



Schengen governance after the Lisbon Treaty

SUMMARY Governance of the Schengen Area aims to find the balance between freedom of movement and the need for security, in the context of increasing globalisation. Within the European integration process, freedom of movement started with workers, as part of the establishment of a common market.

Initially intergovernmental, involving five States, the Schengen foundations were incorporated into EU law with the Amsterdam Treaty. The Schengen Area has also gradually expanded to include the territory of 22 EU and four non-EU Member States.

The Schengen *acquis* has developed into a body of laws aimed at furthering cooperation, and with a special autonomous status. At operational level, important cooperation tools have been developed: the shared database of the Schengen Information System, the Frontex Agency and solidarity through the assistance of Rapid Intervention Teams.

Since the Lisbon Treaty, the multi-layered legal framework has made the reform of Schengen governance arrangements necessary. The ongoing debate has underlined the different constitutional approaches of the EU institutions.



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Lisbonisation of Schengen governance?

Schengen cooperation was born as an intergovernmental project. Even after being integrated into the EU legal framework with the Amsterdam Treaty, Schengen policies on police and judicial cooperation remained under intergovernmental governance within the "third pillar". However since the entry into force of the Lisbon Treaty, these policies now fall under the "Community regime" (with the temporary exception, until December 2014, of the acts already adopted within the third pillar).

In contrast to traditional Schengen governance, the post-Lisbon procedure means codecision for police and judicial cooperation measures, qualified majority in Council as well as full competence for the Commission and Court of Justice. Moreover, the original Schengen objectives need to be addressed ([Article 77 TFEU](#)) in the framework of the wider objective of the establishment of a European area of freedom, security and justice (Article 3 TEU, 67 TFEU). Therefore the removal of internal border checks becomes a consequence of the implementation of the freedom of movement foreseen by the Rome Treaty.

Freedom of movement and abolition of border checks

For 30 years, the implementation of the principle of free movement has been hindered. Member States (MS) were reluctant to move, because of the difficult balance between freedom and security as well as the desire to preserve exclusive control of their territory. Under international law¹, everyone is free to leave any country, including their own, but they are not entitled to have free access to another national territory. This principle is not absolute, however, and sovereign States can agree to establish areas of free movement covering several national territories. This is the case of several customs and passports unions joining together a limited number of States².

Freedom for workers

The European Economic Community (EEC) considered freedom of movement a cornerstone of the four freedoms in order to build a common market. However, for almost 30 years, freedom of movement was limited to workers and self-employed workers. Their rights were defined in particular by [Regulation 1612/68](#) of 15 October 1968 on freedom of movement for (employed) workers within the Community. Jurisprudence of the European Court of Justice (ECJ) played a major role in extending the scope of these freedoms.

Freedom for EU citizens

A key point in the development of freedom of movement was the Treaty of Maastricht (1992). It recognised the right to move for all European Union citizens. This was later codified in [Directive 2004/38](#) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Article 21 TFEU, mirrored in the EU Charter of Fundamental Rights, states that every citizen shall have the right to move and reside freely within MS' territory, within the

limits and conditions set by the Treaties. Freedom of movement has been extended to Iceland, Norway, Liechtenstein and Switzerland (31 European States in total).

Abolition of checks at the internal borders: the Schengen "laboratory"

Freedom of movement can coexist with internal border checks; however without them this freedom is more straightforward.

The decision to abolish checks for goods and persons at the internal borders between MS was taken in the mid-1980s. It started outside the EEC legal framework due to the opposition of the UK and Ireland, which wanted to maintain checks for "non-EEC nationals". A first bilateral Franco-German agreement, progressively abolishing internal border controls was concluded in 1984. It was followed in 1985 by the "Schengen agreement", signed by those two countries and the three Benelux countries. After five years of negotiations, an implementing [Convention \(CISA\)](#) was signed, detailing identity-check procedures, common rules regarding visas, right of asylum and checks at external borders, as well as police and judicial cooperation measures. When it took effect in 1995, checks at the internal borders of the signatory states were abolished, and a "single external border" was created, at which immigration checks for the Schengen Area were carried out.

The fall of the Berlin Wall was a political challenge for Schengen governance, making preservation of security the top priority. Irregular migration and asylum have become critical issues. In this way, Schengen intergovernmental cooperation became a sort of "laboratory" to develop EU policies.

Schengen in the EU framework

In order to integrate Schengen cooperation into the EU legal framework with the Amsterdam Treaty, two compromises were necessary.

The first was to consider Schengen cooperation as a form of "closer cooperation" between the EU MS. In this way the UK, Ireland and Denmark were able to stay outside. Denmark, however, later joined the Schengen area, together with Finland and Sweden, Norway and Iceland, its partners in the "Nordic Passport Union". The Schengen Area therefore does not coincide with "EU territory" even if it is within the EU area of freedom of movement. The absence of the UK and Ireland, and the specific status of Denmark – which considers its participation in the Schengen system an international law obligation – makes managing cooperation complex.

The second compromise in the Amsterdam Treaty was the "double decision regime" for Schengen matters. The decision-making process was split in relation to the policies at stake:

- the Community method ("first pillar") was applied to borders, asylum and migration;
- the intergovernmental method ("third pillar") was used for police and judicial cooperation in penal matters and for the Schengen Information System (SIS).

The Schengen *acquis*: development and internal consistency

The objectives of Schengen cooperation are found in the [Convention Implementing the Schengen Agreement \(CISA\)](#). The Convention forms the basis for dozens of acts which constitute the [Schengen *acquis*](#),

to develop cooperation further. The elements making up the *acquis*, setting out the corresponding legal basis for each of them in the Treaties, were adopted in EU law by Council Decisions [1999/435/EC](#) and [1999/436/EC](#) of 20 May 1999.

According to the consolidated version³ of CISA, the main domains covered by the Schengen *acquis* are:

Expansion of the Schengen Area

The Schengen Area gradually expanded from the original five to include Italy (November 1990), Spain and Portugal (June 1991), Greece (November 1992), Austria (April 1995) and Denmark, Finland and Sweden, as well as Iceland and Norway (December 1996). The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined in December 2007, and the associated country Switzerland and thereafter Liechtenstein in 2008.

Romania and Bulgaria await unanimous approval from the other Schengen members before they can join, while Cyprus has not completed preparations to join because of the island's division.

Overall the "Schengen Area" comprises the territory of 22 EU and four non-EU MS, in which more than 400 million citizens are able to travel without being subject to internal border controls. It covers a total area of 4.3 million km², has 42 673 km of external maritime borders, 7 721 km of external land borders and 1 792 external frontier checkpoints, including international airports.

a) **Border crossing:** Former Articles 2-8 of CISA have been replaced by the Schengen Borders Code (SBC)⁴ which abolishes checks at Schengen internal borders. It also provides, at the "external borders", for a minimum identity check for EU citizens and a thorough check for non-EU nationals. However, in exceptional circumstances, Art. 23 of the SBC allows for internal border checks to be re-established for a temporary period.

b) **Visas policy:** The [EU Visa Code](#) sets out the procedures and conditions for issuing visas for the purpose of short stays and airport transit in the Schengen Area. [Regulation](#)

[No 539/2001](#) defines the common list of countries whose citizens must have a visa when crossing Schengen external borders, as well as the list of countries whose citizens are exempt from that requirement. A [visa reciprocity mechanism](#), currently under revision, has also been set up. If a third country – whose citizens are exempt from the visa requirement – introduces a visa requirement for one or more EU MS, the latter can ask the Commission to negotiate with the authorities of that country on restoring visa-free travel.

c) **Police cooperation:** According to Art. 39 of CISA, the police authorities of the MS shall assist each other for the purposes of preventing and detecting criminal offences. On this basis, the [Council Framework Decision of 18 December 2006](#) was adopted to simplify the exchange of information and intelligence between law enforcement authorities of the EU MS (the "Swedish Initiative"). Moreover, according to Article 40, officers keeping a person under surveillance in their country are authorised to continue their surveillance in the territory of another MS. Article 41 enables police officers pursuing a person caught in the act of committing or of participating in a serious crime in their country to continue the pursuit on the territory of another State.

d) **Judicial cooperation in criminal matters:** The Schengen Convention contains several measures which have been taken as a "model" for other EU laws, such as the [2000 Convention on mutual assistance in criminal matters](#). The CISA has also defined the "*ne bis in idem*" principle (Articles 54-58) according to which a person, whose trial has been finally disposed of in one MS, may not be prosecuted in another MS for the same acts. [Council Framework Decision 2002/584/JHA](#) of 13 June 2002 on the European Arrest Warrant and surrender procedures between MS also takes as reference CISA chapter 4 (Art. 59-66)⁵.

e) **Anti-drugs policy and control of firearms:** Articles 70 to 90 of CISA have been replaced by EC and EU legislation. For instance, firearms are the subject of [Council Directive 91/477/EEC](#) of 18 June 1991 on control of the acquisition and possession of weapons and [Council Directive 93/15/EEC](#) of 5 April 1993 on the harmonisation of the provisions relating to the placing on the market and supervision of explosives for civil uses.

Preserving the consistency of the Schengen *acquis*

The decision of whether an EU measure should be founded on the Schengen *acquis*

("Schengen relevance") has become extremely significant. This is because of the "opt out" of the UK and Ireland as well as the specific status of Denmark.

According to the ECJ, the "closer cooperation" requires that all proposals and initiatives to build upon the Schengen *acquis* must be consistent with the provisions they implement or develop. Moreover the ECJ stated that the coherence of the Schengen *acquis* must be preserved. This means that the States which take part in it "*are not obliged, when they develop it and deepen their closer cooperation, to provide for special adaptation measures for the other MS which have not taken part in the adoption of the measures relating to earlier stages of the acquis' evolution*" ([Judgment C-482/08](#)).

Operational cooperation: Schengen Information System

At operational level, the Schengen Information System (SIS) is the largest shared database on maintaining public security, supporting police and judicial cooperation and managing external border control. Participating States provide "alerts"⁶ on wanted and missing persons, lost and stolen property and entry bans. It is directly accessible to all police officers, and other law enforcement officials and authorities, who need the information to carry out their work.

Background information for each "alert" is accessible through national bureaux for Sirene (supplementary information request at national entry). The national Sirene unit ensures appropriate action is taken if, for instance, a wanted person is arrested on the territory of another Schengen MS; if a person who has been refused entry to the Schengen Area tries to re-enter at another Schengen MS' external border; if a missing person is found; or if a stolen car or identity document is seized. [Migration to an improved version \(SIS II\)](#) has been agreed and should be operational from [9 April 2013](#).

FRONTEX Agency

Set up in [2004](#), with its mandate amended in 2007 and [2011](#), the [European Agency for the Management of Operational Cooperation at the External Borders \(Frontex\)](#) reinforces and streamlines cooperation between national border authorities. It is an essential part of integrated border management. It coordinates joint operations, develops common training standards, and collates and analyses intelligence information on the ongoing situation at the external borders. Moreover Frontex, with Europol and other EU agencies will play a decisive role in the future European Border Surveillance System ([EUROSUR](#)).

RABIT: an EU solidarity tool

According to [Regulation 863/2007](#), [Rapid Border Intervention Teams \(RABIT\)](#) can be created to provide operational assistance for a limited period of time. MS can request an intervention, in case of exceptional pressure, at the external borders. In November 2010 the first RABIT intervention took place at the request of the Greek authorities. Hundreds of border guards from several EU MS were deployed for several months, by Frontex, at the Greek-Turkish land border. RABIT intervention can be considered an example of European solidarity under Article 80 TFEU in the borders, migration and asylum domain.

After Lisbon: more democratic and accountable governance

In the *post-Lisbon-Treaty* era, Schengen cooperation has become the core of the renewed area of freedom, security and justice. The [Stockholm Programme](#) 2009-2014 includes European integrated border management, with the entry into operation of the second generation Schengen Information System (SIS II) and the roll-out of the Visa Information System (VIS). These European networks will be managed by the new [EU agency for large-scale IT systems](#). A new "[smart borders](#)" strategy, recently proposed by the Commission, could be

implemented by an [entry-exit electronic recording system](#) for third-country nationals and by a [registered traveller programme](#) to speed up checks at the external borders. In this new perspective of integrated borders management, reform of Schengen governance has become necessary. However divergent views have arisen between the European Parliament, the Commission and the Council⁷.

Parliament and Commission: consistency between legislation and its evaluation

The EP, supported by the Commission, considered that the main issues in Schengen governance (including the evaluation mechanism) should be dealt with by ordinary legislative procedure, following the legal basis of the main Schengen-related policies (borders, visas, judicial and police cooperation). The Commission submitted a [package](#) of two legislative proposals based on Article 77 TFEU (codecision, with qualified majority in the Council): the first proposal (subject of the "[Coelho report](#)" in the EP) would revise the Schengen evaluation system; the [second](#) ("[Weber report](#)") would amend the Schengen Borders Code. The latter notably covers new cases of reinstatement of internal border controls (such as massive in-flows of migrants and/or failure by a MS in protecting the Schengen external borders).

On institutional grounds, both proposals would upgrade the roles of the EP and Commission, in particular by empowering the latter in cases of reinstatement of border checks. The Civil Liberties, Justice and Home Affairs Committee (LIBE) [adopted](#) the two reports on 11 June 2012.

More generally, the Commission submitted the first six-monthly Schengen overview reports in [May](#) and [November](#) 2012.

Council: preserving MS' pivotal role

The Commission and EP approach has not, however, been endorsed by the Council. Indeed it decided (in [June 2012](#)) that any decision concerning reinstatement of

internal border controls should remain under national control. The Council unanimously agreed that the general Schengen "evaluation mechanism" should remain a "peer evaluation" exercise, based on Article 70 TFEU, with Commission involvement. Evaluations would cover all aspects of the Schengen *acquis*, including the absence of border controls at internal borders. Multiannual and annual evaluation programmes would be established by the Commission, and include both announced and unannounced on-site visits. Frontex should make annual risk analyses, and submit recommendations accordingly. In case of deficiencies, the MS concerned will be required to submit an action plan to remedy it. However according to the Council's text, the EP and national Parliaments would only receive an annual summary report by the Commission on the evaluations carried out.

EP criticism

During the June 2012 EP plenary session, this proposal led to considerable debate in

the LIBE Committee, as well as in the plenary and the Conference of Presidents.

Following the EP's criticism, inter-institutional dialogue was launched. The EP rapporteurs have since then consistently pushed for a more decisive role for the EU institutions as well as full and timely information for the EP and national parliaments. In particular, this should cover all evaluation reports and any measure reinstating internal border checks.

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Endnotes

- ¹ The right of freedom of movement is composed of three main elements: freedom of movement within the territory of a country (Art. 13(1), Universal Declaration of Human Rights, 1948: "Everyone has the right to freedom of movement and residence within the borders of each state."); the right to leave any country; and the right to return to his or her own country (Art. 13 (2), Universal Declaration of Human Rights, 1948: "Everyone has the right to leave any country, including his own, and to return to his country").
- ² Examples include the customs union bringing together Belgium, the Netherlands and Luxembourg (Benelux); the passport union joining the United Kingdom and Ireland (Common Travel Area) and the "Nordic Passport Union" of Denmark, Finland, Sweden, Iceland and Norway.
- ³ [Consolidated version](#) published by the Czech Presidency of the Council of the European Union (June 2009)
- ⁴ [Regulation \(EC\) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders \(Schengen Borders Code\)](#) which came into effect on 13 October 2006.
- ⁵ European Arrest Warrants (EAW) are currently disseminated via the Schengen Information System (SIS).
- ⁶ In January 2012, the SIS recorded 904 355 wanted persons, 4 731 396 stolen vehicles, 408 331 firearms; see [Council document 8281/12 28 of 8 March 2012](#).
- ⁷ See the March 2012 JHA [Council Conclusions](#).