bilateral arrangements - and the absence of the UK and Ireland from Schengen (although a partial change of policy has been announced) risk the development of an incoherent and complicated system of police co-operation. The obscurity and complexity of the Schengen *acquis* itself is a source of confusion, as are the constant and rapid changes taking place without consultation with the CEE accession states. Without having a chance as yet to influence the evolution of the *acquis*, the CEE states find themselves confronted by ever-higher demands on the part of the EU. Unlike most of the political, legal and economic reforms necessary to prepare for EU membership, which can be represented as having beneficial effects for the citizens of the candidate countries, Schengen risks being regarded as an imposed system, set up to defend the interests of existing member-states and which does not take into account the specific needs and interests of the new members. No opt-outs of the sort negotiated by existing members will be permitted for the new entrants, while at the same time there has been debate in some existing member-states about restricting the free movement of persons from CEE even after they become member-states.

The "fortress" mentality prevailing among existing member-states, the preoccupation with erecting an impermeable "hard" border to the east, betrays a self-interested short-termism. The predominant focus of member-state governments on repressive controls at the physical border may respond to the anxieties and expectations of voters, but can divert attention from the broader requirements of genuinely effective border management. This calls for greater emphasis on the development of bilateral and multilateral co-operation reaching well back beyond the borders. What is required is active and supportive engagement with neighbours, because their co-operation is crucially important to the effectiveness of any measure to stop illegal immigration or smuggling.

Even before accession, the candidate countries of Central and Eastern Europe are being required to take on primary responsibility - and the associated heavy costs - of managing the EU's eastern external border. This raises numerous problems. Firstly, while the EU member-states see their own interest



in "hardening" this border, the Central and East Europeans in many respects have an interest in maintaining its present rather "soft" character. For example, the adoption by Hungary of the EU's common visa policy implies the application of a visa regime for visitors from Romania, Ukraine and Yugoslavia, all countries with sizeable Hungarian minorities, for whom the Hungarian government is committed to preserve the freest possible access to the "mother country". Poland's implementation of a more restrictive regime on its eastern border in line with EU demands has caused appreciable damage to the dynamically developing cross-border trade and economic links between Poland and Ukraine, as well as to the evolving new pattern of mutual trust and co-operation in relations between the two states. "Firming up" the border between the Czech Republic and Slovakia seems a senseless aggravation to the peoples of those two countries and is likely to deepen their mistrust and resentment of the EU.

In the process of attempting to impose this border regime on the CEE partners, the contradictory aspects of the member-states' motives are exposed in a damaging way from the point of view of the EU's future relations with Central and Eastern Europe. The above-mentioned problems associated with transferring the Schengen *acquis* to CEE highlight the lack of co-ordination between the EU's internal security objectives and its broader external policy interests - and the tendency of the former to dominate. Moreover, the sense that the central purpose of the EU's emergent border regime is to restrict immigration to an absolute minimum, and that migrants are seen as a criminal threat to the EU, combine to produce an unappealing impression on those who find themselves on the receiving end of EU border control policies. Public opinion in the candidate countries is sensitive to any suggestion that the EU member-states do not treat the CEE candidates as equals and partners, but rather as problematic sources of criminality, unwanted migrants and asylum-seekers, environmental pollution. The member-states need to dispel any impression that they are most interested in the CEE candidates in their role as a buffer-zone in which these unwanted problems can be "dumped", and as convenient scapegoats on which western politicians can heap the blame for rising levels of crime, unemployment and general malaise in their societies.

There is a reluctance on the part of member-states to consider sharing the enormous financial burden of policing and administering the external border. Both Italy and Greece have already unsuccessfully complained at the disproportionate costs placed on them by the Schengen regime, which explicitly places full responsibility on each participant state for its own part of the border. The new eastern external border is both physically complex and demanding to police, and politically very sensitive for the whole EU, and yet it is to be left largely to its economically and administratively weakest members. There are a

number of projects financed by Phare that cover certain aspects of this problem, but the sums involved are very small in relation to the full costs of policing the borders. The provision of high-tech equipment to CEE states to improve efficiency in border control and in policing more generally has, on occasion, been driven by the commercial interests of the security industries of the member-states. In practice the effect may be to enhance the technical-repressive capacities of new democratic states at the expense of human rights norms which are still only weakly embedded in their administrative structures and cultures - and which, of course, the EU professes as fundamental values.

When it comes to police co-operation with the CEE candidate countries, the endemic problems of lack of trust and reciprocity, the readiness to invoke negative cultural stereotypes, and the absence of a common EU model of policing are all too apparent. Perhaps lack of trust is only to be expected at the start given the near-total lack of previous direct personal links between the police officers of the former communist states and their counterparts in the west. Negative stereotypes, however, further impede the development of trust. A new generation of police officers, untainted by the political attitudes and habits of the communist past, is now rising. A high degree of professionalism in the criminal police forces of Central and Eastern Europe is fairly long-established. Problems of corruption and penetration by "mafias" and organised crime certainly exist, but perceptions of the extent and depth of these problems seem to be exaggerated, and generalisations across the board about the situation in CEE must at all costs be avoided.

The result is to inhibit the development of operational co-operation between police forces of the EU members-states and their CEE counterparts. The lack of reciprocity in the sharing of information is noticed and resented by the latter as symptomatic of an inherently unequal relationship. Institutionalised forms of police co-operation always tend to depend in practice on the emergence of accompanying informal arrangements and channels of communication in order to function with any degree of efficiency. These informal networks are likely to be led by people from countries with strong police traditions and a long practice in international networking.

It will be hard to counter the tendency to a "two-tier" pattern of co-operation in an enlarged Union, and yet it may have a major negative bearing on the effectiveness of common action against transnational crime. However, the question of mutual trust and reciprocity is far more salient in the context of criminal police co-operation than in security and border policing operations. Criminal policing is probably not the priority area for co-operation in connection with EU enlargement to the east, and is likely to continue to develop and work most effectively on a bilateral basis. But there is a pressing need for



joint action in the field of border control and immigration. Here, it is easier to prescribe common standards and a common code of operation at the border. Examples of extensive bilateral co-operation - such as joint border patrols - are already in operation between EU member-states and CEE candidates. It is also possible to envisage innovations under the flexibility provisions of the Amsterdam Treaty such as the development of a joint immigration service with a multinational staff. The priority area for police co-operation as concerns an enlarging EU is precisely in borders and immigration control.

Police co-operation is further encumbered by the diversity of models of policing across Europe, which makes it difficult at the EU level to prescribe a single model for training the CEE police forces. There is much evidence of competition between, for example, French, German and British efforts to export their own model to the candidate countries, often backed by the interests of national security industries in exporting their technology. Training schemes are the key way in which officers get to know each other personally and build mutual trust. So far, the United States' FBI, with its Police Academy training programmes, is making far more impact than the EU. A co-ordinated programme of police training offered jointly by the member-states' forces, with each force taking on responsibility for delivery of a specific module, could be the first step to providing a more coherent EU presence and influence.

## Conclusions

The EU's external border cannot be treated simply as a physical line on the ground to be defended solely by the apparatus of repression. The attempt to make it impermeable is doomed to ineffectiveness and can increase instability by disrupting economic and cultural ties between neighbours. The external border has an enormous impact on the states on the other side, and this consideration should be at the centre of the Union's own foreign policy objectives. These must not be displaced by preoccupation with the internal ramifications of enlargement. A concerted and coherent approach, reaching across the Union's three pillars, is necessary to deal with many of the problems related to border management that are at present dealt with as if it were possible to stop them at the border.

The EU must search for active engagement in the problems of the world beyond its own borders, whether or not and to whatever extent it enlarges. Border management - a broader, more encompassing concept than narrowly defined control at the physical border - implies deepening co-operation with the candidate countries and the new eastern neighbours in a wide range of fields: policing and judicial affairs, economic development, education and culture,

cross-border links between local and regional authorities and communities. The internal weaknesses of the pillar structure and the complexity of the institutions will need to be addressed if proper relationships are to be built with third countries bordering the enlarged Union, and with the new entrants joining the Union.

The EU's own internal diversity - including the diverse, and more or less satisfactory ways the member-states implement the *acquis* - is a source of confusion and mixed messages for the candidates, diminishing the effectiveness of the EU's assistance to their preparations for membership. The danger is that this will induce cynicism on the part of the accession countries, who will be tempted to approximate their legislation on paper, but exert less effort in practice. The present institutional structure within the JHA area makes inadequate provisions for political accountability and the right of appeal (judicial recourse) for European citizens, which is a matter of concern for the established democracies of the west as much as for the new democracies seeking to enter the EU. The JHA *acquis* is evolving rapidly, with little consideration for its impact on CEE candidates, who are being asked to implement it with much less flexibility than the member-states have hitherto permitted themselves. An unsustainable contradiction is emerging between the EU member-states' urging the CEE candidates to be ready to take over responsibility for the Union's external frontier in the east as soon as they become members, while at the same time (at least at present) wanting to oblige the new CEE members to accept long transition periods in the area of free movement of people.

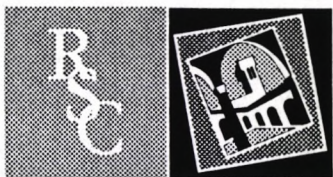
In preparing the candidates for membership, the Commission is developing new capacities in new areas - namely, in JHA - leading to involvement in the CEE's domestic institution-building far beyond what existing member-states have hitherto found necessary or acceptable. These measures have been justified by pointing to the exceptional needs of the CEE candidates, and often the pressure for such involvement comes from the demands of the candidates themselves. These new demands may in turn induce a new readiness on the part of existing member-states to deepen co-operation, for the benefit of the accession candidates but also in their own interests. So, for example, the member-states' impact on police methods and culture in the new democracies could be much enhanced by co-operation among themselves to develop a joint training programme - a "virtual academy" combining the strengths of the EU police forces to match that of the FBI's Police Academy.

Another such area for developing new forms of co-operation is in burden-sharing in the management of the external border. This is already a matter of concern for some existing member-states, and the new CEE members will face



obvious difficulties in meeting the demands placed on them by this responsibility. New forms of co-operation at the external border (such as joint or multi-national border patrols and immigration services), and improved comparative statistical data on immigration and crime, need to be developed by the member-states to confront the tasks which none of them can hope to handle effectively alone. Past experience suggests that such challenges are best met by "flight forward", new steps in deepening integration, rather than retrenchment and retreat.





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