

EUI WORKING PAPERS

RSCAS No. 2005/21



Implications of EU Enlargement for Border
Management and Citizenship in Europe

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EUROPEAN UNIVERSITY INSTITUTE

Robert Schuman Centre for Advanced Studies

European Forum Series

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

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Citizenship in Europe*

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ISSN 1028-3625

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Printed in Italy in May 2005
European University Institute
Badia Fiesolana
I – 50016 San Domenico di Fiesole (FI)
Italy

<http://www.iue.it/RSCAS/Publications/>

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This Working Paper has been written in the context of the 2003-2005 European Forum programme on 'Constitutionalism in Europe', the overall direction and coordination of which was carried out by Professor Bruno de Witte, with Dr. Miriam Aziz as the scientific coordinator.

In order to preserve a clear focus within this broad theme, the scope of the Forum was limited to four distinct but complementary themes, each of which had its own coordinator. Theme 1: 'The Idea and the Dynamics of the European Constitution' was coordinated by Professor Neil Walker; Theme 2: 'The 'East' Side of European Constitutionalism' was coordinated by Professor Wojciech Sadurski; Theme 3: 'The Constitutional Accommodation of Regional and Cultural Diversity' was coordinated by Professor Michael Keating; and Theme 4: 'The Market and Countervailing Social Values in the Constitution of Europe' was coordinated by Professor Martin Rhodes.

Abstract

The process of repositioning European borders in the context of EU enlargement confronts the theory and practice of defining 'European citizenship'. This paper examines the deterritorialisation of the EU's external and internal borders through an analysis of the immigration laws of Poland, Romania and Bulgaria which have all been recently modified in order to meet the requirements of the Schengen *aquis*. Clear lines of continuity can be traced between the externalization of border control through visa policies or readmission agreements and the internalization of borders resulting from institutions which define the legal position of aliens such as expulsion or administrative detention. I will argue that the transformation of European borders creates a system of 'differentiated' memberships which questions the normative assumption that post-national communities are potentially inclusive.

Keywords

European citizenship, EU-East-Central Europe, Enlargement, immigration policy, asylum policy, Europeanization.

Introduction: Repositioning European Borders

The EU enlargement poses an essential challenge to the issue of European membership. The current process of repositioning European borders not only dramatically increases the population of Europe but also confronts the theory and practice of defining 'European citizenship'. This paper concentrates on the case of eastern enlargement and considers, in particular, the changes that have occurred in a post-communist new member state, Poland, and in two perspective member countries, Romania and Bulgaria. During the last decade the debate about citizenship has been largely dominated by contending ideas of an exclusive Westphalian model of membership, based on nationality, versus an inclusive post-Westphalian model where the entitlement to rights is based on *personhood*.¹ In the case of Central and Eastern European countries, this debate has been particularly polarized between normative discourses of 'national values' and 'national community', which have partially framed discussions about internal constitutional reforms, and the depiction of a European post-national and potentially all-encompassing membership.²

The process which redefines citizenship in the context of European Union enlargement illustrates a more complex state of affairs. I will argue that the transformation of European borders creates a system of 'differentiated' memberships which questions the normative assumption that post-national communities are potentially inclusive. My aim is not so much to investigate whether national values continue to permeate the concept of citizenship in central and eastern Europe but to critique the reification of the debate about EU enlargement into contrasting models of membership. In particular I intend to concentrate on the limited inclusiveness of European citizenship revealed by the emerging practice of border administration. In fact, in order to account for the specificity of European membership model(s), it is necessary to focus on the norms that identify boundaries at each level of the European polity. The signing of the Schengen agreements,³ their incorporation in the Amsterdam Treaty through the creation of an area of 'freedom, security and justice' and the enlargement process determined structural changes in border control regimes. The common assumption that controls were subsequently relocated from national borders to the external frontiers of the European Union is only partially true. In reality, the very concept of borders underwent deep transformation.⁴ Borders are no longer dividing lines between political territorial units which clearly define separate sovereignties. On the contrary, they develop into areas where sovereignty is shared among different actors and is sometimes delegated to private agents. Borders delocalise governmental⁵ policies over populations and individuals far beyond either the territory of national states or the territory of the European Union. At

1 The literature on citizenship is extensive, for an overview see Castles and Davidson (2000); for a critical approach on post-Westphalian citizenship see Kveinen (2002).

2 On citizenship and constitutional reforms in Eastern Europe see Preuss (1995); on contending models of citizenship in Eastern and Western Europe see Liebich and Warner and Dragovic (1995); for a critical approach see Spohn and Triandafyllidou (2003).

3 'Schengen agreements' here refer both to the first Schengen agreement signed by Germany, France and Benelux on 14th July 1985, and the agreement of 19th June 1990 which applied Schengen I. All the member states with the exception of United Kingdom and Ireland have gradually joined the Schengen Agreements. The Schengen area also includes two non-EU countries (Norway and Iceland).

4 Elsewhere I have argued that frontiers between member states did not disappear following the implementation of the Schengen Agreements. Citizens of non-EU states are still subject to forms of internal border controls within 'Schengenland' (Mezzadra and Rigo, 2003; Rigo, 2002).

5 The term 'governmental' is used here with reference to Michel Foucault's analysis of the 'art of government' which, according to the author, differs from sovereignty: 'This means that, whereas the doctrine of the prince and the juridical theory of sovereignty are constantly attempting to draw the line between the power of the prince and any other form of power, because its task is to explain and justify this essential discontinuity between them, in the art of government the task is to establish a continuity, in both an upwards and a downwards direction' (Foucault, 1991: p. 91). On borders as dispositives of governmental policies see also Walters (2002).

the same time, the legal institutions which define the status of aliens generate lines of continuity between external and internal boundaries: in other words they internalize borders in the form of diffuse mechanisms of control.

The geopolitical understanding of borders and the role they have served for the construction of national identities, have often overshadowed other meanings of political and territorial boundaries. Firstly, borders not only divide but also link. As a consequence, their main function is less concerned with 'separation' than with 'differentiation'. This was emphasized by Niklas Luhmann who analysed territorial borders as system boundaries and considered them 'means of production of relations' (1982: 237) which allow for increasing differentiation and complexity of modern societies. Secondly, territorial borders produce two orders of relations: between distinct political systems and between the political system and the world which limits the system itself (Id.: 236). In other words, they do not only produce and regulate relations between states, but also immediately over the people who come from outside the political system. It is especially this second order of relations which reveals the characteristic asymmetry of borders: the fact that they perform diverse functions according to the side from which they are crossed (Balibar, 2001: 210).

Migration movement challenges the territorial system of national states. However, when considering trans-national migration, sociological literature rarely takes into account the fact that migrants' flows are not *the only* variable. Territorial political and legal boundaries also move and transform themselves; continuously redefining the relation between citizens and foreigners. The process of European enlargement is a privileged field in which to analyse the transformation of national and supra-national borders and consider the system of differentiated European memberships. The condition imposed on applicant countries of implementing the communitarian and—in particular—the Schengen *aquis*, allows for a temporarily and spatially confined analysis of the tendencies that have already characterized the transformations of the legal systems of present member states. I will focus on changes that have occurred in post-communist legal systems as a consequence of the attempt to incorporate candidate countries into a European area of 'freedom, security and justice'. Particular attention will be given to the legislation on aliens approved by parliaments of Central and Eastern European countries in order to meet the requirements of the Schengen *aquis*. The cases of Poland, Romania and Bulgaria will be used as exemplification. Poland is one of the countries where changes first occurred (largely as a result of its particular relation with Germany) and where transformations in national legislation from the middle of the 1990s to present have been the most far-reaching. Romania and Bulgaria have been chosen with the purpose of comparing countries which will participate in successive phases of the enlargement. Moreover, these two countries hold a key position in relation to migration movements due to the fact that they are situated on transit routes for migrants entering Europe from Asia.

In 2003 Poland approved a new Act on Aliens in view of meeting the Schengen requirements (*Polish Act on Aliens* of 13 June 2003, *Journal of Laws* of 2003, No. 128, it. 1175). The first comprehensive legislation on aliens was passed by the Polish Parliament in 1997 (*Polish Aliens Law* of 25 June 1997) which was then amended in 2001 (Act of 11 April 2001). On the same date it passed the *Act on Aliens*, the Polish Parliament also approved an *Act on granting protection to aliens within the territory of the Republic of Poland* (*Journal of Laws* of 2003, No. 128, it. 1176). This second law introduces new forms of legal status for aliens such as 'tolerated stay' and 'temporary protection'. In December 2002 the Romanian government repealed the previous legislation on aliens and replaced it with a new body of rules approved through an *Emergency Ordinance on the regime of aliens in Romania* (*The Romania Official Journal* No. 955, 27 December 2002). The ordinance was approved on the basis of the provision in article 114(4) in the Romanian constitution which states that the government may adopt 'in exceptional cases' emergency orders that need subsequent approval by the parliament.⁶ In 2002 Bulgaria

6 In 2000 the Romania Government had already adopted an *Ordinance on the Status and Regime of Refugees in Romania* which amended the previous refugee law. This was followed in 2004 by an *Ordinance on the Social Integration of Aliens*

also introduced amendments to legislation, although major changes to the first *Law on Foreigners in the Republic of Bulgaria* approved in 1998 had already been established in 2001.⁷ The principle aim of the changes introduced by the three countries was to adapt the domestic normative framework to the new visa regulation imposed in view of future entrance into the Schengen Area. Nevertheless, these acts affect other aspects of the legal condition of aliens and reflect a progressive ‘Europeanization’ of domestic legislation. To illustrate the consistency between external and internal boundaries, I will focus on a range of legal institutions related to the detention and expulsion of aliens.

European Policies and their Eastward Influence

Before examining the recent transformations in legislation of Central and Eastern European countries and attempting to formulate some hypotheses about the actual and future implementation of laws, it is first of all necessary to refer to the multi-level system of decision making established in the wake of the harmonization of immigration and asylum policies within the actual member states of the European Union. Since the middle of the 1980s, European states have increasingly coordinated their immigration and asylum policies with the aim of combating illegal immigration and redistributing the burden of hosting asylum seekers. The first stage of co-operation coincided with the signing of intergovernmental agreements and conventions such as the Schengen agreements, which concerned the free movement of persons within the territory of member States, and the Dublin Convention, which determined which state was responsible for examining asylum applications. In 1997 the Amsterdam Treaty incorporated the Schengen Agreements into the Union’s *aquis* and asylum and immigration policies were transferred from the third to the first pillar of the Union. This evolution underwent a transitional period of five years (which commenced following the entry into force of the Amsterdam Treaty in 1999) during which time major decisions taken unanimously by the Council were binding for all member states (with the exception of Ireland, United Kingdom and Denmark) and were introduced accordingly into domestic legislation.⁸

Both the Schengen Agreements and the Dublin Convention can be considered ‘laboratories’ for European policies (Monar, 2003), especially in the field of border management. Even though Eastern and Central European countries were not part of these two inter-governmental agreements, they were nevertheless affected by them. In order to benefit from visa exemption for their citizens, during the decade prior to 2004, candidate countries had to progressively implement measures to prevent the transit of illegal migrants through their territory, guarantee the readmission of migrants returned from member states and progressively implement a tighter system of visa regulation the basis of which had already been established within the Schengen framework. Moreover, the system set up by the Dublin Convention to prevent the repeated applications by asylum seekers arriving from countries considered ‘safe’ forced Central and Eastern European Countries to shoulder a great part of the refugees who tried to enter member states overland. As a result, through the Schengen Agreements and the Dublin Convention national borders have not simply been relocated at the external frontier of the Union. Rather, neighbouring countries became dynamic components of a new ‘communitarized’ concept of border which extended its influence throughout their territories.

During the entire accession process, issues of migration control and asylum policies have played a prominent role. As a condition of membership in the Union, applicant states have been required to fully implement the communitarian *aquis* in these areas before completion of their accession and

(Contd.) _____

who Were Granted a Form of Protection in Romania concerning social rights in relation to the status of refugees, ‘conditioned humanitarian protection’ and ‘temporary humanitarian protection’.

7 In 2002 the Bulgarian National assembly also approved a *Law on Asylum and Refugees*. The analysis of the legal acts approved in Poland, Romania and Bulgaria is based on English translations provided by the OCSE Office for Democratic Institution and Human Rights, Warsaw, Poland.

8 For a recent and extensive analysis of the European decision-making system on immigration and asylum policies see Fletcher (2003).

despite the fact they took no part whatsoever in the negotiations and decision process.⁹ Due to the multi-level system of decision-making outlined above and the different stages of its implementation, it is difficult to provide a straightforward account of the results and tendencies of European asylum and immigration policies. Besides European treaties, communitarian and national legislation, the *aquis* encompasses non-binding instruments, norms of general guidance and rules associated with European Union objectives (Byrne, Noll and Vested-Hansen, 2002).¹⁰ In addition, it is essential to consider how domestic strategies of migration control lead to different kinds of bilateral agreements between member states and prospective countries as well as between prospective states and third countries. These include readmission agreements to facilitate the return of illegal migrants and cooperation agreements over the issue of border management.

Member and applicant states have played a different role in regional and sub-regional approaches to migration control according to their stronger or weaker influence in external relations. A typical example is the role played by Germany in influencing Polish and Czech policies, referred to sometimes as the ‘German factor’ (Aniol, 1996: 10). However, migration policies have also been influenced by non-applicant countries, as in the case of Polish visa regulations for neighbouring countries whose entry into force—initially foreseen for the first half of 2003—was postponed on two occasions due to the opposition of Russia, Belarus and the Ukraine. Indeed, the visa requirements to enter the EU—and now also applicant countries—have been recognized as one factor that fuels anti-EU sentiments among the populations of south-east Europe and the former Soviet Union (Vachudová, 2000: 166). After the collapse of the ‘iron curtain’ a new curtain of entry visas and administrative procedures has been erected with the purpose not only of limiting admission to the pre-2004 European member states but also to candidate countries and new member states, frustrating the promise of a freedom of movement that had only recently been acquired. The case of Kaliningrad is paradigmatic. As a result of the implementation of the Schengen *aquis* by Poland and Lithuania the inhabitants of the Russian enclave need a valid passport to travel to the rest of Russia, which is actually in breach of the constitutional right of freedom of movement guaranteed to Russian citizens. During the enlargement negotiations, the Russian government pressed for a flexible application of the *aquis* by neighbouring countries, at least with regard to the inhabitants of Kaliningrad.¹¹ This proposal has not been accepted because admission to the EU does not allow any form of flexibility with regard to ‘security’ matters. The only facilitation for Russian citizens is comprised in two new types of documents which they are able to use when transiting Lithuania to and from mainland Russia: the Facilitated Transit Document (FTD) and the Facilitated Railway Transit Document (FRTD). The absolutist attitude held by EU member states highlights the unequal position of applicant countries and reflects a degree of ‘hypocrisy’ (Walker, 2002: 28; italics in original). This is particularly the case if one considers that the Europe of Justice and Home Affairs is affected by a ‘variable geometry’ arising from the different positions held by the United Kingdom, Ireland and Denmark which are not bound by the Schengen *aquis*.

The increasing relevance of borders is corroborated by the fact that they are becoming ever more autonomous objects of European policy-making and that permanent community structures are created in order to co-ordinate integrated strategies of border management. Already in May 2002 the Commission proposed the setting up of an ‘External borders practitioners’ common unit,¹² which was endorsed by the Council in the *Plan for the management of the external borders of the Member States of the European Union* agreed on June 2002.¹³ More recently the Commission presented a *Proposal for a Council regulation to establish a European Agency for the Management of Operational Co-*

9 On this issue, with regard to Bulgaria and Romania, see Borissova (2003).

10 Examples of non-binding documents include various *Schengen Catalogues* on borders management and police co-operation and the *Green paper on a community return policy on illegal residents* (COM (2002) 0175 final, 10th October 2002).

11 For an extensive analysis of this issue see Potemkina (2003).

12 COMM (2002) 233 final, 7th May 2002.

13 Doc. 1009/02 FRONT 58 COMIX 398, 14th June 2002.

operational at the External Border.¹⁴ While the competencies of the Common Unit regarding the strategic co-ordination of border management would remain, this new Agency would deal with operational tasks that, until now, have been left to the exclusive competence of national authorities. For instance, the Agency would be in charge of ‘co-ordinating and organising return operations of Member States and identifying best practices on the acquisition of travel documents and removal of third country nationals from the territory of the Member States’.¹⁵ The Commission justifies the Agency’s supplementary competencies on the grounds that in most member states such tasks ‘fall under the competencies of the authorities responsible for controlling the external borders’.¹⁶ This extension of competencies confirms, however, that the process of ‘communitarization’ changes the object of border management: managing external borders is not limited to keeping unwanted foreigners out but to continue administrating their positions inside the territory. These positions are not at the exclusive disposal of the hosting state authorities but arise from the intersection of powers exercised by different national, trans-national and sub-national actors.

The words used in official documents to describe the tasks of the ‘Common Unit’ well reflect the balance between decision-making at EU and national levels. The Common unit is defined as ‘acting as “head” of the common policy on management of external borders and as “leader” co-ordinating and controlling operational tasks’.¹⁷ On the one hand, this language echoes the fact that major policy developments have occurred outside the communitarian framework, on the other, it mirrors the reluctance of states to relinquish sovereignty in matters of Justice and Home Affairs. One consequence of this, is that policies related to internal security have been proceeded ‘by drift and reaction rather than by direction and design’ (Walker, 2002: 31). Another related consequence, is that operational agencies and expertise groups proliferate to the detriment of transparency. The alarm raised over the lack of democratic accountability is compounded by the concerns over the limited judicial control of the Court of Justice. In fact, various norms in European Treaties exclude the competence of the Court when ‘relating to the maintenance of law and order and the safeguarding of internal security’ (Art. 68 II EC). This is a provision that is only partially amended by the Constitutional Treaty. Bearing in mind that national legislation considers immigration and asylum policies as strictly related to the maintenance of ‘internal security’ and ‘public order’, operational tasks carried out by national police forces and administrative authorities are *de facto* barred from the control of the European Court of Justice.

The Eastern Borders of Europe

Official documents of the Union declare that the enlargement poses new challenges for the protection of its external frontiers given the fact that new and future member states will be largely responsible for the internal security of the Union.¹⁸ However, the involvement of neighbouring Countries in European policies on immigration control dates back to the beginning of the 1990s. The two main instruments through which present member states have unloaded part of their responsibility towards hosting migrants and asylum seekers are the ‘safe country principle’ and ‘readmission agreements’.

The ‘safe country principle’ was introduced in the German Federal Constitution in 1993 with the aim of regulating the arrival of protection seekers from Poland and the Czech Republic. Asylum seekers entering Germany from a ‘safe country’ would now be subject to denied entry or, if stopped and identified on German territory, to removal. Shortly afterwards, the ‘safe country principle’ was adopted by the other European member states, and all countries bordering the Union were designated

14 COMM (2003) 687 final, 11th November 2003.

15 Ibid., p. 3.

16 Ibid.

17 Ibid., p. 2. The Italian version of the document also utilises the term ‘*direttore d’orchestra*’, orchestra conductor.

18 Doc. 1009/02 FRONT 58 COMIX 398, 14th June 2002.

as 'safe'. This policy had the effect of transforming countries bordering the EU into 'buffer zones' for asylum seekers and transit migration. Moreover, in order to maintain their good relationship with the EU, neighbouring countries were responsible in preventing transit migration from moving further west. The tightening of European migration and asylum policies has spread with a 'domino effect' to Central and Eastern European Countries which, in turn, have modified their domestic legislation, have declared neighbouring countries to be 'safe' and have signed readmission agreements with migrants' countries of origin and transit states. Over the last decade some Central and Eastern European countries have amended their legislative framework on more than one occasion, and each time in an increasingly restrictive way. For example, according to art. 14 of the *Act on granting protection to aliens within the territory of the republic of Poland* of 13th June 2003, an alien arriving from 'a safe country of origin or a safe third country' is refused refugee status as this is now regarded '[a] reason of manifestly unfounded nature of the application'. In the previous *Polish Aliens Law* of 1997 the arrival from a safe country and the lodging of a 'manifestly unfounded' application had to be both taken into consideration in order to refuse the refugee status.

Readmission agreements are the instruments which enable the actual removal of aliens from a state's territory, and are therefore essential to the functioning of the 'safe countries' policy, as well as guaranteeing the return of illegal migrants. Once again, Germany acted as pioneer signing with Poland in 1993 the *Governmental Agreement on Co-Operation in matters Referring to Migration Movements* (Noll, 2002: 43). This agreement was a bilateral modification of a general document signed in 1991 between Poland and the Schengen States which had done little to limit migration, especially to Germany. Since then most other European member states have concluded similar agreements with migrants' countries of origin and transit, and as Central and Eastern European states constitute the unavoidable overland route to Europe (as well as being the origin of migration movements) all candidate countries and new member states are presently bound by these readmission agreements. In turn, prospective member states had to sign analogous agreements with countries of origin of migrants in order to return illegal migrants or refused asylum seekers, but also as a condition of complying with the Schengen *aquis*.¹⁹ Through readmission agreements, the expulsion of aliens can be conceived as a trans-national system of concentric circles. Candidate countries and new member states function as stopoff points outside the core of the other member states, but the reciprocally binding effects of this system reach territories much further away.²⁰

From a legal point of view, the readmission agreements have developed from rather general texts into detailed documents which also regulate the readmission of nationals of third countries who have entered or stayed illegally in the territory of one of the contracting parties before moving to the other. Whereas these initially took the form of bilateral accords between individual states, the European Commission has suggested that these readmission agreements be signed at communitarian level, thus binding all actual (and future) member states, and that readmission clauses be introduced in other kinds of agreements. In addition, while previous agreements required proof of an alien's nationality (which was one of the main obstacles for the return of migrants), there has been a growing tendency to include clauses that widen the range of cases which constitute presumption of a person's nationality or evidence that they have stayed in a state's territory (Peers, 2003). For example, in a note written by the General Secretary of the EU Council circulated to council members regarding the introduction of readmission clauses in cooperation agreements with China, it was advised that '*No proof of identity shall be required in respect of persons to be admitted*'.²¹ By tracing out these readmission agreements, one effectively produces a map of the 'flows of expulsion' of migrants.

19 For the latest developments in negotiations over readmission agreements with third countries see the annual Commission's *Regular Reports on Progress Towards Accession* available for each candidate states.

20 According to Frank P. Weber (1996), the historical precedents of readmission agreements were those signed by Germany in 1920-1921 with Poland, Russia, Latvia, Lithuania, and Estonia in order to facilitate mass deportation.

21 Doc. 13206/01, 25th October 2001, italics in original.

These examples illustrate the assertion that European borders do not coincide with the perimeter of the European Union territory nor with the territory of those states that will become EU members in the forthcoming ‘waves’ of enlargement. Readmission agreements are dispositives of control over population movements which de-territorialize states’ sovereignty and trace borders that cannot be represented as continuous dividing lines. Instead, they constitute administrative borders whose function is not simply to keep out those who are perceived as ‘trespassers’ but, first and foremost, to govern populations both inside and outside a state’s territory. This function of borders is highlighted by another principle of European migration policy; namely the principle of ‘conditionality’ according to which quotas of legal entry are reserved for nationals of those countries which collaborate in combating illegal migration.²² Readmission agreements also play an important role in implementing this principle, since collaborating in combating illegal migration primarily means accepting and facilitating the return of unwanted migrants from European member states.

Readmission agreements are not the only example of the deterritorialization of borders. Migrants seeking to legally enter the EU encounter the border when they first visit the embassy or consulate in their country of origin in order to apply for an entry visa. Didier Bigo and Elseph Guild (2003) have recently used the term ‘*police à distance*’ to describe the Schengen system of visa regulation. According to these authors, the term designates the mechanisms of control which are exercised by ‘professionals’ of security strategies which do not refer to national police forces but to diplomatic authorities and administrative bureaucracies. Therefore, the impact of the shifting of European borders is not limited to legislative changes: it also involves the constitution of new authoritative figures and forms of expertise involved in the implementation of new social practices. Besides candidate and new member states, neighbouring countries are also affected. Legislation on aliens approved in Central and Eastern European countries in order to compel with Schengen visa regulation for example provide for the establishment of new consular offices in neighbouring countries.

The incorporation of candidate countries and new member states in the area of ‘freedom, security and justice’ (which will take place starting from 2007) also implies the transfer of the notions of ‘national security’ and ‘public order’ that have been developed in the pre-2004 member states. According to art. 5 of the Convention which applies the Schengen Agreements, in order to be admitted into the territory, an alien must not be considered dangerous to the ‘national security’, the ‘public policy’ and the ‘international relations’ of *any one* of the member states. Usually the classification of a foreigner as an unwelcome migrant depends on her/his lack of fulfilment of national legislation requirements during a previous stay in a Schengen country. The criteria of data on ‘undesirable aliens’ registered in the pan-European information system (SIS) are therefore defined at national level and range from criminal offences to simple breaches of administrative rules. Due to the overlapping of the different conditions of entry into Schengen territory, the concepts of ‘security’ and public ‘order’ (or ‘policy’) applicable in the area of ‘freedom, security and justice’ are thus not the result of an autonomous elaboration but the sum of restrictions established in each country.

After the completion of the accession to the Schengen area, therefore, any interpretation of migration laws approved in view of meeting the Schengen requirements will also need to take into consideration notions of ‘national security’ and ‘public order’ as defined by each member state. For instance, in the case of Poland entry is barred to those foreigners whose data ‘has been recorded in the index of aliens whose residence on the territory [...] is undesirable’ (*Polish Act on Aliens* art. 21(1)) and to any foreigner whose entry or residence ‘may constitute a threat to the state security and defence as well as to the public security and policy or it would be in breach of the interests of the Republic’ (*Polish Act on Aliens* art. 21(6)). In the case of Romania, entry is refused to aliens who represent a ‘threat for national defence and security, public order, health and moral probity’ (*Emergency*

22 On ‘conditionality’ in migration policies, see the *Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union’s relations with third countries*, COM(2002) 703 final, 3rd December 2002.

Ordinance on the regime of aliens in Romania art. 6(1,f)²³ or, in the case of Bulgaria, to those ‘included in the informational massif of the unwelcome foreigners in the country’ (*Law on Foreigners* art. 10(14)). Although these norms refer directly to domestic criteria, their combination with art. 5 of the *Schengen Convention* extends the normative definition of ‘national security’ and ‘public order’ or ‘policy’ in a manner proportional to the extension of the area of ‘security, freedom and justice’.

The notion of ‘*police à distance*’, as exercised by consular authorities, regards migrants who attempt to legally enter European member or candidate states. In the same way, a migrant who tries to enter the enlarged Europe, partially or totally avoiding the legal requirements, encounters its borders long before its territorial delimitation. They are encountered, for example, when the migrant uses transport companies to reach the European Union or applicant states. ‘Carriers’, in fact, are required to make stringent checks for undocumented aliens to avoid running the risk of sanctions. ‘Carrier liability’ clauses are contained in all aliens laws of European member states, and they are also now introduced in applicant countries’ legislation so as to meet the Schengen *aquis*. Such clauses, for example, were first introduced in Poland with the *Aliens Law* of 1997. In the new *Polish Act on Aliens*, art 138 states that ‘if the carrier [brings] into the territory of the Republic of Poland an alien who does not possess [...] the travel document and the visa required to cross the border, [...] an administrative fine in the amount of PLN equal to the sum not less than EUR 3000 or EUR 5000 for each person carried shall be imposed on the carrier’. Comparable norms are also present in Romanian (art.7 of the *Emergency Ordinance on the regime of aliens*) and Bulgarian legislation (art. 20 of the *Law on Foreigners* amended in 2001). In addition to administrative fines, Polish and Romanian acts oblige carriers to return aliens to the countries from which they were transported or to refund expenses sustained for their forced repatriation. As a result of such provisions, not only the state’s typical function of border control but also the implementation of operational tasks concerning repatriation are delegated to private agents.²⁴

Legal Borders

European borders maintain many elements of ‘fortification’ which characterized traditional national borders. Poland, for example, preserved and even reinforced defensive tools of the old ‘iron curtain’ that, through the PHARE programmes,²⁵ were relocated along the eastern frontier. Differing from conventional geopolitical borders, the new European external frontiers are not fortified against the threat of military invasions. As Helmut Dietrich has pointed out, the new border regime ‘represents a socio-technological attack on the informal cross-border economy and on transit migration’ (Dietrich, 2002). Among other reasons, official documents and public discourse justify the fortification of European borders in view of combating illegal migration and the abuses of asylum requests. Nevertheless, the tightening of asylum and migration polices can also be seen to lead to a massive ‘illegalization’ of movements (Noll, 2002: 31). In the case of asylum seekers, it has been underlined elsewhere that ‘persons who formerly sought protection would now regard illegal stay as the better option, avoiding any form of contact with authorities’ (Id.). In the case of cross-border trade and transit migration, new visa requirements mean that movements of population which were formerly

23 The *Emergency Ordinance on the regime of aliens in Romania* also provides for a particular administrative measure of authority based on a declaration of undesirability which can be ordered ‘against an alien who performed, performs or there are strong evidence that he intend to perform such activities as to endanger the national security and public order’ (art. 83(1)). An alien can be declared undesirable for a period from 5 to 15 years with the possibility of extending the term.

24 This state of affairs particularly jeopardises the rights of protection seekers who normally do not possess entry visas or travel documents.

25 PHARE stands for *Pologne-Hongrie: Assistance à la reconstruction économique*. The project specification of the PHARE programmes for 2001 and 2002 also provides an insight into the modernization and extension of Polish eastern border.

considered lawful have become illegal.²⁶ In fact, since the collapse of communist regimes until recently, Central and Eastern European countries possessed relatively laissez-faire migration regimes.

The process of ‘illegalization’ of migration movements can be reconstructed by examining the most recent changes that have occurred in domestic legislation and comparing them with previous laws on immigration. Of particular significance are the conditions of detention and expulsion of aliens as these are the sanctions that legal systems typically reserve to illegal migrants. Under the *Polish Aliens Law* of 1997, for example, illegal entry *per se* was not formally sanctioned with expulsion. Even though art. 52 stated that an alien who did not possess the requisites to entry and residence in Poland was liable to expulsion, this norm was nevertheless rather general. The amendments introduced in the *Polish Aliens Law* in 2001 specified the procedures under which an alien might be obliged to leave (art. 51) or might be deported from the territory of the Republic of Poland (art. 52). Listing preconditions of the deportation orders, Art. 52 of the emended act also refers to the requirements of entry established in art. 13 which, in the new version, exclude the authorization of entrance to aliens who ‘crossed the border in defiance of the regulation’ (art. 13(1) point 6). The *Act on Aliens* of 13th June 2003 substantially reiterates the same conditions of expulsion while introducing new cases of expulsion in view of Poland’s future membership in the Schengen space and information system (art. 88(1) point 4 and point 5). However, the ‘Penal provisions’ chapter of the new act states that whoever ‘resides on the territory of the Republic of Poland without the required authorization [...] shall be liable to a fine’ (art. 148). The progressive ‘illegalization’ of the movement of migrants is thus completed: an alien who resides in a territory without permit is not only subject to expulsion but also liable to a penal provision.

The progressive ‘illegalization’ of previously lawful behaviours is made explicit in the Romanian legislation. Art. 79 of the *Emergency Ordinance on the regime of aliens in Romania* states that: ‘The competent authorities [...] may take the measure of removal from the Romanian territory against the alien *whose stay in Romania has become illegal* or whose right to stay was revoked under the condition of this emergency ordinance, as well as against the alien *who has been decided to have entered illegally* the Romanian territory and, as the case may be, they can decide the interdiction of re-entering Romania for an established period of time’ (emphasis added). Differently from the cases of Poland and Romania, the *Law on Foreigners* amended in 2002 by the Bulgarian Parliament did not explicitly introduce major changes that would legally qualify in different terms the conduct of border ‘trespassers’. The Bulgarian criminal code already included penal sanctions for illegal entry and stay. But, of course, the tightening of conditions for legal entry and stay widens the range of preconditions that qualify individual conduct as unlawful.

Both Romanian and Bulgarian legislation penalise the illegal crossing of borders with sanctions that include incarceration. In 2001 the Romanian government approved an *Emergency Ordinance on Romania’s state border* according to which: ‘The entrance or exit of the country by illegal crossing of the state border is a criminal act and is punished with imprisonment from 3 month to 2 years’ (art. 70(1) of the ordinance). Art. 279 of the Bulgarian criminal code provides for up to 5 years of imprisonment for persons who cross the borders without the required documentation. Paragraph 5 of the same article excludes punishment for those who enter the country to apply for asylum, although memoranda of nongovernmental human rights organizations have reported cases of asylum seekers being detained on the basis of the criminal code.²⁷ While this limitation of the rights of asylum seekers rightly raises humanitarian concerns, so the deprivation of migrants’ personal liberty on the basis of simply crossing borders should be a cause for alarm. Such crimes are legislatively constructed. They do not offend pre-existing public or private goods, but changeable and, to a certain extent, imported

26 As well as new legislation entering into force, in 2003 Poland adopted measures for the legalization of aliens who were staying illegally in the country or who had become illegal. This ‘amnesty’ was ultimately a failure because only 4000 aliens applied for legalization out of an unofficially estimated presence of several hundred thousand irregular migrants.

27 International Helsinki Federation for Human Rights, Annual Report, 1999.

concepts of ‘public order’ and ‘security’ which are the outcome of the ‘communitarization’ of borders. As a result, there is little perception of such offences as anti-social by the ‘perpetrators’ themselves.

Even when the formal sanction for migrants who enter or reside unlawfully in a national territory is a penal sanction, expulsion remains the ultimate punishment which characterizes their legal status. This form of punishment reserved to non-citizens may lead to consequences which are more severe than those established by penal provisions. As stated in chapter 9 of the *Polish Act on Aliens*, expulsion may also be preceded by the ‘placement of an alien in the guarded centre or in arrest for the purpose of expulsion’. According to the *Polish Aliens Law* of 25th June 1997 and its successive amendments, an alien could be detained for 48 hours prior to expulsion. The period could be extended to a maximum of 90 days under a court decision. The new *Act on Aliens*, besides reiterating such provisions, introduces a clause which states that: ‘the period of stay in the guarded centre or in the arrest for the purpose of expulsion may be prolonged for a specified period necessary to execute the decision of an expulsion, if that decision was not executed due to the aliens fault. The period of stay in the guarded centre or in arrest for the purpose of expulsion may not exceed one year’ (art. 106(2)). This example illustrates how the same act of illegally entering or staying in Polish national territory leads, on the one hand, to a penal sanction of a fine (qualified as such under the ‘Penal provision’ chapter), on the other, to an administrative procedure that can end with the actual punishment of one year of detention. In other words, a serious limitation of individual freedom is based on an administrative, rather than criminal, procedure. Moreover, the phrase ‘due to the aliens fault’ can be better understood by referring to other legislation which contains similar provisions. For example, according to the German law the detention period can be extended if the expulsion is not executed because the alien does not collaborate in providing the information or the documents necessary to her/his identification. Therefore, even if not formally defined as penal, such norms have a correctional function typical of the modern theory of punishment which also aims to direct individual behaviour.

In the case of foreigners who do not fulfil the legal requirements for entry or stay in Romanian territory, the *Emergency Ordinance on the regime of aliens* distinguishes between the administrative measures taken for the ‘return of aliens’ (art. 88-90) and for the ‘expulsion of aliens’ (art. 91-92). Both measures may imply the physical deportation from the territory also against the alien’s will. The difference between the two does not depend on the outcome, but on the fact that expulsion is reserved to the alien ‘who committed a crime on the Romanian territory’ (art. 91(1)). The combined disposition of art. 92(2) and art. 15(1) excludes expulsion for aliens ‘charged or accused in a penal case [when] the prosecutor decides the implementation of the interdiction measure of leaving the town or the country’ (art.15(1a)) and for aliens ‘sentenced by a final court decision [when] they have to carry out a prison sentence’ (art.15(1b)). Although illegal entry is qualified as a criminal offence under Romanian law, the combination of the above norms does not result in ‘border trespassers’ facing an ordinary criminal procedure unless they have already been sentenced or there is a prosecutor’s order of interdiction to leave the territory. The ultimate punishment for illegal migrants remains expulsion rather than penal sanction, nevertheless the qualification of border crossing as a criminal act plays a powerful symbolic role in the criminalization of migrants.

Under the rubrics ‘Public Custody’ and ‘Accommodation Centres’ the Romanian legislation also provides for the administrative detention of foreigners. The measure regards aliens issued with either a return or an expulsion order. However, while the measure expires within 30 days in the case of aliens being returned (and can be extended for a maximum period of 6 months (art. 93(2)(6))), for aliens awaiting expulsion the law does not establish any temporal limitation. Besides leading to severe consequences for personal liberty, the qualification of the detention of aliens as an administrative measure of ‘public custody’ allows *de facto* for the breach of general principles of criminal law which require the peremptory determination of penalties.

The Bulgarian *Law on Foreigners* provides for a wide range of compulsory administrative measures for aliens who do not fulfil the legal requirements of entry and stay: the ‘revoking the right of stay’ (art. 39(1)); the ‘compulsory taking to the border’ (art. 39(2)); the ‘expulsion’ (art. 39(3)); the

‘prohibition to enter’ (art. 39(4)) and the ‘prohibition to leave’ (art. 39(5)) the country. While expulsion is imposed when the presence of the foreigner in the country ‘creates a serious threat for the national security or the public order’ (art. 42(1)) and is always followed by a prohibition of entry for 10 years, in the case of an alien being compulsorily taken to the border there is no automatic prohibition of re-entering the country. Differently from Polish and Romanian legislation, the Bulgarian law does not include norms which provide for the administrative detention of aliens. Nevertheless, the preconditions listed for the application of the compulsory administrative measures overlap with conducts penalised by the criminal code. Aliens may thus be detained for illegal entry on penal grounds.²⁸ As a consequence the fate of ‘border trespassers’ under Bulgarian law is ambiguous since in reality the outcome of their prosecution, as well as the entire penal procedure, may be overridden by the application of compulsory administrative measures.

These examples of the legal institution of expulsion and detention of foreigners bring into light the increasing intermingling between penal institutions and administrative procedures. This is a process which has characterized the evolution of migration laws of the pre-2004 member states and which is now influencing the changes to legislation of candidate countries and the new post-2004 EU states. The fact that the Bulgarian law does not include the administrative detention of aliens is not the sign of a different political choice, but rather an indication of a lesser degree of ‘Europeanization’ in domestic legislation. This is clearly apparent in the Commission’s report on progress towards accession, which recommends Bulgaria construct adequate detention centres for illegal aliens in order to meet criteria necessary to enter the area of ‘security, freedom and justice’.²⁹ Instead, the rising number of detained foreigners under the Polish law was judged by the Commission as a sign of its efficient implementation of Schengen standards,³⁰ while the PHARE programme for Romania provide considerable funds for the further construction of detention centres for migrants.³¹

In a comparative perspective with Romanian and Bulgarian legislation on immigration, the Polish law is undoubtedly the one where the process of ‘Europeanization’ has been accomplished. Administrative remedies prevail, while penal instruments mostly serve a symbolic role. In contrast, the Bulgarian legislation still maintains a strong penal character which is the legacy of the normative framework preceding the country’s transition from communism. In all three countries, however, there is a clear tendency towards a progressive administrative treatment of the legal position of foreigners. Such a tendency in legislative developments has taken place in all of the current member states which has been to the detriment of judicial control over the procedures carried out against aliens and has been exacerbated by the limited jurisdiction of the Court of Justice at European level.

Citizens across European Borders

The succeeding waves through which the enlargement process will take place highlight the diachronic dimension of the boundaries of European membership. The physical and temporal boundaries of membership expand to include new categories of previous foreigners, while excluding others not only from the original polity, but also from the new extended boundaries which in the past they were allowed to cross. Although exempt from visa requirements to enter the European Union, citizens of the candidate countries are currently subject to national legislations on immigration when hosted in present member states including measures such as expulsion, administrative detention and work

28 According to the International Helsinki Federation for Human Rights, it is a standard practice in Bulgaria to detain asylum seekers and so called ‘bogus’ asylum seekers in the transit zone of Sophia airport and in a centre in nearby Drujba. This practice often exceeds the maximum limit of 24 hours prescribed by the Ministry of Interior (International Helsinki Federation for Human Rights, annual report 1999).

29 European Commission, *Regular Report on Bulgaria’s Progress towards Accession*, 2003.

30 European Commission, *Comprehensive Monitoring Report on Poland’s Preparation for Membership*, 2003.

31 Phare 2001, *Strengthening the Management of the Migration Phenomenon in Romania*, RO-0107.17.

permits. The Commission's report on Romania's progress toward accession emphasised the considerable number of Romanian illegal migrants returned in 2003 from present member states and neighbouring first wave candidate countries.³² These figures are considered a sign of Romania's success in implementing readmission agreements, as well as the efficacy of neighbouring countries in implementing Schengen standards of control. In addition, citizens of candidate states are affected by dispositions approved in their own countries which aim to prevent illegal migration to Europe. For example, according to an *Emergency Ordinance* approved in August 2001 by the Romanian government: 'The entering or leaving a foreign state by the illegal passing of its borders, committed by a Romanian citizen or by a person without citizenship residing on the Romanian territory is considered as an offence and is punished with imprisonment from 3 months to 2 years'.³³ Hence, a Romanian citizen (and also future European citizen) who illegally crosses the border of the European Union or of a neighbouring country such as Hungary is liable, if caught, to be expelled from the hosting country, returned home and then prosecuted and punished as a 'border trespasser'.

Even after accession, citizens of the new member states do not immediately benefit from the Schengen lifting of national borders because workers are not able to freely circulate during a transitional period which lasts from two to seven years. During this time migration movements for employment purposes are regulated according to communitarian and national policies, even though different conditions may be agreed on the basis of bi-lateral relations between singular member states and candidate countries.³⁴ Although the greater possibility of mobility was regarded as one of the benefits of enlargement in the eyes of the populations of Central and Eastern European Countries,³⁵ accession to European citizenship is restricted precisely with regard to those rights which characterised its most significant content: the freedom of movement and settlement in other member states. Nevertheless, visa exemption for citizens of candidate countries and new member states facilitate their accession to the informal labour market and assure them a privileged position in comparison to migrant workers of different origin (Bell, 2002).

The relocation of the European Community's eastern borders implies the fortification of boundaries that during the Nineties were easily crossed by the inhabitants of Central and Eastern European countries or which, in the cases of states born after 1989, did not even exist. The history of the region has been characterized by the re-drawing of national boundaries; the modifications which occurred after the collapse of the communist bloc being only the most recent case. As a consequence, many candidate states face the problem of ethnic nationals living in neighbouring countries. The case of Hungary is the most problematic as there are Hungarian minorities living in Slovakia, Romania, Ukraine and the former Yugoslavia. Although to a lesser degree, other candidate countries are affected by similar situations such as the Polish minority living in the Ukraine and Romanians living in Moldova. As underlined by the Romanian scholar Alina Mungiu-Pippidi, the sealing off of the borders of prospective member states severs connection between 'minorities with countries where the bulk of their culture lies, prompting illegal entrance and feeding resentment' (2001: 7). This has induced applicant countries to pass laws which entitle ethnic nationals who are citizens of other countries to a particular status of semi-citizenship. The best known case is the so-called *Status Law* which entitles Hungarian nationals to limited work-permits and other benefits. Following the example of Hungary, other countries approved legislations which give ethnic nationals comparable rights or decrease conditions and periods necessary

32 European Commission, *Regular Report on Romania's Progress towards Accession*, 2003.

33 Atr. 1(1), *Emergency Ordinance no. 112 referring to the punishment of some action committed abroad by Romanian citizens or by person without citizenship residing in Romania*, 30th August 2001.

34 European Commission, *Information note on the free movement of workers in the context of enlargement*, 6th March 2001. After May 1st 2004 restriction to the free circulation and settlement of workers have not been applied only for the citizens of Cyprus and Malta, while the United Kingdom, Ireland and Sweden have allowed for the free entrance of workers arriving also from other new member states.

35 European Commission, *European citizens and freedom, security and justice, a qualitative survey of citizens of the 15 Member States and of the 13 applicant countries*, March 2003.

to acquire citizenship, such as the Polish *Repatriation Act* of 9th November 2002, and the amendments introduced in 2002 in the Bulgarian law on citizenship. Such legislative acts have been criticised for basing the entitlement to rights on ethnic grounds and have thus been considered as nationalistic measures in breach of the universalistic principle which should ideally characterize European membership.³⁶ More simply they can be seen as a partial solution to the problem of the mobility of ethnic nationals once these find themselves on the other side of the fortified borders of an enlarged Europe.

Focusing on the temporal dimension of borders illustrates how membership in an enlarged Europe is developing as a plurality of diachronically differentiated legal positions. Following accession, citizens of the new member states enjoy a status of semi-membership in contrast to the one granted to the citizens of the other 15 EU states as their right of circulation and settlement for employment purposes is limited. The same conditions will apply to the countries in the succeeding waves of enlargement reproducing a sort of waiting-room for future citizens. Nevertheless, citizens of prospective member states already enjoy a privileged status compared to non-Europeans. At the same time, new visa requirements applied by candidate countries in order to meet Schengen standards extends the restricted area for migrants arriving from third countries. This disparity is, to a certain extent, mitigated for ethnic nationals of new member states and candidate countries living in third countries, as they enjoy limited membership rights in kin states. Each restriction to the freedom of movement and settlement of new and future citizens is also a limitation to their social mobility. Therefore, each differentiated status corresponds to a position in a hierarchical order of relations.

Conclusion

The context of enlargement is a useful framework in which to analyse the system of differentiated membership which result from the transformation and repositioning of European borders. From the point of view of membership, borders are first and foremost ‘biographical’ borders encountered by migrants long before their arrival in the proximity of EU territory. As Elspeth Guild has underlined: ‘One important physical manifestation of borders results from attempts by individuals to move. The individual, through interaction with state and other actors over the granting or withholding of rights, activates the “border” and engages with the government regarding the position of the border’.³⁷

The role that political and territorial boundaries serve in producing relations of *difference* over foreigners, commences ‘outside’ and continues ‘inside’ in the form of diverse legal status ascribed to individuals. Clear lines of continuity can be traced between the externalization of border control through visa policies or readmission agreements and the internalization of borders resulting from the institutions of expulsion or the administrative detention of aliens. Legal borders have exactly the function of constructing boundaries of *difference* surrounding individuals. It is this *difference* that matters, rather than the actual physical departure of foreigners from the territory, as it allows the implementation of ‘governmental’ policies of border management directly over individuals.

At the same time, the enforcement of policies and orders over a territory no longer applies to the state but to a network of different actors and bureaucracies. Foreigners’ positions are not ruled by law but are ‘administrated’ in the name of a functionalistic principle of securitization. From the approach of the political and legal theory this process reflects a cleavage in the unity between law and sovereignty which has characterized the depiction of the modern state. In his essay on governmentality, Michel Foucault pointed out that law and sovereignty were absolutely inseparable; ‘On the contrary, with government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as

36 For an extensive analysis of the Hungarian *Status Law* and of debates on similar acts under discussion in other countries, see Fowler (2002).

37 Elspeth Guild, ‘Moving the Borders of Europe’, inaugural lecture held at University of Nijmegen, 30th May 2001, quoted in Bigo and Guild (2003).

tactics—to arrange thing in such a way that, though certain number of means, such and such end may be achieved’ (1991: 95). From the position of the individual, the cleavage between law and sovereignty corresponds to a fragmentation of its legal subjectivity.

Traditional representations of citizenship, even when based on contending grounds for membership, have been characterized by equality among citizens. Difference resided outside borders, be they the nation’s or the community’s boundaries, or those extended over an ideal *cosmopolis*. In contrast, as underlined by Étienne Balibar, the positioning and functioning of borders no longer regard the margin of Europe but its inner method of government (2003). Borders are dragged into the core of Europe because they follow the biographies of the individuals whose mobility is limited. Paradoxically, the fact that the exclusive and discriminatory character of the ‘European fortress’ not only lies at its perimeter but extends within and beyond the territorial delimitation of the EU, also allows for a wider definition of its potential inclusiveness. This, however, does not derive from an abstract model of ‘post-national’ membership, but from the fact that the fortified borders of Europe are violated and contested on a daily basis by people in movement. A consideration of these non-institutional aspects of membership and the everyday ‘practice of citizenship’ demonstrates how the limits of inclusion coincide with those of exclusion and subsequently calls into question any rigid distinction between citizens and foreigners. The enlargement process challenges the theory and practice of defining European membership exactly because it brings into light how the deterritorialisation and relocalisation of the EU polity’s borders leads to a fragmentation of the legal subjectivity of the *citizen*. In other words, any eastern border of Europe is a border drawn within Europe itself.

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