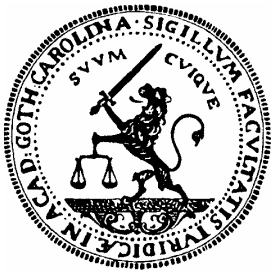

FACULTY OF LAW
University of Lund

Master of European Affairs programme, Law

Ana Stojkovic

The Impact of European Immigration Law on The Free Movement of Persons Area

Master thesis

Supervisor
Jörgen Hettne

European Law

Spring 2006

Contents

Summary

The European Internal Market is one of the major achievements of the European integration, and as stipulated in Article 14 ECT it consist of "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions in the treaty". The free movement of persons is one of the four freedoms guaranteed by the Community which regulates the movement not only of EU citizens within the Community but also of third country nationals entering the Community.

Consequently, the need for creation of European immigration law was more than clear considering the free movement of persons policy and the area without internal frontiers. The main reason for a European cooperation in immigration matters was the intention to prevent excessive immigration and illegal entry of third country nationals.

Therefore, a common European policy on this subject was created starting by remedying the deficit of the Maastricht Treaty by creation of the Amsterdam Treaty and the communitarization of immigration matters in its Title IV, continuing with the establishment of the Schengen acquis.

The first part of the thesis deals with explanation of the immigration law development by giving a brief overview of the EC Treaty immigration clauses. Next, I am going through the Schengen acquis and its historical development, present content and its exceptions, that is to say the positions of UK, Ireland and Denmark respectively.

The main part of the thesis focus on the Schengen Implementing Convention and particularly its provisions on visa requirements for short visits, as well as the controversies this clauses are creating in practice and the proposals for their solution. At the end I am elaborating on Macedonia's situation regarding Schengen visa policy, problems it is facing and concrete suggestions for their overcoming.

The purpose of the paper is to examine the impact that SIC immigration provisions have on the area of free movement of persons, looking at whether the SIC provisions may influence the possibilities for persons to move to the territory of a Schengen Country for a short visits.

The analysis lead to the conclusion that advantages for EC nationals are quite small, yet the negative effects on non EC nationals are considerable, which accordingly has negative influence on the free movement of persons area.

Abbreviations

C-VIS	Central Visa Information System
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	European Community Treaty
EU	European Union
ID	Identification Document
IOM	International Organization for Migration
JHA	Justice and Home Affairs
MS	Member States
N-VIS	National Visa Information System
OJ	Official Journal
RM	Republic of Macedonia
SAA	Stabilization and Association Agreement
SCH	Schengen Common Handbook
SIC	Schengen Implementing Convention
SIRENE	Supplementary Information Request at the national Entry
SIS	Schengen Information System
TEU	Treaty on European Union
UK	United Kingdom
VIS	Visa Information System

1 Introduction

The establishment of a European internal market is one of the main achievements of the European integration, and as stipulated in Article 14 ECT it consist of "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions in the Treaty". The free movement of persons is one of the four freedoms guaranteed by the Community which regulates the movement not only of EU citizens within the Community but also of third country nationals entering the Community.

Consequently, the need for creation of European immigration law was more than clear considering the free movement of persons policy and the area without internal frontiers.

Article 62 ECT has regulated the implications of the internal market on the European law by obliging the Council to adopt "measures with a view to ensuring in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or national of third countries, when crossing internal borders"[1]. The very idea of the European Union as "an area of freedom, security and justice " require European coordination and even harmonization of the rules and regulations governing immigration and asylum matters[2].

In this essay I will first try to give and overview of the regulations of immigration in the Community Treaty and its secondary legislation, with a brief explanation of immigration clauses from the EC Treaty and respective positions of UK and Ireland.

Next, I will provide a profound explanation of the Schengen acquis and especially the Schengen Implementing Convention with its visa provisions. This will be followed by an examination of the provisions on visa requirements for short visits where I will make an effort to point out the problems which SIC immigration clauses are creating in practice and give some suggestions of how to solve the problems in the future.

At the end I will elaborate on Macedonia's situation regarding Schengen visa policy, the problems it is facing and the concrete suggestions for their overcoming. This part shows the reality of Schengen visa policy from a third country perspective.

[1] Hailbronner, K " Immigration and Asylum Law and Policy of the European Union" (2000), p.35.
[2] Ibid.

The general aim of this paper is to examine the impact that the SIC immigration provisions have on the area of free movement of persons by looking at whether the SIC requirements may influence the possibilities for persons to move to the territory of a Schengen Country for a short visits.

2 Title IV

European immigration policy has been developed at different stages, and on several occasions. The low level of coordination in the early inter-governmental cooperation at European level in the 1970s and early 1980s substantially changed with the creation of the Co-ordinators' Group and then, although not for all EU states, through the Schengen framework[3].
Mechanism for closer cooperation on inter-governmental level was provided under the Third Pillar structure which emerged from the Maastricht Treaty through the work of the K.4 Committee and the Justice and Home Affairs Council[4].

The Treaty of Amsterdam has substantially transformed the legislation for visas, immigration and other policies related to the free movement of persons which is the consequence of the changing process started in 1970s, codified in the Dublin Convention[5], the Schengen Convention and subsequently in the Maastricht Treaty. Through their insertion in the Title IV of the EC Treaty, these provisions symbolize significant progress in the existing legal context and constitute one of the major achievements arising from the Amsterdam discussions. Title IV is the actual communitarization of the Third Pillar internal market (visas, asylum and immigration) provisions and for the part of the Schengen acquis.

The Amsterdam Treaty represents a new framework for an area of freedom, security and justice in which the free movement of persons is ensured in combination with provisions of Community instruments related to border controls, immigration and asylum enclosed in Title IV EC as well as closer inter-governmental cooperation in criminal matters in Title VI TEU[6].

Yet, the measures are not exhaustive because many questions remain within the Member States' competence, and one can feel certain tension between the communitarized Title IV and the inter-governmental Title VI.

Title IV basically provides an agenda for a new policy instead of specifying binding obligations in every area. Its provisions do not have direct effect but the obligation to create an immigration and asylum policy based on Community competence is clearly stated[7].

---

[3] O'Keeffe and Twomey, "Legal issues of the Amsterdam Treaty" (1999), O'Keeffe essay "Can the leopard change its spots ? Visas, immigration and asylum following Amsterdam", p.271-288.
[4] Ibid.
[5] 1990 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of European Community.
[6] O'Keeffe "Can the leopard change its spots ? Visas, immigration and asylum following Amsterdam", p.272.
[7] Ibid.

As you are aware, the five year time limit for the Council to create necessary measures stipulated in some of the provisions of Title IV, has already run out and the Council has done it job. However, my intention by mentioning these provisions and elaborating on Title IV clauses is to provide the reader with an overview of the history of the present legislation in immigration matters and also to help the reader better to understand the provisions and intentions of the Schengen acquis, particularly the Schengen Implementing Convention which I would like to concentrate on mainly in this essay.

Most of the substantive provisions stipulated in Title IV EC are temporary clauses with limited period of time of five years after entering into force of the Amsterdam Treaty, in which period the Council should adopt several measures with the aim of ensuring the free movement of persons in accordance with Article 14 EC. More specifically, some of those measures are measures for abolishment of internal frontiers (Article 62), rules on short term visas (Article 62(2)), setting conditions on entry and residence and issuing residence permits etc. Immigration policy is also predicted to be subject of Community law but the general five years time-limit for the adoption of legislation is not applied due to the difficulty of reaching agreements in this sensitive area which directly touches on national sovereignty[8].

However, this title is subject to principal exceptions, as for instance Article 64, offering an exception to the Community competence stipulating that "this title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and safeguarding of internal security". It continues that in the event of emergency inflow of third country nationals, the Council may, acting on a proposal from a Commission, but without consulting the European Parliament, adopt provisional measures by qualified majority.

According to Article 68 EC the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 64, but the Court is entitled to give preliminary rulings concerning the interpretation of Title IV EC or concerning the validity and interpretation of Community acts based on it. Special arrangements have been made regarding United Kingdom and Ireland on one side and Denmark on the other, such as a protocol on their position stipulating that title IV and secondary legislation based on it or international agreements made pursuant to it shall not bind the United Kingdom and Ireland[9].

One can easily recognise the importance of the Amsterdam changes in this area and the communitarization of the immigration law, which in the same time represented pressure on the Community institutions for more effective work on this subject and stanadardization if not even harmonization in this very sensitive but important field of Community law.

[8] Id.fn.6.
[9] Ibid.

The significance of changes can be summarize as follows.
Title IV has not entirely subordinated national control over immigration and asylum policy to Community competence. Therefore, the principle of supranational law- making in this title is different from the one in the other segments of Community law. There are few points that describe the approach of the Member States regarding supranationalization[10].

As I have already mentioned, Title IV represents an example of closer cooperation, as aimed in Article 40, 43-45 TEU and Article 11 EC, but still not all of the Member States participate fully in this cooperation. The exceptions are UK, Ireland and Denmark with their opt-in and opt-out arrangements elaborated further below. Furthermore, the Title IV measures established by Article 63 ECT are limited to specific areas only and they are neither complete nor exclusive. This powers introduce the minimum standards (Article 63(1)(b-d) and 2(a) ECT), which consequently make possible the decision to go further than the common standards of law and to the discretion of the Member States. The protocols and declarations linked to provisions on immigration, visa and asylum contain doubts in favour of national foreign policy- making[11].

Changes have also been made in decision-making process set out in Article 67 EC where the Commission and the European Parliament have reduced legislative roles compared to the regular community procedure. The Commission in particular is no longer the sole motor of integration within the Community thus it is completely excluded from influence over national *domains réservés*. Judicial supervision by the European Court is also limited in comparison with the rest of the Treaty, for example in the area of visa policy, Title IV even deprived the Court of powers it held under the Maastricht organization and as to the Council the preference is for unanimous voting[12].

[10] Hailbronner, K " Immigration and Asylum Law and Policy of the European Union" (2000), p.36.
[11] Ibid.
[12] O'Keeffe and Twomey, "Legal issues of the Amsterdam Treaty" (1999), O'Keeffe essay "Can the leopard change its spots ? Visas, immigration and asylum following Amsterdam".

3 Schengen acquis

Title IV EC Treaty shows that immigration and asylum policy of the European Union has been communitarized but the concrete implementation by the Member States of the Title IV provisions is done through the so called Schengen acquis .
The Schengen Protocol was annexed to the Amsterdam Treaty laying down detailed arrangements for integration process. An annex to that protocol specified what is meant by 'Schengen acquis'. The Schengen acquis encompasses the Schengen Agreement concluded in 1985, the Schengen Convention implementing the Schengen Agreement signed in 1990, protocols and accession agreements which followed as well as different decisions from the Executive Committee concerning abolition of checks at internal borders and movement of persons, decisions on police and judicial cooperation among Member States, decisions on Schengen Information System (SIS) and several others[13].

3.1 Schengen Agreement

During the 1980s, there were many uncertainties about the meaning of the "free movement of persons " concept. Some Member States were of the opinion that this should apply to EU citizens only by keeping internal border checks with the aim to differentiate between citizens of the EU and third country nationals. Others were in favour of free movement for everyone meaning an abolishment to internal border checks. Since all of the Member States could not reach an agreement, France, Germany, Belgium, Luxembourg and the Netherlands decided in 1985 to create a territory without internal borders. This is known as the "Schengen area"[14]. The agreement was signed on the ship *Princess Marie-Astrid* on the Moselle River, near Schengen, a small town in Luxembourg on the border with France and Germany[15], which is the place from which the agreement took its name. This 'freedom of movement' is followed by 'compensatory' measures to prevent terrorism and organised crime. The agreement aims to improve policy and judicial cooperation between states, as well as the introduction of common visa policies[16].

Its goal was to ceised border checkpoints and controls within the Schengen area and harmonize external border controls. Controls on the movement of goods at the borders of the Schengen States were to be simplified and the

[13] Council booklet, "the Schengen acquis integrated into the European Union" (1999), source: http://ue.eu.int from April 2006.
[14] Ibid.
[15] Wikipedia, source : http://en.wikipedia.org/wiki/Schengen_treaty from April 2006.
[16] Palomar, Teresa, " Migration Policies of the European Union", source : www.emz-berlin.de from April 2006.

customs formalities were to take place inside the teritories of the Member States. The control on persons was no longer to take place at the internal borders since it was to be partly transferred into the territories of the Member States but mainly to the external borders of the Schengen territory[17].

The Agreement contains short-term and long-term measures. The short-term measures reduce controls at common frontiers.
The long-term measures (Title II of the agreement) concern inter alia[18]:

- the abolition of controls at common frontiers and their transferal to external frontiers (Article 17)
- combating of international crime and the introduction of a right of pursuit for police officers (Article 18)
- harmonization of laws and regulations, e.g. on drugs and arms (Article 19)
- harmonization of visa policies, conditions of entry to national territories and the rights of nationals of states that are not members of the Community (Article 20)
- facilitation of customs clearance of goods (Article 25)

It is generally considered that an important incentive for the conclusion of the Schengen Agreement of 1985 was the economic advantage that was expected from the elimination of the border controls among the Signatory States. Movement of goods was to be facilitated with the abolition of the control procedures at the border and mutual trade was expected to have a substantial improvement[19].

This Agreement was originally separate from the European Union (then European Community) but has since become an EU competence, although there are some non-EU members inside the Schengen area and some EU members outside[20].

Schengen Agreement was implemented in 1990 and finally integrated into the European Union framework by the Amsterdam Treaty in 1997.
In 1990, the Schengen Agreement is implemented by the Schengen Implementing Convention, which comes into effect in 1995 after the addition of Italy in 1990, Spain and Portugal in 1991, Greece followed on 6 November 1992, Austria in 1995 and finally Denmark, Finland and Sweden joined on 19 December 1996[21].

---

[17] Intergovernmental Conference, briefing n.27, "The IGC and the Schengen Convention", source : www.europarl.eu.int from April 2006.
[18] Ibid.
[19] Meijers, H "Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police " (1991) p.57.
[20] Wikipedia, source : http://en.wikipedia.org/wiki/Schengen_treaty from April 2006.
[21] Palomar, Teresa, " Migration Policies of the European Union", source : www.emz-berlin.de from April 2006.

Consequently, after some time, the Schengen area has been extended to include every Member State apart from the United Kingdom, Ireland and Denmark, who still have exceptions.

After the Treaty of Amsterdam entered into force on 1 May 1999, the Schengen provisions with the exception of SIS were moved into the First Pillar, under Community competence. Accordingly, these provisions automatically fall under the jurisdiction of the Court of Justice, which facilitates their enforcement[22].

3.2 Schenegen Implementing Convention

The Schengen Implementing Convention was created in June 1990. It was ratified after several years primarily due to the particularities of the German Constitution, and was put into force on 1 September 1993[23]. At the same date, the Executive Committee started drafting the implementing measures. Because of the complexity of the problems concerning the Schengen Information System (SIS) the actual initiation of cooperation among the Member States was postponed until 26 March 1995. In the same time the adoption of the Schengen provisions presented an illustration of the conflict between the European Commission and the Member States, or between the supranational and intergovernmental modes of decision making. With the abolition of internal border controls, the Commission's competence was disrupted by the Member States[24].

However, in the long run, the Schengen regime was joined by almost all EU states, with the exception of the UK and Ireland but on the other hand a Schengen cooperation agreement was concluded with the non-EU members of the Nordic Passport Union (Norway and Iceland) in 1996. Norway and Iceland have also fully implemented the Schengen regime since 25 March 2001[25].

3.2.1 Analysis of the Schengen Convention legal provisions

Coming into effect in 1995, the Convention has eliminated the internal borders of the Schengen States and has created a single external border where immigration controls for the Schengen area were carried out according to a common set of regulations. General rules about visas, asylum rights and checks at external borders were accepted to make possible the free movement of persons within the Schengen territory. With the purpose

[22] Palomar, Teresa "Migration Policies of the European Union", source : www.emz-berlin.de from April 2006.
[23] IOM Workshop on the application of the Schengen Agreement, 1999 Vilnus Lithuania, "Theoretical aspects : the legal framework of the Schengen regime".
[24] Ibid.
[25] Article "The Schengen Agreement and the Convention implementing the Schengen Agreement", source : www.auswaertiges-amt.de from April 2006.

to make this possible, an information system known as the Schengen Information System (SIS) was set up to exchange data on people's identities and descriptions of objects which are either stolen or lost[26]. Accordingly, in order to reconcile freedom and security, this freedom of movement was accompanied by so-called "compensatory" measures. This involved improving coordination between the police, customs and the courts taking necessary measures to combat important problems such as terrorism and organized crime[27].

The Convention contains 142 articles divided into 8 titles, which cover[28]:

- free movement of persons and the crossing of Member States' (internal and external) borders
- visa policy
- asylum policy
- police cooperation and mutual assistance on criminal matters
- the policy on drugs
- firearms controls
- the Schengen Information System (SIS)
- the transport and movement of goods.

In the following chapter I will try to give a brief overview of the Convention provisions in order to improve the understanding of what it deals with.

The Convention does not differentiate between the nationals of Schengen and non Schengen area but rather between EC national and ”aliens”[29].
Checks on persons at the internal borders are abolished by Article 2. The abolition does not prevent the border police from asking for ID documents randomly, only systematic checking is prohibited. Nevertheless non EC national are obliged to report to the authorities after crossing the border (Article 22).

Article 3 contains provisions for external border crossings which in principle may only be crossed at fixed border points and times. Entry and exit checks are in general carried out on all persons, EC national just have to establish their identity (Article 6), while incoming aliens must provide travel documents and satisfy entry conditions. Sanctions should be imposed for bringing in aliens by air, sea or land without having the proper travel documents (Article 26) and for the remunerated assistance to an alien entering illegally (Article 27).

[26] Article ”The Schengen acquis and its integration into the Union”, source : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm from April 2006.
[27] Id. fn.15.
[28] Intergovernmental Conference, briefing n.27, “The IGC and the Schengen Convention”, source : www.europarl.eu.int from April 2006.
[29] Article 1 of the Schengen Implementing Convention (SIC).

A common policy on movement of persons and a common visa policy is set out in Article 9, and as for the practical criteria of who is entitled to enter the Schengen area, the provisions of Article 5 apply. In this context, the provision concerning a threat to public policy and national security of any contracting parties (Article 5(1)(e)) is especially important.

Non EC nationals shall only be allowed entry to the Schengen territory if they hold residence permit issued by one of the contracting parties or if they meet the following requirements: possession of a valid travel document with a visa, where applicable, substantiating the purpose and conditions of the planned visit and having sufficient means of support, not having been reported as an inadmissible alien nor regarded as a threat to public order, national security or the international relations of any of the contracting parties[30]. If an individual is not eligible to enter at least one Schengen party on these grounds, he will not be let into the whole Schengen area.

Article 5(2) contains an exemption clause regulating when these provisions can be derogated on humanitarian grounds. Also, these rules do not preclude the right of asylum provided for in Article 18.

Visas for short visits (less than 3 months) are dealt within Articles 9-17 providing for a common policy on the movement of persons and, in particular, common visa policy. This provision has led to the "white list" (countries which do not require visas to enter the Schengen group), the "black list" (visas are needed to enter all Schengen members), and the "grey list" (countries on which no common policy exist)[31]. Article 12 talks about under what conditions a Schengen country should issue a visa. Article 15 explicitly stresses that a visa may be issued only if the provisions of Article 5 are fulfilled. Article 18 addresses visas for long visits; the provisions of Article 5 apply here, too**.** Conditions governing the movement of aliens are covered in Articles 19-20.

An alien holding a residence permit issued by one of the contracting parties as stipulated in Article 21, may move freely for up to three months within the territories of the Member States unless he is reported as an undesirable person. Article 25 provides for the issuing of a residence permit to an individual who has been reported as inadmissible in the Schengen Information System which includes data relating to aliens who are reported for the purpose of being refused entry, stipulated in Article 96 of the Convention.

This question will be elaborated further in this essay. If a country is to grant a residence permit to such an individual, it has to consult the reporting Schengen country. If a residence permit is finally issued, the formerly reporting country is obliged to withdraw its report from the SIS computer but may keep the individual on its national reporting list.

[30] Article 5 (1) SIC.

[31] Meijers, H "Schengen internationalization of central chapters of the law on aliens, refugees, security and the police" (1991).

Measures related to organised travel are set out in Articles 26-27. The Convention authorises the carrier to check travel document and provides for sanctions if carriers are negligent in fulfilling their obligations.
Asylum procedures are specified in Articles 28-38**,** which part has been replaced by the Dublin Convention and later in 2003 by the Dublin II Regulation drawing up rules for asylum seekers. Furthermore, a great deal of measures in the field of police and security are possible under Articles 39-91, more specifically police cooperation and modernization of some aspects of international cooperation in criminal matters.

Economic affairs are dealt with in Title V on transport and movement of goods (Articles 120-125), whereas Title VI contains provisions concerning harmonization of the law on protection on personal data (Articles 126-130). An Executive Committee of representatives of the governments of all Member States has the obligation of the implementation and interpretation of the Convention (Articles 131-133), which role has later been taken over by the European Council[32].

3.2.2 The Schengen Information System (SIS)

Title IV is devoted to one of the main instruments of co-operation between the authorities, a joint information system, the Schengen Information System (SIS)**.** It is created of a central database located in Strasbourg and the national sections of the signatory states permanently linked with the central computer for updating its databases. This Schengen mechanism, is consisted of an information network created to provide all border posts, police stations and consular agents from Schengen group Member States with access to data on particular individuals or on objects which have been lost or stolen[33]. Member States supply the network through national networks (N-SIS) connected to a central system (C-SIS), and this is supplemented by a network known as SIRENE (Supplementary Information Request at the National Entry)[34].
Some of the data that may be included in the SIS are information regarding nationals of non Schengen countries for whom an alert has been issued for refusing entry to the Schengen area. The aim of this 'non-admissible list' is to prevent the entry of a person from outside the Schengen area whenever this person has been previously rejected in one Schengen state[35].
Moreover with aspiration for closer cooperation on the security subject in the European Community, the Schengen III Agreement was signed on 27 May 2005 by seven countries (Germany, Spain, France, Luxembourg,

[32] Joubert,C and Bevers,H "Schengen Investigated" (1996), p.34.
[33] Article "The Schengen acquis and its integration into the Union", source : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm from April 2006.
[34] Ibid.
[35] Palomar, Teresa, "Migration Policies of the European Union", source : www.emz-berlin.de from April 2006.

Netherlands, Austria, and Belgium) at Prüm, Germany. This agreement, in the light of principle of availability discussed after the Madrid bomb attack on 11 March 2004, could allow the States to exchange all data in relation to DNA and fingerprint data as well as to cooperate against terrorism. Finland has also expressed an interest in joining[36].

The SIS has caused some controversy: should it remain in the Third Pillar or be moved to the First Pillar[37]? According to a recent decision of the Council, it will stay in the Third Pillar but still provokes a number of interesting questions, which will be addressed later in this paper.

3.3 Schengen and the European Union

A number of 26 countries, together with all European Union states except the Republic of Ireland and the United Kingdom, but including the non EU Member States Iceland, Norway and Switzerland have signed the agreement and 15 of these countries have implemented it so far.
The main aim of non EU states Iceland and Norway joining the Schengen Agreement is to preserve the open borders agreement between the Nordic countries that has been in effect since 1952[38].
Thus, an agreement was signed between Iceland, Norway and the EU on 18 May 1999 in order to extend that association[39]**.** These countries continue to participate in the drafting of new legal instruments building on the Schengen acquis. Those acts are adopted by the EU Member States alone, but they apply to Iceland and Norway as well.
In practice, this union is in the form of a joint committee outside the EU framework made up of representatives from the Icelandic and Norwegian Governments and members of the EU Council and the Commission[40]. There are clearly set out procedures for notifying and accepting future measures or acts .

The Schengen Agreement was established apart from the European Union partly due to the lack of consensus among EU Members, and partly because those willing to implement the idea did not wish to wait for others who were not ready[41]. The Treaty of Amsterdam incorporated the developments resulted of the Schengen agreement into the European Union framework, effectively making the Schengen Agreement part of the EU. Among other

[36] Wikipedia, source : http://en.wikipedia.org/wiki/Schengen_treaty from April 2006.
[37] IOM Workshop on the application of the Schengen Agreement, 1999 Vilnus Lithuania, "Theoretical aspects : the legal framework of the Schengen regime".
[38] Wikipedia, source : http://en.wikipedia.org/wiki/Schengen_treaty from April 2006.
[39] Official Journal L 176 of 10.07.1999.
[40] Article "The Schengen acquis and its integration into the Union", source : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm from April 2006.
[41] Id., fn.26.

things the Council of the European Union took the place of the Executive Committee which had been created under the Schengen Agreement.
Future applicants to the European Union are bind with the Schengen Agreement criteria in relation to the external border policies as an condition to be accepted into the EU. The existing parties who are not EU members have less possibilities to participate in shaping the progress of the Schengen Agreement as a result of the Treaty of Amsterdam. Their choices are substantially reduced to agreeing with whatever is presented before them or withdrawing from the Agreement[42].
The eight Eastern and Central-European countries (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) who joined the European Union on May 1, 2004 are set to implement the Agreement in October 2007. Cyprus and Malta have a different timetable[43].

Switzerland has become a signatory of the Schengen agreement in October 16, 2004 and has ratified it by referendum on June 5, 2005 leaving its implementation as a next step. Personal controls at the borders between Switzerland and Schengen are expected to cease around the end of year 2007[44].

3.3.1 Exceptions

However, there are some parts of the Member States participants in the Schengen acquis which are not covered by the Schengen Agreement for one or another reason. This exception applies to Heligoland of Germany and Svalbard of Norway although Jan Mayen Island is covered by the Agreement. Greenland and the Faroe Islands of Denmark, even though formally excluded from the Schengen area, are integrated within it.

The association agreement with Denmark lays down that persons traveling between the Faroe Islands and Greenland on the one hand, and the Schengen Member States on the other hand, are not subject to a border check. Moreover, the traditional Free Movement of Persons acquis of the European Community is not applicable to Greenland and to the Faroe Islands[45].

It is well known that what makes this Schengen acquis particularly difficult to grasp is large number of exceptions from it, as are opt-in/opt-out politics of United Kingdom and Ireland on one side and Denmark on the other.
This countries participate only partly in the Schengen acquis and have opportunities of choice in several matters. Because of the complexity of this

[42] Id. fn.38.
[43] Id. fn26.
[44] Source : http://www.lfv.se/templates/LFV_InfoSida_70_30____38441.aspx from April 2006.
[45] Id. fn.38.

fraction of the Schengen Agreement I will elaborate on this question separately below.

3.4 Opt-in / Opt-out politics

The abolition of controls on all persons in the EU at internal border (stated in Art. 62 ECT) was not welcomed by some Member States. The United Kingdom and the Republic of Ireland have opted out from the new provisions regarding the free movement of persons established by the Treaty of Amsterdam. Denmark, although a signatory of the Schengen Agreements, also did not agree to apply the Community method in the area of the free movement of persons and has reserved the right not to fulfil all the requirements from the EC Treaty in this field[46].

The compensation for the European Union decision to implement its programme for an area of freedom, security and justice is the fact that the UK, Ireland and Denmark were provided with special derogations from this new vision of the Union policy[47]. As already commented, the special exemptions agreed for the three countries verify the fact that the Community method clearly adopts a multi-track approach[48].

3.4.1 United Kingdom and Ireland

With the combination of protocols attached to the EC Treaty and Treaty on European Union the UK and Ireland have obtained special exemptions from participation in the European Union agenda for an area of freedom, security and justice. The protocols on Article 14[49], the position on the UK and Ireland[50] and the Schengen acquis protocol[51] represent part of the political price paid by the Union in granting greater competence at Community and third pillar levels in relation to justice and home affaires matters[52].

In contrast to the Danish position, which can be considered as political pragmatism, the UK and Irish exemptions from the freedom, security and

[46] Palomar, Teresa "Migration Policies of the European Union", source : www.emz-berlin.de from April 2006.
[47] O'Keeffe,D and Twomey,P "Legal Issues of the Amsterdam Treaty", Article by Hedemann-Robinson, M "The area of freedom, security and justice with regard to the UK, Ireland and Denmark: the Opt-in/Opt-out under the Treaty of Amsterdam", p.289.
[48] Id., p.290.
[49] Prot. No.3 on the application on certain aspects of Art.14 of the Treaty establishing the European Community to the UK and Ireland (1997) OJ C340/97.
[50] Prot No.4 on the position of the UK and Ireland (1997) OJ C340/99.
[51] Prot No.2 integrating the Schengen acquis into the framework of the European Union (1997) OJ C340/93.
[52] Id. fn.47.,p.291.

justice measures have been negotiated on the basis of ideological grounds, at least as far as the UK is concerned[53]. Having in mind the European integration history one can concludes that UK has been consistently opposing the elimination of internal immigration controls in order to create greater mobility for persons within the territory of the Union. However, although for different reasons the positions of UK and Ireland are still common to one another[54].

3.4.1.1 Protocol on Art.14 EC in relation to UK and Ireland

In combination with the Protocol on the position on UK and Ireland, the Protocol on Article 14 EC provides for a complete exemption for both countries regarding any first pillar measures which can influence the abolition or facilitation of domestic border controls in consideration the movement of persons from other Member States[55].

The first two articles of the Protocol stipulate that, contrary to the interpretation of Article 14 EC, both Member States retain the right to exercise frontier control on all persons wishing to enter their territories coming from other Member States with purpose of verifying whether they have right of entry under Community law. Thus, the Protocol can be regarded as an acceptance of the British position that the internal market as defined by Article14 does not signifies abolition of all internal border controls created to check the immigration of third country nationals[56].

In addition, Article 2 is in favour of the two states retaining the right to continue to operate the common travel area without prejudice to individuals' Community law rights.

3.4.1.2 Title IV Opt-in and Opt-out

The Anglo-Irish opt-out from the provisions of Title IV is regulated by the Protocol on the position of the United Kingdom and Ireland which provides that both countries are granted special exemption to remain outside the framework of Title IV.

According to Article 1 of the Protocol, the UK and Ireland will not participate in the adoption of measures under Title IV EC nor will they be bound by any measure or decision based upon it (Art.2), in other words they

[53] Id. fn.34, p.291.
[54] Ibid.
[55] Ibid.
[56] Hailbronner,K "Immigration and Asylum Law and Policy of the European Union" (2000), p.103.

will stay immune to any direct or indirect legal effect of this Title. They may, however, as stipulated in Article 3, participate in the adoption and application of proposed measures if they express their wish to do so within three months after a proposal or initiative has been presented to the Council.

According to M. Robinson it would be more appropriate to refer to this Protocol as an opt–in rather than an opt-out facility[57]. It specifies two opportunities to join which UK and Ireland share, that is in ex ante-initial or ex post-subsequent stage.

Article 3 provides for the possibility of opting in at proposal stage but it is clear that this type of opting in cannot be used for blocking the decision process. Namely, if after a reasonable period of time a measure cannot be adopted with the United Kingdom and Ireland taking part, the Council may adopt such measure without their participation**.** Furthermore, these countries may also opt-in for the questions of Community legislation adopted by the other Member States, but always subject to admission by the Commission[58]**.** The difference between this two countries in their possibilities is that Ireland unlike the UK, under Article 8 has the possibility of withdrawing unilaterally from the protocol.

3.4.1.3 Schengen Opt-in and Opt-out

As a special form of exemption, the Schengen acquis Protocol clarifies that the13 EU Member States other than the UK and Ireland have a possibility to establish closer cooperation between themselves under the umbrella of the EU institutional and legal frameworks[59].

The Protocol allows Britain or Ireland to participate in the Schengen follow up process (initial opt-in). Despite that, this clause[60] is made in order to make possible for both countries to accept some or all of the provisions of the acquis. It is to be noted that UK and Ireland are granted only limited possibilities of participating in the integration process. Although Article 4 of the protocol specifies that either or both countries may request to take part in any or all of the acquis at any time, still their participation is conditional upon the unanimous agreement of the Council members. Where either country has not notified the Council 'within a reasonable period' that it wishes to take part in measures building on the Schengen acquis[61], the other participating members are deemed to be authorised to engage in closer cooperation **.**

[57] Article by Hedemann-Robinson, M "The area of freedom, security and justice with regard to the UK, Ireland and Denmark: the Opt-in/Opt-out under the Treaty of Amsterdam".
[58] Art.4 of the Protocol on the United Kingdom and Ireland.
[59] Id. fn.34, p.296.
[60] Art.5 of the Protocol on the Schengen acquis.
[61] Ibid.

Until now, these countries have made several request for joining the other Member States in the Schengen acquis provisions. For example in March 1999 the United Kingdom asked to take part in police and judicial cooperation in criminal matters as well as in the Schengen Information System (SIS) which was approved by Council decision in 2004[62] evaluating United Kingdom as capable of implementing this part of the Schengen acquis. Ireland has also asked to take part in some aspects of Schengen, roughly corresponding to the aspects covered by the United Kingdom's request, in June 2000. The request was approved by the Council decision in 2002[63]. Regarding this two applications the Commission in its opinions has stressed that the partial participation of the two Member States should not have the effect of reducing the consistency of the acquis as a whole[64].

3.4.2 The exemption of Denmark

Even though Denmark has signed the Schengen Agreement, it has a possibility to choose within the EU framework whether or not to apply any new decisions taken under Title IV of the EC Treaty, even when it comes to those that constitute a development of the Schengen acquis[65]. The very aim of the Danish opt-out from Title IV provisions is the need to ensure that Danish political and legal institutions practice maximum powers of control over the implementation of the new creation of Europe[66].

The Danish opt-out from both, the implementation of Title IV EC and the Schengen follow up process, is governed by the Protocol on the position of Denmark, securing a politically acceptable exception from the European Treaty commitments. Thus, with one notable exclusion, Denmark is precluded from participating in the adoption of Title IV acts (Article 1), and is guaranteed legal immunity in respect of such measures (Article 2). The exception relates to the field of visa policy regarding third country nationals[67]. Denmark will still participate with the other 12 Member States in the adoption and application of any future measures connected to the items listed in Article 62(2) EC. Most likely, the reason for including this exception is coming from the fact that Denmark sees no objection to building upon measures already agreed upon under the first pillar in these area[68].

Similarly to the British and Irish position, Denmark has secured itself the possibility of opting into Title IV measure if it so chooses but on substantially different conditions. The Protocol offers Denmark no opportunity for participating at proposal stage. Article 5 instead stipulates

---

[62] OJ L 395 of 21.12.2004.
[63] OJ L 64 of 07.03.2002.
[64] Article "The Schengen acquis and its integration into the Union", source : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm from April 2006.
[65] Ibid.
[66] Id. fn.57, p.298.
[67] Art.4 of the Protocol on the position of Denmark.
[68] Id. fn.66.

that it will have opportunity to accede to a Title IV measures only within a period of six months after the Council has decided upon the proposal in issue. Moreover, if Denmark decides to join, its decision will create an obligation under public international, as opposed to Community law. In contrast with the UK and in common with the Irish position, Denmark has secured itself the option to withdraw unilaterally from the Protocol at any time[69].

According to M. Robinson, considering the political situation in relation to further European integration in Denmark, ”special arrangements had to be made in the context of incorporation of Schengen acquis within the framework of the European Union”[70].

Article 3 of the Protocol stipulates that Denmark is to retain the same rights and obligations in relation to other signatories of the Schengen accords. This provision, together with article 5 of the protocol on the position of Denmark, are the main changes and exemptions of Denmark’s legal obligations regarding Schengen acquis.

To resume briefly on the part of the opt-in and outs, the UK and Ireland are in principle excluded from integration of the sector of freedom of movement, asylum and immigration, but may opt into Community law if they so desire, whilst Denmark is wholly excluded, except for visa policy, and can only opt for the possibility to apply acts building upon the Schengen acquis as a matter of regular international law.

It is considered that Danish opt–out has become an enormous obstacle to the normal development of Community law, in particular in the field of civil cooperation, where as Kuijper[71] notes ”even the Danish themselves hardly wanted it to be applied”. It is to be concluded that this variable geometry, as the exemption practice is called, tends to create confusion in this area of European Community legislation and it is hard to consider it as a success. Furthermore, despite that the Schengen Agreement has been incorporated into the EU, it has not been voted upon by any of the EU Institutions. Because of this, there are some concerns regarding the democratic accountability of the Agreement. For example, Greece, prior to accepting and signing the Agreement, raised questions about the legality of the Schengen Information System, and suggested that it represented a violation of privacy[72].

---

[69] Art.7 of the Protocol on the position of Denmark.

[70] Id. fn.34, p.300.

[71] Pieter Jan Kuijper, Article “The evolution of the third pillar from Maastricht to the European Constitution” , Common Market Law review, April 2004.

[72] Article ”The Schengen acquis and its integration into the Union”, source : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm from April 2006.

This and several other controversial questions inspired by the Schengen acquis are to be addressed further in this essay.

4 Immigration Law

As presented bellow, the Schengen Impelmenting Convention among other things deals with transfer of border controls on persons and provides for cross-border cooperation in the fields of criminal law, the law on asylum, aliens law and privacy.

Further in this paper, I shall focus on the provisions regulating immigration law, especially visa issues, and try to evaluate the effect that Schengen Implementing Convention, especially its immigration clauses, has on movement of persons. The Schengen States have agreed upon a large number of compensatory measures as a result of the elimination of internal border controls and in order to prevent the appearance of security deficit at the external borders of Schengen area.

The compensatory measure directly related to European immigration law are[73] :

- uniform standards governing external border controls (Art.3-8 SIC)
- a common visa regime (Art.9-18 SIC, now complemented with Regulations 1683/95 and 574/99 within their scope of application)
- common conditions regulating the movement of third country nationals within the area of Schengen States

Integration of the Schengen acquis and immigration policies into the framework of the European Union legal basis, has been a major step in the communitarization process[74].

4.1 General principles of crossing the external borders

As mentioned before Articles 3-8 of the Schengen Implementation Convention are the ones regulating the external border governance in the Schengen area, stipulating where the borders can be crossed, introducing penalties for unauthorized crossing of the border and also distinguishing between internal and external flights.

External border controls "shall be made in accordance with uniform principles, within the scope of national powers and national legislation,

[73] Hailbronner,K "Immigration and Asylum Law and Policy of the European Union"(2000), p.125.
[74] Ibid.

account being taken of the interest of all Schengen States"[75]. Additionally a person who has entered a Schengen State is able to travel freely within the entire area covering Schengen States territories subject to the conditions laid down in Articles 2(1) and 19-23 SIC. One very important thing that national border authorities must consider is that Schengen States have in effect delegated the competence to control entry into their territory to the States situated at the border with third countries, those outside the Schengen area. This border Schengen States are called "trustees" of "guarantors" in relation to the rest of the Schengen States, bearing the biggest responsibility in immigration issues having in mind the fact that they have to consider the cumulated interests of all Schengen States[76].

The uniform immigration principles continue to be elaborated in Article 6(2) SIC as well as in the Schengen Common Handbook adopted by a decision of the Executive Committee. This principles implies that persons entering the Schengen territory must establish their identity. Stricter controls in the sense of the Article 6 (2) (a) SIC may only be carried out if there are grounds for the presumption that the person in question constitutes a threat to national security and public policy making. The aliens are subject to thorough controls as defined in Article 6(2)(a) SIC pursuant to sub-paragraph (c).

The Schengen Common Handbook contains official instructions for the border police which task is to ensure that the surveillance of the external borders is executed in accordance with the uniform principles[77]**.** Beside the references to national legislation in Article 6 SIC, communitarized SIC provisions do not confer any competencies on national border authorities with respect to border controls[78]. In executing closer cooperation Schengen states should "assist each other and maintain constant close cooperation with a view to the effective exercise of checks and surveillance"[79]. For this purpose, the States shall "exchange all relevant, important information, with the exception of data relating to named individuals, unless otherwise provided in the Convention, shall as far as possible harmonize the instructions given to authorities responsible for checks and shall promote the uniform training and retraining of officers manning checkpoints"[80].

In addition, Article 7 also provides that "such cooperation may take the form of exchange of liaison officers". Exchange of liaison officers serves to mitigate organizational and language difficulties, and contributes to better understanding of respective national administrative structures. Cooperation is not only carried out between the Schengen States, but also between the

[75] Article 6(1) SIC.
[76] Hailbronner,K "Immigration and Asylum Law and Policy of the European Union"(2000), p.130.
[77] Ibid.
[78] Westphal, "Die Polizei" (1995), p.114,115.
[79] Article 7 SIC.
[80] Ibid.

Schengen States and neighboring Third Countries. These measures have substantially improved the effectiveness of external border controls[81].

4.2 Visa policy

Chapter 3 SIC talks about visa and visa policy stipulating that Schengen States have decided to harmonize their visa policy[82]. This can be regarded as a benefit for third country nationals since they do not have to apply for different visas for each EU State, but only for one type of visa, the Schengen visa.

Policy efforts to harmonize visa regime have started at the intergovernmental level but not much later the visa policy was added to European law[83]. The Palma Document, which is considered as a starting point for intergovernmental cooperation among the Member States to strengthen controls at external frontiers, listed the legal instruments to be agreed, for example the general list of countries whose citizens would be subject to a visa requirement, creation of a list of persons to be refused entry, harmonization of criteria for granting visas, and a European visa[84]. In the Maastricht Treaty, these questions were split between the First and the Third Pillars. A new article 100c, integrated in the internal market provisions of the EC Treaty, required the Council to "determine the third countries whose national must be in a possession of a visa when crossing the external borders of the Member States"[85].As a next step, as mentioned before, the Amsterdam Treaty fully communitarizes visa policy in Article 62(2)(b) ECT. Finally, the Schengen Protocol integrated the Schengen visa regime into the framework thus created, and the Council attributed this regime to Article 62(2)(b) ECT as the appropriate legal basis.

The common visa regime of the European Union now consist of :

* Article 62(2) (b) ECT and the relevant legal basis;

* The Community instruments adopted during the Maastricht era under ex article 100c ECT, which are :

    - Regulation 1683/95[86] of 29 May 1995 laying down a uniform format for visas which has communitarized the Schengen uniform format for short-term visas

[81] Id. fn.66, p.133.
[82] Article 9 SIC.
[83] Id. fn.71.
[84] Denza,E "The Intergovernmental Pillars of the European Union"(2002), p.304.
[85] Ibid.
[86] O.J. 1995 L 164/1; COM (94)28.

- Regulation 574/99[87] of 12 May 1999 determining the third countries whose nationals must be in a possession of visas when crossing the external borders of the Member States

* the SIC visa regime as attributed by the Council

* the intergovernmental instruments adopted pursuant to ex Article K.3.(2) TEU, in particular the Joint Action on airport transit arrangements of 4 March 1996[88].

4.2.1 Negative, positive and grey listing under the SIC

The harmonization of the visa policy under the SIC is a subject for unanimous voting as were also the three confidential (negative, positive, grey) lists adopted by the decision of the Schengen Executive Committee under Article 9(2) SIC and attached to the Common Consular Instruction .
The Schengen lists have not been added to EU legal bases, accordingly they only bind upon the Schengen group[89]**.** The negative or black list is specifically regulated by Regulation 574/1999 which establishes a common list of third countries whose nationals shall be required to be holders of visas when crossing the external borders of the Member States.

What may be considered as a lack of this Regulation is that it does not establish any criteria for deciding which third countries shall be added to the negative list although policy for prevention of illegal immigration and threats to internal security can be regard as basis for such determination[90]**.**
The Community negative list was modelled on the Schengen list, and in fact now it represents the Schengen list with exception of few countries[91].
This list can only be changed by unanimity voting of the Schengen group and the amendments must be altered into respective national laws[92].

The Schengen group has also created indicative, non legally binding, positive and grey lists. Positive list contains third countries whose national are exempted from visa obligations and the grey one determines third countries whose nationals must possess visa in at least one and, at most, six Schengen States**.**

---

[87] O.J. 1999 L 72/2.
[88] O.J. 1996 L 63/8.
[89] Hailbronner,K "Immigration and Asylum Law and Policy of the European Union"(2000), p.134.
[90] Id. p.136.
[91] The Commmission proposed to adopt the Schengen list as a Community list, which was accepted, but 28 countries have been removed from the Commission proposal.
[92] According to Article 9(2) SIC.

4.2.2 Regulation 574/1999

Regulation 574/1999 identifies visas granted for stay in one or several Member States for a period of no more that three months, or for transit through the Member States territory. Transits through the international zones of airports and transfers between airports in a Member State are determined by the Joint Action on airport transit arrangements. It is strange that visa requirements are partly determined by a Community regulation and partly by a Joint Action adopted within the framework of Title VI TEU, but this is a logical reflection of the dispute between EU Institutions on this question[93] .

4.2.3 The Schengen visa

The introduction of a uniform visa, under Articles 10 and 11 SIC, valid for entire Schengen area is considered to be the major step in the process of harmonization of visa policies under the Schengen Convention. Moreover because these two provisions later have been attributed to Article 62(2)(b) ECT.

Article 10(1) SIC stipulates that the uniform visa ”may be issued for visits not exceeding three months” similarly as Article 5 of the Regulation on uniform format for visas[94] also determines that visa can be issued for a stay in a Member State or for transit through the territory of airport transit zone**.** The Schengen visa has the same format representing all EU Schengen States and is issued on a sticker fulfilling all necessary requirements for the highest protection against counterfeiting[95]. The specifications for the uniform visa format are set out in the Annex of Regulation 1683/95. The visa should contain information, in particular concerning the Member State of emission, the place and date of issue, the territory for which the visa is valid, the period of its validity, the number of entries and the intended duration of stay.

The SIC provisions differentiate between conditions for third country nationals entering for short (not exceeding three months) and long stays. The Schengen entry regime is related to short-term visits only. Thus the Schengen group has established three categories of Schengen visas in the Common Consular Instruction :

(A) visa on airport transits;
(B) transit visa;
(C) visa for short visits

---

[93] Id fn.89, p.135.
[94] Regulation No.1683/95.
[95] Id. Fn.89, p.141.

Conversely, admission of aliens for long term-stays is regulated by the national laws of the Schengen States. Even those Member States which agreed on cooperation in the Schengen framework did not reach consensus with respect to entry regimes of long-term stays since their social and labour market legislations are substantially different[96].

However, on the basis of the Schengen acquis also, a valid residence permit issued by a Schengen State together with a valid travel document can substitute for a visa. Consequently, a third-country national presenting his/her passport and residence permit issued by a Schengen State can be allowed to enter another Schengen State for a short stay without needing a visa. Of course this equivalence does not apply to residence permits issued by the United Kingdom and Ireland, since they do not apply the Schengen acquis[97] .

[96] Id fn.89, p.147.

[97] Article "Same visa policy for all European Union Member States" source : http://europa.eu.int/comm/justice_home/fsj/freetravel/visa/fsj_freetravel_visa_en.htm from April 2006.

5 Visa for short visit

The Schengen States have reached an agreement on the conditions of entry for short-term visits. Application for this type of visas should be made at the Embassy/Consulate of the country which is the main destination of the journey. If the intention is to travel to several Schengen countries without having a main destination, one should apply for a visa at the Embassy/Consulate of the first country that one enters unless it is just a transit country. Honorary Consulates are not allowed to issue Schengen visas[98]. A Schengen visa enables a person to visit one or several of the Schengen countries for business, tourism, visiting friends/relatives etc. for a maximum of 90 days every six months. The holder of this visa is entitled to travel freely to all EU Member States, except for UK and Ireland. The right is, however dependent of continuous fulfilment of entry requirements[99].

The uniform visa may only be issued if a third country national meets the conditions of entry from Article 5(1) SIC[100], which are :

- be in a possession of a valid document or documents permitting him to cross the border, as determined by the Executive Committee;
- in possession of a valid visa if required ;
- if applicable, submits documents substantiating the purpose and conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to a return to his country of origin or to travel in transit in a Third State, into which his admission is guaranteed, or is in position to acquire such means legally;
- has not been reported as a person not to be permitted entry;
- is not considered to be a threat to public policy, national security or the international relations of any of the Schengen States

Member States therefore, have an obligation to check the SIS system in order to establish whether this conditions are fulfilled, which means that if a third country national must be refused entry pursuant to Article 96 SIC, any application for visa must be refused[101]. Member States can only derogate from this principle as stipulated in Article16 SIC " on humanitarian grounds or in the national interest or because of international obligations". Conversely, Schengen States **do not** have any obligation to issue visa for admission to their territories a third country national who meets all the requirements for entry contained in Article 5(1) SIC read together with Article15 SIC[102]. In providing that visas **"may be issued"** if the relevant

[98] Article **"**Schengen Visa" source : http://www.eudelindia.org/en/features/schengen_visa.htm, from April 2006.
[99] Art.19(1) SIC read together with Art. 5(1)(a) and (d+e) SIC.
[100] According to Article 15 SIC.
[101] Id. fn.89 p.144.
[102] Ibid.

conditions are met, Article 15 illustrates that EU States have discretional right of refusing entry in their territories and that, despite the set conditions they have the last word. This means that aliens who fulfil all the conditions numbered in Article 5(1) SIC do however not have a right to admission for a short visit. In this way the Schengen States will have the competence to additionally adopt an admission policy with regard to an alien who fulfils all the Treaty conditions, which can result in more demand being made on the alien then those provided in the law, in this case the Schengen Convention[103].

The situation makes an alien dependent on the Consular administrator good will and his wide scope of appreciation. Another practical consequence is that it can substantially prolong the procedure of granting visas, since an alien is given additional time for submission of supplementary documents which are then revised, possible to happen in several repetitions which leaves the alien with reduced legal certainty.

According to H. Maijers this is a ”retrogressive move in comparison with the international freedom of movement given after the second world war through the abolition of the visa requirements considering that the right to visit is now being lost again”. Furthermore, one can think that in this sense the Schengen Convention may violate the Helsinki Accord’s obligations on States not to put new impediments for the movement of persons[104].

Communitarization of this part has not change anything because Title IV is equally based on the idea that third country nationals cannot claim the right of entry into the Member States regardless of whether relevant entry regime derives from a supranational or national source[105].

5.1 The purpose and conditions of visit

One of the conditions for obtaining visa is for an alien to “submit documents substantiating the purpose and conditions of the planned visit”[106].
The particular obligation has provoked some debates on the question whether it should be considered as an infringement of privacy, especially the requirement where one must describe his relation with another person he plans visiting. This can include showing telephone bills, recent and old pictures and other parts of person’s private life. It has been argued that such a violation of privacy cannot easily stand the proportionality test considered in the light of Article 8 ECHR.
In Meijers opinion there is no objective necessity for the control of the purpose of the visit.

---

[103] Meijers,H “Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police” (1991), p.64.
[104] Id. p.65.
[105] Hailbronner,K ”Immigration and Asylum Law and Policy of the European Union”(2000), p.145.
[106] Article 5(1) SIC.

The said competence can create confusion for the immigration officers complicating their responsibility to be objective because of the fact that the above mentioned information inevitably would create impression for the alien which can influence the officers. According to him "it is just embarrassing to, apart from providing information to substantiate ones means of support, make public further plans and information and additionally undergo a "a check on one's person"". Meijers suggests that it is maybe better to leave to the alien in question to raise this subject where he estimates it is necessary instead of immigration authorities asking for data of purpose and conditions of the planned visit

One the other hand Kay Hailbronner is of the opinion that "even assumed that the obligation to declare the purpose of visit is an intrusion of privacy, such intrusion would be justified in accordance with the limitation resting on Article 8 ECHR", which provides :

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

He sees the requirement to control the purpose of the visit as a suitable and necessary measure to determine whether a third country national must be considered as a threat to public policy, national security or the international relations of a Schengen State. Still, this issue whether public order or the individual privacy interests take priority should be determined on a case-by-case basis. Moreover, according to him, as long as the sovereign right of states to refuse entry of alien is upheld, it must be concluded *a maiore ad minus* that the obligation to submit necessary documents for the purpose of being granted entry is justified by the sovereign right in question.

I personally can not agree that the sovereign right of the State, national security and public policy can be protected only by declaring the purpose of visit or even by submitting the evidence for the relationship with the person you are planning visiting. This requirement sometimes can attack humans dignity, create a feeling as if someone is already suspect even more because the procedure of applying this request is not clearly defined and is again left to the administrator's wide discretion of acting and asking for different evidences as a support of the purpose of visit. In my opinion it is invasion of privacy indeed and not only not justified according to the Article 8 ECHR but not even a good way of protecting State's national security.
Even though I can agree with the part that **"**the obligation to submit **necessary documents** for the purpose of being granted entry is justified by

the sovereign right in question". Submitting documents yes, that kind of obligation I agree, must exist but the controversial point is what kind of documents? Is the disclosure of private documents necessary for the protection of the State?

There must be a better way of solving this question. I can think of more severe checks in Member States national security networks whether the person has left the country after visa expiration. Closer cooperation and information exchange between national security systems of Member States and the third countries perhaps can also serve the purpose.

The obligations to prove sufficient means or of being in a position to legally acquire the means for self-support during the intended period of sojourn and transit costs which can be submitted in cash, credit cards, traveler's cheques or other appropriate guarantees, goes in the same line of reasoning with the providing documents for the purpose of visit[107].

5.2 Reporting aliens for the purpose of being refused entry

As mentioned before, entry to the territories of Schengen States must be refused where a third country national has been reported as a person not to be permitted entry. The term 'reported' is defined in the Schengen Convention and refers to persons listed in the Schengen Information System for reasons numbered in Article 96 SIC. This situation is called 'alert' and signifies indication for the immigration officers not to admit the person in question or to expel him[108]. The decision to report is taken by the reporting state in compliance with its domestic legislation but applies to the whole Schengen territory unless in exceptional circumstances, on the objection of one of the other parties the information is recorded on a national reporting list[109].

The report may according to Article 96(2) SIC be based on a 'threat to the public order or national security and safety which the presence of an alien in national territory may pose '. Such may in particular be the case with an alien who has been sentenced to at least one year of imprisonment for an offence or an alien who, upon sufficient grounds for belief has committed serious offences including those referred to in Article 71 SIC, or against whom there is genuine evidence available of an intention to commit such offences. Describing the cases of threat to public order or national security as 'particular' examples, Article 96(2) SIC does not present an exhaustive list of reasons for reporting of third country nationals for the purpose of being refused entry. Schengen States may, therefore, introduce additional

[107] Id. fn.105, p.149.
[108] Id., p.150.
[109] Id. fn.103, p.67.

grounds as an example of public order or national security concerns. Additionally, Article 96(2) SIC leaves a wide scope of evaluation to Schengen States' legislation with respect to the determination of grounds for registration in the SIS. For example, reference is made to 'national security'. This phrasing indicates that national concepts of 'security' shall be recognized at European level rather than exchanged by a uniform European approach[110]. What's more, in defining offences carrying a custodial sentence of at least one year as a potential case of threat to public order or national security, Article 96(2)(a) SIC implies that policy decisions taken with a view to periods of sentences, at the national level, shall be fully respected**.**

The report may also be based on fact that the alien has been the subject of a deportation, removal or expulsion order due to non-compliance with national regulations on the entry or residence of aliens[111]. The wording of Article 96 is vague, allowing the parties every opportunity to maintain their own criteria which means that again, national *ordre public* concepts must be recognized under the reference to national regulations on entry or residence of aliens**.** The report applies to the whole territories of the contracting parties and thus has consequences in a non reporting state, meaning that the fact that concepts of public order or national security may differ between the Schengen States will sometimes result in a third-country national being reported by one state and refused entry by another on that basis, even though his behavior would not have constituted grounds for reporting in the second State[112]**.**

If, under article 5(2) SIC, a Schengen State admits any third-country national who has been reported on the grounds specified in this provision, that State must restrict the permission to enter to its territory and inform the other Schengen States accordingly**.** A Contracting party may only oppose data on an alien reported by another State if it has evidence to suggest that that item is legally or factually inaccurate or if it has issued the alien with a residence permit valid for its territory.

As the practice showed, there was some misunderstanding among the States regarding the interpretation of this provision and obligations of Schengen States, luckily resolved by the Court of Justice in the case presented below.

[110] Id. fn.105, p.150.
[111] Article 96(3) SIC.
[112] Meijers,H "Schengen-Internationalization of central chapters of the Law on aliens, refugees, security and the police"p.67,68, Hailbronner, K "Immigration and Asylum Law and Policy of the European Union", p.150,151.

5.2.1 The ECJ Opinion on the relationship between the States regarding the SIS obligations

For the first time the ECJ gives an explanation on the relationship between the Convention Implementing the Schengen Agreement and freedom of movement for persons in its judgment in the case Commission v Kingdom of Spain[113]. In this case the Court solves the confusion among the Schengen Sates concerning the interpretation of Schengen provisions in particular those related to SIS.

The European Commission brought proceedings against Spain before the Court of Justice of the European Communities following complaints from two Algerian nationals, Mr. Farid and Mr. Bouchair, who were the spouses of Spanish nationals, living in Dublin and London respectively. The Spanish authorities refused to issue a visa and to allow them entry into the Schengen Area on the sole ground that they had been placed, by Germany, on the SIS list of persons to be refused entry as posing threat to public policy or national security[114].

In its defense the Spanish Government contended that it was only following the administrative practice which complies with the provisions of the SIC as part of the Community law. The Spanish Government also argued that under Articles 94(1) and 105 SIC the assessment of whether there are circumstances justifying entry of an alert for an alien into the SIS falls within the competence of the State which issued the alert, in this case the Federal Republic of Germany, which is responsible for ensuring that the data entered into the SIS is accurate, up-to-date and lawful, and is the only State authorized to add to, correct or delete that data[115]. In their understanding, the other Contracting States, are obliged, in accordance with Article 5 and 15 SIC , to refuse entry or a visa to an alien for whom an alert has been issued as they did in this case[116].

The Court, in order to clear this confusion, explained the relationship between the SIC and Community law on freedom of movement for persons.

It observes that the Schengen Protocol confirms that provisions of the Schengen *acquis* are applicable only if and in so far as they are compatible with European Union and European Community law. Closer cooperation in the Schengen field must be conducted within the legal and institutional framework of the European Union and with respect for the Treaties[117].

[113] Judgment of ECJ from 31 January 2006 in case No. C-503/03.
[114] Press release No.07/06.
[115] Paragraph 36 from the Judgment.
[116] Ibid.
[117] Paragraph 34 from the Judgment.

It follows that the compliance of an administrative practice with the provisions of the SIC may justify the conduct of the competent national authorities only in so far as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons[118].

The Court has always emphasized that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons which must be interpreted strictly. According to the settled case law[119] reliance by a national authority on the concept of public policy presupposes a genuine and sufficiently serious threat affecting one of the fundamental interests of society. However, as stipulated in paragraph 48 of the Judgment, circumstances such as a penalty involving deprivation of liberty of at least one year or a measure based on a failure to comply with national regulations on the entry or residence of aliens may provide a basis for an alert in the SIS for the purpose of refusing entry on grounds of public policy. Entry into the Schengen Area or the issue of a visa cannot, in principle, be granted to an alien for whom an alert has been issued for the purposes of refusing entry[120].

As the Court makes clear, the Contracting State may issue an alert for such a person but only after establishing that his presence constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Furthermore, a Member State which consults the SIS must be able to establish, before refusing entry into the Schengen Area to the person concerned, that his presence in that area constitutes such a threat. The Court recalls, in that connection, that the Schengen system has the means to answer requests for information made by national authorities faced with difficulties in enforcing an alert, referring to the SIRENE system which was specifically designed for that purpose[121].

Therefore, the Court finds against Spain on the ground that the Spanish authorities refused entry to Mr. Farid and Mr. Bouchair without having first verified whether their presence constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

By this judgment the Court clarifies the interpretation of the Convention stating that if one Country considers someone as an alert and refuse that person an entry it can not automatically be considered that the person in question may not enter any other Schengen State but this question must be resolved on a case-by-case basis by each Member State according to its national security policy.

[118] Paragraph 35 from the Judgment.
[119] Case 36/75 Rutili prg.28, Case 30/77 Bouchereau prg.35.
[120] Paragraph 49 from the Judgment.
[121] Paragraph 55,56,57 from the Judgment.

5.2.2 SIS controversy

The SIS has been described as the 'heart' of the Schengen co-operation. The novelty of the SIS is that for the first time law enforcement agencies in Europe are able to exchange information online. While such development enhances the capacity of law enforcement authorities, it may on the other hand cause injuries to person's privacy and protection of personal data.

Many people have access to data registered in the SIS, in particular, the whole police forces in all member countries. With about 48 000 terminals in member countries connected to the SIS, it is easy to imagine the number of people with access[122]. The Schengen Convention does not regulate data protection instead that is left to national legislation of the Contracting Parties which may easily create different levels of protection since the national legislation is different from country to country. As said before, data protection provisions in the Schengen Convention have serious flaws which can be reflected in undermining individual protection. The conditions for registration into the SIS are vague and wide therefore can be used to register persons for many different reasons, some which are openly political and has nothing to do with violation of immigration laws[123].

Another critic for the Schengen Convention is the eventual threat to privacy posed by the Schengen Information System. Namely, the exchange of information on the undesirable aliens is ensured by the co-operation of police forces. Although there are provisions aimed at offering some protection from abuse of the information, there is wide criticism relating to the eventual danger to personal freedom especially as the Treaty lacks any supra-national judicial control[124]. Similarly, compensation for injury caused to a person through the use of the data filed in the SIS is regulated by national law. Action for right of access and compensation may be brought in any member country which can result in "shopping around" for the country with the most favourable laws[125].

The provisions of the Convention in relation to the SIS system, have provoked many doubts, controversial questions and debates. Legal analysts consider some parts of these provisions also as not transparent enough.

For example, the Convention does not oblige a State to back report with a reasoned opinion, nor does it contains a provision regarding a legal remedy

---

[122] Karanja,S "The Schengen Treaty" source: http://folk.uio.no/stephenk/pub/notused_english.shtml from April 2006.

[123] Ibid.

[124] European Parliament 1992, p 20, Brochman 1995, p 88.

[125] K.Karanja,S "The Schengen Co-operation: Consequences for the Rights of EU Citizens"(2000) source: http://www.personvern.uio.no/pvpn/artikler/M&R2Article.htm from April 2006.

against that report, the only thing is the reference made to domestic procedures[126].

The Committee on Civil Liberties and Internal Affairs of the European Parliament has noted that "police services are in a sense exploiting the internationalisation of the maintenance of law and order to increase their power or acquire new ones which they would probably not be granted by their own national parliaments"[127]. This deficit has been harshly criticized as elaborated below.

Furthermore, the Schengen Convention does not provide the alien with the right to be informed about the data concerning him but oddly enough he may require that any inaccurate data must be corrected. Under Article 111(1) SIC "Any person may, in the territory of each Schengen State, bring before the courts or the authority competent under national law an action to correct, delete or provide information or obtain compensation in connection with a report concerning him". He can do so only if he has any knowledge about the fact that he has been reported. Having in mind the serious consequences of reporting it would be desirable that the Contracting Parties are constrained to notify and also make available a legal remedy against any such report[128].

Despite all this critics about the Schengen Information System, in practice it seams that European Union authorities do not agree with respective opinions. Having in mind the fact that the new Member States will not be able to participate in the present SIS due to high technological requirements, the Council and European Parliament have made proposal for a Regulation on the establishment, operation and use of the second generation Schengen Information System (SIS II)[129].

The purpose of the SIS II shall be, in accordance with this Regulation, to maintain public policy and a high level of public security, including national security, in the territories of the Member States**.**

The proposal is introducing a number of new functions for the SIS, it will be retaining more types of personal information and providing wider access to law enforcement and administrative agencies[130].

---

[126] Meijers,H "Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police" (1991) p.67.

[127] European Parliament 1992, p 20, Brochman 1995, p 88**.**

[128] Id. fn.126, p.68.

[129] COM (2005) 236, 2005/0106 (COD).

[130] Statewoch, source : http://www.statewatch.org/news/2002/apr/01sis.htm from May 2006.

SIS II is introducing four new functions. One of them is to create a database of violent individuals who are supposed to be prevented from travelling to certain events during certain periods, and the second database will be detailing all issued and refused visas. The other two new roles for the SIS would be to create a "restricted access terrorist database" and a new category of "persons precluded from leaving the Schengen area", including people under criminal investigation, individuals on conditional release and children at risk from abduction[131]. According to the proposal SIS II will contain new additional "identification material" such as photographs, fingerprints and "possibly even other material[132]" as well as "intelligence markers", or police supposition, which would bring in suspected offences, any "psychological danger", and objects "owned, held or used". The document also suggests biometrics records that would be linked by "SIS II to national databases for facial recognition, number plate recognition and fingerprint identification". It is claimed that this would allow greater data protection supervision.

The proposal for SIS II has been faced with the same type of criticism as for the present SIS. But obviously the EU Justice and Home affairs authorities are of the opinion that security system in EU should be strengthen, because of which there has been a proposal for establishment of a third information system presented as follows.

5.2.3 Visa Information System (VIS)

The Council has decided to establish a Visa Information System (VIS). It adopted the conclusions for the purpose and the structure of the VIS on 19th February 2004 after which the European Commission has adopted a proposal for a Regulation constituting the Visa Information System (VIS), the instrument for the exchange of data between Member States on short-stay visas. The purpose of the VIS system will be exchange of visa data between Member States and it will constitute a tool to support the common visa policy. Its task will also be to facilitate checks at the external borders and within the Member States, the application of the 'Dublin'-Regulation determining the Member State responsible for examining an asylum application and the identification and return of illegal immigrants[133].

[131] Ibid.

[132] A debate is going on about DNA profiles but it is not officially confirmed.

[133] "Proposed Visa Information System (VIS) enhances security and facilitates travelling in EU" (2005) source : http://www.traveldailynews.com/new.asp?newID=20406&subcategory_id=95 from May 2006.

The Commissioner responsible for Justice, Freedom and Security, Vice-President Franco Frattini, defining the purpose of the VIS system, has noted that : "VIS has two main goals: contributing to the internal security of the Member States and the fight against illegal immigration by supporting the common visa policy and the checks on the visa applicants, thereby facilitating bona fide travelling in the Schengen area without internal borders"[134].

More particular, the VIS is suppose to meet the following objectives:

- constitute an instrument to facilitate the fight against fraud, by improving exchanges of information between the Member States (at consular posts and at border crossing points) on visa applications and responses thereto;
- contribute to the improvement of consular cooperation and to the exchange of information between consular authorities;
- facilitate checks that the carrier and the holder of the visa are the same person, at external border checkpoints or at immigration or police checkpoints;
- contribute to the prevention of "visa shopping";
- facilitate the application of Dublin Regulation (EC) No 343/2003 determining the State responsible for examining applications for asylum;
- assist in the identification and documentation of undocumented illegal migrants and simplify the administrative procedures for returning citizens of third countries;
- contribute towards improving the administration of the common visa policy and towards internal security and to combating terrorism[135].

According to the projects, the VIS shall be composed of a European central database, which will be connected to the national systems enabling consulates and other competent authorities of the Member States to enter and consult data on visa applications and the decisions taken thereto[136].

The VIS is designed to enclose extensive personal information supplied by people who apply for a visa to the EU territory, such as:

- the applicant's identity

- the type of visa in question: Schengen uniform visa or "national visa", long or short term

- the status of the visa: visa requested, issued, formally refused, annulled, revoked or extended

[134] Ibid.

[135] Source：
http://europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_vis_en.htm from May 2006.

[136] Id. fn.133.

- the authority that issued the visa (including border crossing points) and whether that authority issued it on behalf of another State

- the authority that formally refused, annulled, revoked or extended the visa and the grounds for doing so

- the record of persons who issued the invitations and who are held liable to pay board and lodging costs

- The digitized photographs, or original photographs of the visa applicants taken with a digital camera, will also be included.

Among the data to be processed in the VIS, alphanumeric data and photographs will take place, but also fingerprints of the applicants to ensure exact verification and identification. The Council and the Commission are ensuring that the clear definition of access rights and the purposes for which the data may be consulted, the responsibilities for its use and supervision shall ensure a high level of data protection[137].

The VIS is created to be a two-tier system consisting of a Central Visa Information System (C-VIS) and a National Visa Information System (N-VIS) in each Member State. Visa, immigration, police, and security agencies will all be able to search VIS provided that visa data are required for the performance of their tasks. It is said that only visa-issuing authorities can enter and update data making sure that the information will be kept for "at least five years" after the decision on whether to grant the visa[138].

The Council's suggestion is that the VIS system should be included in the same technical architecture as the Schengen information system. The VIS is expected to be up and running by 2007 but even its proposal has initiated some criticism by different parties.

In the Communication from the Commission to the Council and the European Parliament of 11 December 2003[139] the Commission is recommending synergies to be made between Schengen Information System II and a future Visa Information System (VIS) involving in particular a common technical platform.

[137] Ibid.
[138] Article "Visa holders visiting the EU to be put on a European database", source : www.euractiv.com from May 2006.
[139] COM(20003) 771 final - Not published in the Official Journal.

5.2.3.1 VIS Criticism

The EU Article 29 Data Protection Working Party has issued a critical report on the proposed Regulation on the Visa Information System (VIS). The report opens by saying[140]:
”The project of setting up a central database and a system of exchange of information concerning short-stay visas raises important questions for fundamental rights and freedoms of individuals and in particular their right to privacy. It will lead to a massive collection and processing of personal and biometric data, their storage in a centralised database and to large scale exchanges of information concerning a huge number of persons." It notes that the VIS central database is intended to deal with 20 million visa applications a year resulting in 70 million set of fingerprint data within five year (an estimated 30% will be frequent visitors).

Stateswatch also worry that these programmes will erode privacy for which it stated that "Taken together, SIS II and VIS will introduce the surveillance of the movements of everyone in the EU - citizens, legally resident third-country nationals, visa entrants and irregular migrants - and the storage of their personal data on an unprecedented scale.(...) These systems will be used for speculative surveillance, general intelligence gathering and "fishing expeditions", but more importantly, individual records will increasingly result in coercive sanctions, such as the refusal to travel, the refusal of visa or asylum applications, the refusal of admission to a country at external borders, detention pending extradition, even deportation"[141].

The great concern also is the possibility of the data being used for other purposes. Due to the sensitivity of the biometric data the Working Party asks for the reason that would justify such a decision and whether there was no alternative approaches that could answer the same need but in a different manner involving lower risk

This question can be related to principle of proportionality and as well fundamental legitimacy of collecting these data which does not only concern the processing procedures. According to the Working Party the attention should also be drawn to the possible expansion of the access scope to include entities other than those that had been envisaged initially[142].

[140] EU Data protection working party criticize proposals on VIS (Visa Information System) source : http://www.statewatch.org/news/2005/sep/09eu-vis-art-29-rep.htm from May 2006.
[141] Article “Visa holders visiting the EU to be put on a European database”, source : www.euractiv.com from May 2006.
[142] Id. fn.140.

5.3 Public Policy and National Security

Finally, third country nationals must be refused entry if they are 'considered to be a threat to public policy, national security or the international relations of any of the Schengen States'[143]. Because the concepts of public policy vary among Schengen States the third country nationals are under obligation to meet the public policy requirements not only of the Schengen State they wish to enter but also those of all other Schengen States. Consequently, if third country national is considered to be a threat to the order public of one Schengen State he may not be granted visa for the whole Schengen territory.

Narrow interpretation of Article 5(1)(e) SIC would imply that the Schengen State with the strictest order public definition will be the one defining the standards for all Schengen States in connection with granting of visas[144]. However, such narrow reading and the situation it can create may be considered as a reason more for the Schengen States to adopt a common visa policy in a near future**.**

[143] Article 5(1) (e) SIC.
[144] Hailbronner,K "Immigration and Asylum Law and Policy of the European Union"(2000), p.151.

6 SIC and the Rule of Law

6.1 SIC Provisions Regarding Judicial Review

Taking into account that international treaties which Schengen Convention primary was, may be self-executing there was a discussion of whether some SIC provisions have direct effect. Currently SIC provisions bind upon Schengen States in their capacity as Community law but their legal force in relation to individuals should be considered separately[145]. At present, neither SIC provisions nor decisions of the Executive Committee, although implemented in the EU legal basis, meet the criteria for imposing self-executing obligations. The jurisprudence of the European Court of Justice cannot be relied upon to construe self executing obligations related to individuals under Community law, unless such obligations can be obtained from Regulations of the Community. For example if a third country national is being refused entry to a Schengen State's territory he can not judicially resolve the issue at the European level. Accordingly, the third country national may only challenge respective decisions for reason of alleged misuse of discretionary power at national level subject to relevant national law[146].

Moreover, the provisions in the Schengen Common Handbook and the Common Consular Instruction do not take direct effect either. Individuals cannot rely on provisions of the Handbook or the Instructions to enforce any right and conversely they don't impose any duties to individuals. The Handbook is binding for border authorities only, and the Common Consular Instruction contains official instructions for the consulates and embassies of Schengen States created make sure that SIC visa provisions are applied according to the uniform principles adopted.

The most important role in the visa decision process is reserved for the Executive Committee which decisions as said before can not be appeal at European Level what constitutes a great flaw of the Convention and communitarized European law in the same time. This body is responsible for setting up the general set of rules for the examination of visa applications, the conditions regulating the issue of visas at the border, the requirements for the extension and refusal of visa, and the principles governing the preparation of a SIS common list[147]**.** In short, its task is a mixture of legislation and jurisdiction but without being public and without any form of direct and specified control by a democratically elected body.

[145] Id. fn.144, p.151.
[146] Id. p.152.
[147] Meijers,H "Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police" (1991), p.68.

Boeles[148] drown attention to the risk that the authority to issue visa will be recognized in the Executive Committee. That would imply that there is no legal remedy against the refusal to grant a visa because the national judge is in general not authorized to examine decisions taken by international organs and the Schengen Convention does not provide for any remedy either.

Unfortunately this is exactly what sometimes happens in practice and it has become ordinary practice which no one questions.
For example when searching for information on Czech visa[149], you will find this information related to the legal remedy of the visa decision.

"In case the visa is not granted there is no legal title to change the negative decision. The processing fee cannot be returned in case that your application is rejected or in case that you don't use the issued visa to travel to the Czech Republic"[150].

That is not a pleasant situation for any applicant for visa since it undermines the principle of legal certainty even more having in mind the fact that many of the Schengen provisions leave a wide margin for appreciation and discretionary powers to the Consular administration.
In order to be in line with the European law and the legal certainty it provides in the other legal spheres it might be desirable a separate European Administrative Appeal Court to be established**.**

6.2 The role of rule of law

Due consideration must be given to the role of the rule of law in relation to the area of granting visas and admission. Criticism of the current regime is result of the accumulation of entry conditions in the absence of a obligation to admit aliens who fulfill all entry conditions[151]**.** Related criticism focus on the questions of whether third country national whose visa application or entry into the Schengen area has been refused is entitled to be issued a reasoned opinion for the decision, and whether he can review the decisions for reporting him in the SIS[152] **.** The SIC provisions do not oblige Schengen States to either justify or to inform the alien of refusal of entry. Furthermore, frequently Member States do not give written reasons for refusal of a visa application or denial of entry. Some would justify this type of conduct as supremacy of the public interests over any private interest to be granted relevant information, since it would be practically difficult to supply reasons for millions of relevant decisions.

---

[148] Boeles, "Free Movement of Persons : Human Rights at the External Frontiers"(1990).
[149] Czech Republic is a Member State of EU, signatory of the Schengen Agreement, waiting for implementation by the end of 2007.
[150] Czech embassy in Sweden , source : http://www.mzv.cz/wwwo/default.asp?id=27723&ido=14586&idj=2&amb=73&ParentIDO from May 2006.
[151] Id. fn.144, p.158.
[152] Ibid.

In Hailbronner's opinion, taking into account that generally no one has an individual right to be issued a visa or granted entry, substantive human rights under either international treaties or constitutional law are not affected by refusal of a visa application. Still any third country national has a legitimate, though not legally acknowledged interest to be informed about the reasons for any refusal and to have opportunity to make corrections to a decision based on unlawful or incorrect assumptions.

One suggestion for a solution may be that national law offer more favorable treatment to third country nationals concerned[153]. So, the legitimate interest of the alien to be provided with a reasoned opinion for visas rejections may be accepted at national level although giving written reasons for a negative decision can not be recommended for practical reasons[154].

Well known criteria for the refusal of visa are the failure to meet the general requirements for admission and the risk of overstaying which makes the decision bodies of Schengen countries particularly careful when issuing visas. Sometimes the impression is that Schengen States use a policy of discouragement by not granting visa in the first instance and only examining the application after the person in question has insisted[155]. In case the decision is negative the communication of it is not in writing nor is there any indication of the grounds for refusal. In this situation, it is very difficult for the applicant to take any action against the refusal.

Another mode of discouraging visa applications is the visa fee which is not refundable in any case and is to be paid in advance. The evidence in line with this observation is the recent proposal of the Council for doubling the amount of the fee for obtaining visa which is the same for all Schengen countries. Having in mind the fact that in general third countries on the list for obtaining visas are developing countries, the high amount of visa fee is a god way of discouraging aliens for applying for visa but in the same time it represents an obstacle more for free movement of persons especially young people with the need to travel and gain useful experiences.

[153] Id. p.159.
[154] Id. p.160.
[155] Id. fn.147, p.69.

7 Application of Schengen visa policy in R.Macedonia

In order to explain how the Schengen visa regime works in practice I will briefly present the Macedonian experience.

The Republic of Macedonia is one of the countries on the "black list"-countries whose citizens need to be in a possession of a Schengen visa for entering the largest part of European Union territory. Accordingly, Macedonian citizens for many years now have to plan their intended, for example, one week stay in one of the EU Countries, usually one month in advance. They generally spend days in visiting a number of Institutions for obtaining the required documents and evidences which will make them eligible for a Schengen visa, next go stand in long queues from the early morning hours, long before the respective Embassy or Consulate opens, submit them selves to unpleasant 'interview' which closely resembles an interrogation and finally they wait for days for a decision to come if they are lucky not to be asked for additional documents which of course will prolong the procedure.

This are the steps that a Macedonian citizen has to go through if he wants to go and visit some European metropolis, a football match, business meeting or attend some kind of seminar.

Obviously this procedure signifies an impediment of free movement of persons, an obstacle to exchange cultural habits, knowledge, experiences and ideas, which contradicts the main idea and purpose for creation of European family continuously enlarging and accepting new Member States. Moreover, the freedom to move from one European country to another is a fundamental precondition for ensuring that especially young people can contribute to European integration and growth[156].

7.1 Relations between R.Macedonia and EU regarding Schengen visa regime

Article 310 EC Treaty provides for the conclusions of agreements between the Community and Third countries or international bodies. In this sense Member States are collectively to conclude agreements with Third states, notwithstanding any bilateral agreements they might have with those Third Countries[157].

[156] Youth Forum Jeunesse, source : www.getvisable.org from May 2006.
[157] Rogers,N and Scannel,R "Free movement of persons in the enlarged European Union" (2005), p.247.

An example of this kind of agreement is the Stabilization and Association Agreement signed between Republic of Macedonia and the European Union on April 9, 2001 ratified by all Member States and put into force on April 1,2004.

In the field of Justice and Home Affairs, this Agreement anticipates that special attention will have to be paid to strengthening Institutions at all levels: in the area of administration in general, the enforcement of law and the functioning of legal mechanisms in particular. This especially regards the strengthening of the rule of law. The parties also agreed to cooperate in the areas of visa, border control, asylum and immigration setting up a framework for this cooperation which will include technical and administrative assistance for among other things training of staff and security of travel documents as well as detection of false documents[158].
In the field of legal migration the Republic of Macedonia agreed to readmit any of its nationals illegally present on the territory of a Member State[159].

Since visa regime has always been a debatable question between Republic of Macedonia and European Union, the EU established conditions which Macedonia should fulfil with an aim of facilitation and liberalization of the Schengen visa policy. Among the requirements that R. Macedonia must fulfil are the conclusion of the re-admission agreements with the EU Member Countries, police reform with more intensive training of the border police and issuance of new passports in line with the EU standards, including fingerprints[160].

At present Macedonia is governing an intensive campaign for the facilitation and liberalization of Schengen visa regime. The concrete suggestions are the procedure to be simplified and more dignified for those who apply for visa with multiple entrances and longer stays. This ultimate goal will be reached by a set of smaller practical steps such as privileges for diplomats, businessmen and free of charge visas for students, scientists, sportsmen and transporters[161].

This is just one suggestion of answering the problems regarding visa policy of the European Union which can be acceptable for both sides, the EU and the Third Countries and yet in the line with the European integration.

[158] Article 75 from Stabilization and Association Agreement (SAA).
[159] Article 76 SAA.
[160] Ministry of Foreign Affairs of Macedonia, source : http://www.mfa.gov.mk/ministerstvo from May 2006.
[161] Sector for European Integration , source : www.sei.gov.mk from May.2006.

8 Conclusion – SIC immplications on the free movement of persons area

The Schengen Convention was faced with a great criticism first of all because of the secret atmosphere in which it was created and the lack of openness it is still surrounded by, as well as because of insufficient democratic control and especially the role of the Executive Committee[162].

Another important objection already elaborated, is the absence of a general independent judicial control which can be remedied either by a separate independent judicial body or by expanding the jurisdiction of the Court of Justice to have control in individual matters as well[163]. Further flaw of this Convention is the impact that Schengen Information System has on individual's private life.

Shortly, in order to make a resume of the impact that Schengen Convention and especially the implications its visa regime has on the free movement of persons, one should make comparison between advantages and disadvantages that this Convention is offering.

Undoubtedly this Convention has certain advantages for aliens already residing in the territory of one of the Contracting States, since there is no visa requirements when they wish to travel within the European Union territory. Furthermore, people admitted for a short visit can travel through the whole Schengen territory with the same visa. An advantage more is that there is no control on persons at the internal borders.

On the other hand, the intensification of external border controls and of national controls of persons oppose this advantages[164] and it is obvious that the limitations of the Schengen Convention, considering free movement of persons especially affect the nationals of third states.

This can be concluded from the discretion authority of the State in regards to entry for short visits, which gives the State right to pose additional requirements which go further than sufficient means and threat to public order. The Signatorie States undertook to pursue a common visa policy without any guarantees that the criteria for issuing the visa will be made public and that the procedural guarantees will be respected[165].

---

[162] Joubert,C and Bevers,H "Schengen Investigated"(1996), p.36.
[163] Ibid.
[164] Meijers,H "Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police" (1991), p.72.
[165] Id., p.73.

The abolition of the right to short visit and the range of the visa obligations represent obstacles to the mobility of persons and exchange of different cultural experiences which is in contradiction with the main aim of the European Community, enlargement of Europe by accepting new countries. It makes more difficult the opportunity especially of young people to travel, get education and exchange experiences with people from the European Union which is a loss for both sides.

This European policy may be the result of the fear of EU Countries from the expansion of people from the third countries in their territories resulting in uncontrolled migration. However, considering the fact that the Schengen Convention is in force for many years now and there has been no appreciable expansion of the movement of persons its impact can be felt more on the restrictions which have been intensified.

It can therefore be concluded that maybe it is time for changes since the movement of persons does not on its own justify the construction of the Schengen visa policy as it is at present.

Conversely, seeing that the changes in international migration are apparently a result of migration due to its humanitarian character, considering the recent wars and great number of refugees all over Europe, the Contracting parties could focus their attention to try to face this new development upholding their humanitarian and human rights engagements[166].

[166] Ibid.

Bibliography

LITERATURE

David O'Keeffe and Patrick Twomey — "Legal Issues of the Amsterdam Treaty", Hart Publishing Ltd,1999.

Denis Martin and Elspeth Guild — "Free Movement of Persons in the European Union", Butterworths a Devision of Reed Elsevier (UK)Ltd,1996

Dr.iur.Pierre Garrone — "La Libre Circulation des Personnes", SChulthess Polygraphischer Verlag AG,1993

Eileen Denza — "The Intergovernmental Pillars of the European Union", Oxford University Press, 2002

Kay Hailbronner — "Immigration and Asylum Law and Policy of the European Union", Kluwer Law International, 2000

Chantal Joubert and Hans Bevers — "Schengen Investigated- A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights", Kluwer Law International, 1996

H.Meijers — "Schengen-Internationalization of central chapters of the law on aliens, refugees, security and the police", W.E.J. Tjeenk Willink-Kluwer law and taxation, 1991

Nicola Rogers and Rick Scannell — ”Free Movement of Persons in the Enlarged European Union”, Sweet and Maxwell Ltd, 2005

ARTICLES

Pieter Jan Kuijper — ”The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects”, Common Market Law Review, April 2004

David O’Keeffe — ”The Schengen Convention: A Suitable Model for European Integration”, Yearbook of European Law(1991)

David O’Keeffe — ”The Emergence of a European Immigration Policy”, European Law Review (1995)

David O’Keeffe — ”Recasting the Third Pillar” Common Market Law Review (1995)

Steve Peers — ”The Visa Regulation: Free Movement Blocked Indefinitely” European Law Review (1996)

Steve Peers — ”Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union” Common Market Law review (1996)

Steve Peers — ”Building Fortress Europe: The Development of EU Migration Law” Common Market Law Review (1998)

INTERNET SOURCES

Council Booklet ”The Schengen Acquis Integrated into the European Union”(1999) available at : http://ue.eu.int , from April 2006.

Wikipedia encyclopedia, available at : http://en.wikipedia.org/wiki/Schengen_treaty , from April 2006.

Palomar, Teresa, Article ”Migration Policies of the European Union”, Available at : www.emz-berlin.de , from April 2006.

Intergovernmental Conference, briefing No.27, “The IGC and the Schengen Convention”, available at: www.europarl.eu.int , from April 2006.

Article ”The Schengen acquis and its integration into the Union”, available at : http://europa.eu.int/scadplus/leg/en/lvb/l33020.htm , from April 2006.

Article “Same visa policy for all European Union Member States”, available at:http://europa.eu.int/comm/justice_home/fsj/freetravel/visa/fsj_freetravel_visa_en.htm, from April 2006.

Article ”Schengen Visa” available at : http://www.eudelindia.org/en/features/schengen_visa.htm, from April 2006.

K. Karanja, S “The Schengen Treaty”, available at: http://folk.uio.no/stephenk/pub/notused_english.shtml , from April 2006.

K. Karanja, S “The Schengen Co-operation: Consequences for the Rights of EU Citizens”(2000), available at : http://www.personvern.uio.no/pvpn/artikler/M&R2Article.htm, from April 2006.

Statewatch, available at : http://www.statewatch.org/news/2002/apr/01sis.htm from May 2006.

Article ”Proposed Visa Information System (VIS) enhances security and facilitates travelling in EU” available at : http://www.traveldailynews.com/new.asp?newID=20406&subcategory_id=95, from May 2006.

Article “Visa holders visiting the EU to be put on a European database”, available at : www.euractiv.com , from May 2006.

EU Data protection working party criticize proposals on VIS, available at: http://www.statewatch.org/news/2005/sep/09eu-vis-art-29-rep.htm, from May 2006.

Ministry of Foreign Affairs of Macedonia, available at : http://www.mfa.gov.mk/ministerstvo, from May 2006.

Sector for European Integration in Macedonia, available at : www.sei.gov.mk, from May 2006.

OFFICIAL DOCUMENTS

Treaty Establishing The European Community OJ C 325/33

Agreement between the governments of the States of the Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

European Convention on Human Rights from 4 November 1950.

Convention from 19 June 1990 applying the Schengen Agreement of 14 June 1985.

Protocol (No.2) integrating the Schengen acquis into the framework of the European union (1997) OJ C 340/93

Protocol (No.3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the UK and Ireland (1997) OJ C 340/97

Protocol (No.4) on the position of the UK and Ireland (1997) OJ C 340/99

Protocol (No.5) on the position of Denmark (1997) OJ C 340/101

Council Regulation 1683/95 Visas (1995) OJ L 164/1

Council Regulation 2317/95 Visas from third Countries (1995) OJ L 234/1

Decision of The Executive Committee of 28 April1995 on common visa policy. Decision contained in the minutes of the meeting of the Executive Committee held in Brussels on 28 April 1995 (SCH/Com-ex (95) PV 1 rev).

Decision of The Executive Committee of 27 June 1996 on the principles for issuing Schengen visas in accordance with Article 30(1)(a) of the Convention implementing the Schengen Agreement (SCH/Com-ex (96) 13 rev 1).

Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13)

Table of Cases

C-503/03, 31 January 2006

Commission of the European Communities v
Kingdom of Spain