

**Seminar Public on the Schengen Convention
Development of the Schengen Information System (SIS II)
and Data Protection: What Strategy for the Future?**

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What is the situation regarding the new Member States?

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1. In my brief presentation, I will not go into technicalities related to the further development of the Schengen system. Rather, I would like to consider the problem within a broader context, to touch upon several underlying issues related to pertinent basic ideas and concepts.

2. We used to speak about freedom of movement in terms of fundamental human rights which must be ensured to everybody, without any discrimination. However, the content of this right is limited by nature: every person has the right to leave any state, including his/her own, but to enter only his/her own state. Thus, international law recognizes no right in respect of entry to another country. A state can refuse visa to a foreigner, and no justification or explanation is required. Although in some cases provisions of the ECHR can be invoked (e.g. the right to family life), and some precedents of the kind are known, these remain exceptions rather than a rule. But - in order to enjoy the right to leave, one must cross the border. Thus, the declared freedom of movement, i.e. the right to leave - remains purely declarative without the right to enter.

3. For the people like myself, i.e. those who grew up behind the "iron curtain", the freedom of movement is of particular

significance. It is not merely a technical procedure but rather symbolizes freedom we were deprived of for most of our lives.

4. For many years, the Western democracies demanded from the USSR to ensure freedom of movement for its citizens. The USA restricted trade relations with the USSR (the Jackson-Vanick amendment). Somewhat paradoxically, as soon as this demand was met by the successors of the USSR, the door was immediately locked from another side. The Jackson-Vanick amendment is still in force, however, it is related now not to the freedom of emigration but, reportedly, to import of chickens from the USA to Russia.

5. My Ukrainian colleague will probably say more on the issue. Presumably, for us, citizens of the EU accession states, all these troubles - long queues for visas, unexplained refusals, unreasonably lengthy proceedings, etc – are already in the past. Does this mean that we should feel as having joined the elite club, do not care any longer about the problems our neighbors face, and enthusiastically engage in building “fortress Europe”? I believe it is very important not to lose the sense of solidarity with our European neighbors, and to keep in mind that migration policies do involve strong, though limited, human rights dimension.

6. Strengthening border control is usually justified from the point of view of security. But - how effective these measures are in terms of security? As a rule, those involved in terrorist activities stay legally in the country. It would be interesting to see some data, as much as they are available in public domain, on whether the strengthened border control, indeed, improves security conditions.

7. Another common justification for strengthening border control is the need to fight illegal migration. However, this coin has two sides. Lack of opportunities for legal immigration makes would-be immigrants an easy prey of traffickers.

Restrictions on immigration provoke fraud and overstay: if one has good reasons to believe that s/he will not be allowed to come again, s/he will do his/her best to stay in the country when visa expired. Labor immigrants are necessary in aging Europe anyway. Therefore, increasing opportunities for legal migration might appear an efficient tool to combat illegal immigration and trafficking.

8. The situation of third country nationals and stateless persons who are permanent residents of the EU accession states deserves special consideration. There are sizeable groups of persons who were permanent residents and citizens before the restoration of independence or dissolution of a larger state, who due to some reasons were not granted citizenship of restored or new states. While in the Czech Republic the problem of statelessness of the Roma has been successfully resolved, eg in Latvia about 500,000 permanent residents – what makes more than 20% of the entire population - still have the status of so called non-citizens. Most of them were born in Latvia, and never migrated from one country to another. At the moment, these permanent resident non-citizens need visa to enter the EU member states – with the only exception for Denmark who unilaterally extended visa-free regime to Latvian non-citizens.

I am not going to re-open the political debate over Latvian and Estonian citizenship laws. My point is related merely to the legal status and the conditions of movement for these persons after Latvia and Estonia join the Schengen treaty. The naturalization policies so far proved ineffective, as since 1995 – when the Latvian citizenship law was adopted – only a bit over 65,000 of them have naturalized. Thus, they will probably be present here – i.e. in the EU - for quite long time.

Although the final consolidated text of the Directive on third-country nationals is not yet available, it seems that this directive will not give a clear answer. One can conclude that this Directive does not single out, as a special category, those

stateless persons who under no conditions can be refused residence permit or expelled from the territory of the EU member states: simply because of their statelessness, no other state is under obligation to accept them. Is it reasonable to extend to these persons the same formal requirements as to “typical” immigrants? Who will gain from keeping burdensome bureaucratic procedures with the outcome pre-determined in advance, or from limiting the freedom of movement of persons who spent all their lives in the same country?

9. One more urgent issue: is the principle of non-discrimination really universal and fully applicable also in migration and asylum policies? The Directive on third-country nationals, indeed, contains some non-discrimination clauses. But there are also examples of different kind. Thus, in the United Kingdom, in April 2001, a special exemption from the Race Relations Act was adopted¹. In fact, it prescribes discriminatory treatment against certain persons wishing to enter the British territory – not on the basis of their citizenship but merely on the basis of their ethnic origin. In particular, Kurds, Roma, Tamils, Pontic Greeks, and others are mentioned as targets.

10. Finally, I would like to briefly touch upon the asylum policies, since the Schengen and Dublin systems are closely related. It should be kept in mind that the respect for the right to seek asylum is not a manifestation of good will but a legal obligation under the Geneva Convention and its 1967 Protocol. Four years ago, PACE adopted Recommendation 1440 (2000) for which I was a rapporteur, “Restrictions on asylum in the member states of the Council of Europe and the European Union”. Inter alia, PACE called on the European Union “to ensure that the planned common European asylum system in no way undermines” the Geneva Convention “nor has the effect of reducing the responsibility of EU member states for persons in need of international protection at the expense of non-member states”.

¹ See http://www.errc.org/rr_nr2-3_2001/snap11.shtml for the full text and comments

Unfortunately, since then some reasons for concern persist. To mention just a few:

- Accelerated asylum procedures have the aim of increasing efficiency. However, they may raise concerns over the full and fair consideration of each case, and the effective access to a right of appeal and judicial review;
- Extended use of the concept of temporary protection and other subsidiary measures – instead of granting refugee status under the Geneva convention. The current situation of Roma from Kosovo, against whom some EU member states carry out forced returns, despite security conditions in Kosovo obviously do not permit this, is the most recent and salient example;
- Measures designed to prevent undocumented travellers from entering and submitting applications for asylum;
- Introduction of the lists of safe countries of origin and safe third countries may undermine the very possibility to have the well-reasoned application for asylum properly considered;
- Differences in rights afforded to refugees, notably in respect of the family reunion;
- Last but not least: the problem of fair burden-sharing – or rather burden-shifting – from “old” EU member states to “new” member states, related to their geographic location.

11. I consider growing migration as an asset rather than threat. Migrants contribute to economic development and enrich cultural diversity of Europe. I have no doubt that further efforts should be made to fight illegal migration and trafficking. However, it is of paramount importance to ensure that, in the

course of the further development of the common migration and asylum policies, the human rights dimension is kept high on the agenda.