

# Informing the Borders Debate

*Elsbeth Guild, Sergio Carrera and Alejandro Eggenchwiler*

*Many areas of EU policy will be the subject of critical debate and discussion in the campaigns leading up to the European Parliament elections on 4-7 June 2009. Although the specific themes and the relative importance attached to these themes will vary substantially from one member state to another, the issues that have become EU policy and law over the past ten years in the Area of Freedom, Security and Justice deserve informed and consistent analysis. These policies touch the core of every individual's right to liberty and security in an enlarged Europe.*



*This Background Briefing focuses on borders. It first sets the scene by outlining the current state of play in EU border policy and the next steps that are expected to be taken in the near future. We then present key shortcomings and issues surrounding this policy domain. The concluding section highlights the main challenges in this field and puts forward key recommendations for the next five years..*



This Briefing is one in a set of four dealing, respectively, with immigration, asylum, borders and data protection. They have been produced as part of a project: "Informing the Immigration Debate: Preparing for the European Parliament Elections 4-7 June" supported by the Barrow Cadbury Trust, an independent charitable foundation that funds and promotes social justice initiatives (for more information, see <http://www.bctrust.org.uk>). The Background Briefings aim to inform the debate about these controversial and often technical issues for the political parties as they prepare for the EP elections and address the voting public.

Elsbeth Guild is a Professor at the Centre for Migration Law of the Radboud University of Nijmegen (the Netherlands) and a Senior Research Fellow in the Justice and Home Affairs Section at CEPS. Sergio Carrera is a Research Fellow and Head of the Justice and Home Affairs Section at CEPS. Alejandro Eggenchwiler is Research Assistant at CEPS. An earlier version of this Background Briefing was presented at a lunch on April 15th in the European Parliament, organised in cooperation with the office of Baroness Sarah Ludford, Member of the European Parliament, Member of the Committee on Civil Liberties, Justice and Home Affairs and Vice-Chairwoman of the Subcommittee on Human Rights.

Unless otherwise indicated, the views expressed are attributable only to the authors in a personal capacity and not to any institution with which they are associated.

Available for free downloading from the CEPS website (<http://www.ceps.eu>) © CEPS 2009

## 1. State of Play and Next Steps

The management of the EU borders is undergoing a radical transformation of its substantive and institutional elements, as well as a process of de-territorialisation, with the development of European databases, information networks and biometric technology (for a full list of the measures adopted in the field of borders, see Annex 1). The adoption of a common corpus of legislation known as the 'Schengen Borders Code' (Community Code on the rules governing the movement of persons across borders) has been associated with the institutionalisation of EU border management, following the setting up of FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU), RABIT (Rapid Border Intervention Teams),<sup>1</sup> EPN (European Patrols Network)<sup>2</sup> and CRATE (Central Record of Available Technical Equipment database).<sup>3</sup> The EU border management system is also implemented by means of Joint Operations, coordinated by FRONTEX and involving various member states, which are carried out at the sea, land or air borders. The EU's control and surveillance measures over irregular human mobility are also spreading geographically, beyond the common EU external territorial border, through joint operations, into the territory of third countries in Africa, and on the basis of bilateral agreements/partnerships between member states and third countries.

In 2008, according to FRONTEX, member states reported some 175,000 (+20%) detections of irregular border crossings at the EU's external sea and land borders. While at the sea borders most detections were reported by Italy (37,000), followed by Greece (29,100) and Spain (16,200), at the land borders the largest numbers were reported at the Greek borders with Albania (38,600) and Turkey (14,500), and at the Spanish border with Morocco at Ceuta and Melilla (7,500). The Eastern land borders totalled 6,200 cases of irregular border crossings,

with Poland (3,298), Slovakia (978), Hungary (877) and Romania (756) accounting for 95% of the total. As regards refusals of entry, in 2008, member states reported some 140,000 cases altogether, split almost equally between the land borders (around 60,000) and the sea borders (65,000). The largest number of refusals, however, were reported at the UK (17,600) and Spanish (13,600) air borders.<sup>4</sup>

On 13 February 2008, the European Commission submitted a new Border Package entitled "Preparing the next steps in border management in the European Union",<sup>5</sup> in which it proposes the development of up to three new computerised

*"The concept of Integrated Border Management does not take account of the heterogeneity and diversity inherent in the 'EU border'."*

databases containing personal data: 1) an Entry/Exit System registering the movement of specific categories of third-country nationals, 2) an Automated Border Control System to enable the automated verification of a traveller's identity whether EU-citizen or not and 3) an Electronic Travel Authorisation System to obtain personal data from non-EU travellers through a pre-departure online check. The package also contains two documents that suggest significant changes in respect to the role of FRONTEX and the orientations of the EU's integrated border management concept. These are the "Report on the evaluation and future development of the FRONTEX agency",<sup>6</sup> and the "Communication on the creation of EUROSUR (European Border Surveillance System)",<sup>7</sup> a satellite-based border surveillance system. The Commission intends to follow up this Communication with the presentation of concrete legislative proposals by 2010.

## 2. Shortcomings and Issues

The EU aims to develop an integrated management system for its common external borders that falls within the so-called "Border Management Strategy",<sup>8</sup> in order to enhance border controls and surveillance and tackle all phenomena identified as threats, risks and insecurities to the Union more effectively. The concept of Integrated Border Management (IBM), however, does not take account of the heterogeneity and diversity inherent in the

1 A pool of officials from member states' border guard agencies to be deployed upon the request of a member state in cases of "urgent and exceptional pressure".

2 A permanent joint operation in selected parts of the Atlantic Ocean and the Mediterranean that is coordinated by FRONTEX and run by the border guard authorities of Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia and Spain.

3 The database contains technical equipment (vessels, aircrafts, helicopters) for border control and surveillance belonging to member states, which they, on a voluntary basis and upon request from another member state, are willing to put at the disposal of that member state temporarily.

4 FRONTEX General Report 2008, pp 7-9.

5 COM (2008) 69 final, 13.02.2008.

6 COM (2008) 67 final, Brussels, 13.02.2008.

7 COM(2008) 68 final, Brussels, 13.02.2008.

8 Informal JHA Ministerial Meeting, Tampere, 20-22 September 2006, "Development of the EU's Integrated Management System for External Borders: Border Management" Strategy, 7 September 2006, Finland's EU Presidency.



'EU border', which itself is far from being a uniform demarcation line between the inside and the outside. This becomes evident when comparing the border of the Internal Market with that of the Schengen Area. While the Internal Market is at the heart of the EU, the external Schengen border attempts to frame a common territorial space with no internal frontiers, where the free movement of persons is formally guaranteed. At present, only 22 EU member states are part of Schengen Area<sup>9</sup> and 3 non-EU member states.<sup>10</sup> It aims at integrating one more.<sup>11</sup>

Moreover, the development of common European rules regarding the crossing of the EU's external frontiers ('Schengen Borders Code'), and the creation of FRONTEX, has led to uneven border practices, in spite of the fact that one of the objectives of the shared legal framework is equal treatment and respect for the rule of law. For instance, joint operations coordinated by FRONTEX might raise racial discrimination issues, in so far as they target specific national groups. In this regard, the Joint Operation HYDRA (Illegal Chinese Migration by air),<sup>12</sup> which led to the apprehension of 291 Chinese nationals during April-May 2007, is illustrative. There is also inadequate knowledge and public information about the ways in which the EU's external borders are being managed and their impact on fundamental freedoms and rights inside and abroad.

Lastly, the implementation of the IBM strategy has been greatly shaped by an untested belief in security technology as the ultimate solution for any threat the EU might face. Such an approach takes for granted the human and ethical implications of the use of new security technologies or treats them as an issue of secondary concern. In this regard, the creation of databases that manipulate large amounts of personal data to search for persons with certain characteristics, e.g. the Schengen

*"The implementation of the integrated border management strategy has been greatly shaped by an untested belief in security technology as the ultimate solution for any threat the EU might face."*

*"The post of EU border monitor should be established to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights."*

Information System (SIS II), the Visa Information System (VIS) and the DNA database under the Prüm Treaty, leads to racial and religious profiling, which violates the Charter of Fundamental Rights. Similarly, the systems proposed in the Commission's 2008 Border Package,<sup>13</sup> not only do not appear to stand up to the tests of proportionality and reasonableness that are essential for any new EU legislation, but raise the same serious concerns about any individual's rights to protection of personal data and to non-discrimination.

### 3. Future Challenges and Recommendations

The following challenges can be foreseen as regards the development of the EU borders policy:

First, the European Parliament should carry out its own evaluation of FRONTEX and member states' activities in light of the rule of law and fundamental rights. To this end, it should request that FRONTEX evaluation reports of the joint operations, risk analyses and feasibility studies be made public and subject to independent scrutiny. In addition, it should inform citizens and third-country nationals (TCNs) on the ways in which the EU border is being managed and the implications of security technologies and new border management proposals over their rights and liberties.

Second, the post of EU border monitor should be established in order to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights, and to monitor the conditions under which expulsions of irregular immigrants take place, under the framework provided by the Directive on common standards and procedures in member states for returning illegally-staying TCNs (the Returns Directive).

Lastly, an in-depth assessment of large-scale IT systems as regards not only their 'efficiency' but also their legal and ethical implications, should be carried out. Equally, the questions of adequacy and proportionality of the flow of information need to be addressed to avoid the idea that maximum technology is by definition the solution for better security.

<sup>9</sup> Ireland and the UK decided not to participate. Bulgaria, Cyprus and Romania only partially apply the Schengen acquis at the moment, and checks are therefore still carried out at the borders with these three member states. Denmark is in the Schengen area but, for certain provisions, it can choose whether to implement new decisions or initiatives or not.

<sup>10</sup> Iceland, Norway and Switzerland.

<sup>11</sup> Liechtenstein.

<sup>12</sup> According to the FRONTEX General Report 2007, HYDRA involved 22 airports in 16 member states and deployed 11 experts.

<sup>13</sup> An Entry/Exit System; an Automated Border Control System and an Electronic Travel Authorisation System. See Section 3 for further details.

## ANNEX\*

### *Adopted measures*

1. Reg. 1683/95 on common visa format (OJ 1995 L 164/1)  
- amended by Reg. 334/2002 (OJ 2002 L 53/7)  
- amended by Reg. 856/2008, OJ 2008 L 235/1.
2. Reg. 539/2001 establishing visa list (OJ 2001 L 81/1)  
- amended by Reg. 2414/2001 moving Romania to 'white list' (OJ 2001 L 327/1)  
- amended by Reg. 453/2003 moving Ecuador to 'black list' (OJ 2003 L 69/10)  
- amended by Reg. 851/2005 on reciprocity for visas (OJ 2005 L 141/3)  
- amended by Reg. 1932/2006 (OJ 2006 L 405/23).
3. Reg. 789/2001 on procedure for amending CCI (OJ 2001 L 116/2).
4. Reg. 1091/2001 on freedom to travel for holders of long-term visas (OJ 2001 L 150/4).
5. Reg. 333/2002 on visa stickers for persons coming from unrecognised entities (OJ 2002 L 53/4)
6. Reg. 415/2003 on visas at the border and visas for seamen (OJ 2003 L 64/1).
7. Reg. 693/2003 on FTD and FRTD (OJ 2003 L 99/8).
8. Reg. 694/2003 on format for FTD and FRTD (OJ 2003 L 99/15).
9. Reg. 1295/2003 re special rules for Olympic Games (OJ 2003 L 183/1).
10. Decision establishing a Visa Information System (VIS) (OJ 2004 L 213/5).
11. Reg. 2007/2004 establishing External Borders Agency (OJ 2004 L 349/1).
12. Reg. 2133/2004 on biometric features in EU passports (OJ 2004 L 369/5).
13. Recommendation on visa issuing for researchers (OJ 2005 L 289/23).
14. Reg. 2046/2005 on Olympic visas: OJ 2005 L 334/1.
15. Reg. 562/2006, borders code: OJ 2006 L 105/1 (applies from 13.10.2006)  
- amended by Reg. 296/2008, OJ 2008 L 97/60  
- amended by Reg. 81/2009, regarding use of the VIS (OJ 2009 L 35/56) - adopted Nov. 2008.
16. Two decisions on transit through new Member States, Switzerland (OJ 2006 L 167)  
- see implementation information, OJ 2006 C 251/20.
17. Reg. 1931/2006 on local border traffic within enlarged EU/at external borders of EU (OJ 2006 L 405/1).
18. Decision establishing European Borders Fund (OJ 2007 L 144).
19. Regulation 863/2007 on border guard teams (OJ 2007 L 199/30).
20. Decisions on transit through Romania, Bulgaria, Switzerland (OJ 2008 L 161).
21. Reg. 767/2008 establishing Visa Information System (OJ 2008 L 218/60) ; third-pillar VIS Decision (OJ 2008 L 218/129).
22. Reg. on biometric visas (adopted March 2009; not published yet).

### *Proposed measures*

1. Proposed Reg. on visa code (COM (2006) 403, 19.7.06): deal between Council and EP, March 2009; approved by EP, April 2009.
2. Regulation amending Regulation on passport security: COM (2007) 619, 18 Oct. 2007: deal between Council and EP, Dec. 2008; approved by EP
3. Regulation codifying Regulations establishing EC visa list (COM (2008) 761, 28 Nov. 2008) – discussion underway in Council working group.
4. Regulation codifying Regulations establishing EC visa format (COM (2008) 891, 19 Dec. 2008).
5. Regulations on long-term visas (COM (2009) 90 and 91, Feb. 2009) - discussions ongoing in Council, EP.
6. Regulation on Schengen evaluation (COM (2009) 102, March 2009) - discussions ongoing in Council, EP.

### *Forthcoming measure*

1. Proposals on SIS/VIS/Eurodac management agency, reports on stamping of passports and border traffic system

\* The authors are grateful to Prof. Steve Peers (Essex University) for this table of measures.