

## The implementation of the EU *acquis* on illegal immigration by the candidate countries of Central and Eastern Europe: challenges and contradictions

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**Abstract** *One of the major issues in the process of EU eastward enlargement has been the ability of the candidate countries to assume membership of the Schengen zone and to effectively guard the external border of the Union post-accession. The debate is inextricably linked with the development of the EU as an 'area of freedom, security and justice' which has resulted in increasing EU action in matters related to illegal immigration and organised crime, and arguably a reproduction of the Schengen repressive logic within the EU. In this context, a condition of membership for candidate countries is the full implementation of the EU *acquis* on illegal immigration and border controls. The aim of this article is to demonstrate the challenges facing these countries towards the achievement of this goal. The analysis will focus on the Czech and Slovak Republics, until recently in different accession 'waves', and Poland, a 'first-wave' country with a different geopolitical position. The paper will attempt to demonstrate that the attainment of the highly repressive EU *acquis* in the field – which is mainly the result of a consistent securitisation of migration in EU policy discourse and legislation – not only fails to correspond to a clearly defined problem, but also poses to candidate countries a series of multifaceted challenges (legal, socio-political, economic, organisational and last, but not least, symbolic) which, if disregarded, may create more problems than those the *acquis* attempts to address.*

KEYWORDS: ILLEGAL IMMIGRATION; TRAFFICKING; BORDER CONTROLS; EU ENLARGEMENT; CENTRAL AND EASTERN EUROPE

### Introduction

One of the key issues in the eastward enlargement of the European Union has been the ability of the candidate countries to assume membership of the Schengen zone and to guard the external border of the Union, which will be moved to their eastern border post-accession. The debate has resulted largely from the development of the European Union as an 'area of freedom, security and justice' with increasing competences in the field of policies on illegal immigration and organised crime. These have developed in tandem with the abolition of internal borders within the EU which, according to the Schengen 'compensatory' logic, requires the parallel development of a strong external border.

In this context, candidate countries have to fully implement the EU *acquis* on illegal immigration and border controls, with a view to being ready for the Schengen accords at the time of their accession to the EU. This paper aims to

demonstrate the challenges facing these countries concerning the achievement of this goal. The analysis will focus on the Czech and Slovak Republics, countries with traditional links and – until recently – in different ‘waves’ of accession; and Poland, a traditional ‘first-wave’ country like the Czech Republic, but with a rather different geopolitical position. Similarities and differences will be highlighted in order to cast light on the main issues and contradictions which face these countries and their neighbours on their way to European union.

### **The ‘Area of Freedom, Security and Justice’: illegal immigration and enlargement**

A main feature of the post-Cold War security landscape has been the shift of policy attention, at both national and international levels, to threats beyond the conventional type of military threats to the state. The framing of activities as ‘new’ security threats (‘securitisation’) meriting urgent action to counter them has been extensively documented and analysed in this context (see, *inter alia*, Kelstrup and Williams 2000; Lipschutz 1995; Waever *et al.* 1993). Emphasis varies from analyses of security as a ‘speech act’, highlighting the process under which phenomena are perceived and promoted as security threats (Waever 1995; Waever *et al.* 1993), to securitisation as a product of power struggle between groups making ‘security’ claims in order to gain and legitimise power (Bigo 2000, 2001). These differences aside, most analytical attempts take into account the appearance in policy discourse of threats ranging from environmental pollution to transnational organised crime and migration. The securitisation of migration has contributed to the coining of the concept of ‘societal security’ (Waever *et al.* 1993), highlighting societies, rather than states, as being threatened in identity terms. In this context migrants become actors in a ‘security drama’, constructed as the ‘Other’ by those who view them as a threat, with the goal of ultimately excluding them (Huysmans 1995).

In the European Union, the securitisation of migration was first reflected in the Maastricht Treaty. Article K1 of the new Justice and Home Affairs pillar extended Union competence to matters of common interest, ranging from asylum and immigration policy and external border controls to police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and ‘other serious forms of international crime’. According to the same provision, the adoption of measures on these matters was justified for the purposes of achieving the objectives of the Union, ‘in particular the free movement of persons’. The opening of the internal borders in the Single Market resulting in free movement within the EU is thus inextricably linked with the need for repressive measures to control the external border of the Union from unwanted threats listed as matters of ‘common interest’. Immigration is expressly included in this list, along with various forms of international crime: in this manner, the Treaty created a ‘security continuum’, transferring the illegitimacy of criminality to immigration (Anderson *et al.* 1995: 164–7; Bigo 1996).

According to one of the first comprehensive analyses of EU policing post-Maastricht, immigration has through this ‘security continuum’ been amalgamated with security concerns in three ways: through an *instrumental* merging, expressed by the proliferation of the use of intelligence, information-sharing through channels such as the Schengen Information System (SIS) and repressive measures such as the imposition of visas and carrier sanctions; through an

*institutional* merging of previous *ad hoc* or international bodies such as Trevi and the Ad Hoc Group of Immigration into the Treaty on European Union (in the form of the Committee established by Article K4 of the Treaty); and through an *ideological* merging, viewing immigration as a threat along with organised crime and terrorism (Anderson *et al.* 1995: 165). This amalgamation thus leads to a multiplication of repressive measures against migrants, who are now viewed as presumptively deviant (*'criminels en puissance'*; Bigo 1996: 257). This criminal stereotype has been reproduced by the media in many EU member states during the 1990s (Tsoukala 2001).

On the basis of the aforementioned predictions on 'instrumental merging', a first look at the EU legislative output on immigration post-Maastricht would come as a surprise: few measures have been adopted, most of them non-legally binding, in the form of recommendations and resolutions. Maastricht, however, was only the first step in the development of EU immigration policy, which has been largely consolidated in the Amsterdam Treaty. Perhaps the greatest innovation of the new Treaty has been the insertion in the EC Treaty of Title IV on 'visas, asylum, immigration and other policies related to free movement of persons'. A great part of immigration policy has thus been removed from the Maastricht third pillar and become 'communitarised', a move that ensures, subject to the many conditions set out in the Treaty, greater judicial and parliamentary control by EC institutions.

This move, however, does not disassociate immigration from security considerations; far from it. Title IV is specifically tailored to ensure the 'free movement of persons' by 'directly related flanking measures with respect to external border controls, asylum and immigration ... and measures to prevent and combat crime in accordance with the third pillar provisions'. Title IV sets a tight deadline of five years for the adoption of such measures, and the last year has witnessed the proliferation of repressive measures related *inter alia* to carriers' liability, the facilitation of illegal entry and residence, and the mutual recognition of expulsion decisions. But the most visible reflection of the survival of the 'security continuum' in the EU has been the incorporation of the Schengen *acquis* in the Amsterdam Treaty. The Schengen Convention is a combination of provisions on policing and border/immigration controls ranging from the Schengen Information System to measures on visas, carrier liability and human smuggling. As it has been pertinently noted, these 'multi-functional' measures can be used for controlling both immigration and asylum, and crime (den Boer 1998).

Both Title IV and the incorporation of the Schengen *acquis* in the EC Treaty reinforce the 'compensatory' logic of extensive, multi-level measures of immigration control with the aim to 'seal off' the external border of a Union with no internal borders. These developments must be viewed in the context of the new constitutional objective for the EU, clearly enshrined in the Amsterdam Treaty, which is to develop into an 'area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (Article 2, Treaty of European Union). This wording is repeated in Title IV, as well as in the first article of the revamped third pillar.

Central to the development of this new objective is the characterisation of the Union as an 'area', a territory where the defensive and repressive logic of security maintenance is dominant and where security has become a 'categorical

endogenous value' (Kostakopoulou 2000: 508). This move towards 'territorialisation' puts forcibly forward the notion of the EU as a unitary territory gaining legitimacy as a security actor. Reference to one, single 'area' is inextricably bound with the concept of a common border, and this contributes towards the creation of common feelings amongst those who are 'inside' of belonging, but also of threat. The link between EU citizenship and feelings of safety (the words expressly used in the new Article 29, Treaty of European Union) reinforces this dichotomy, implying 'a fundamental distinction between a "safe(r) inside" and an "unsafe(r) outside" with the EU frontiers as the dividing line and law enforcement as the key instrument to maintain and further enhance this distinction' (Monar 2001). Such a perception has implications for the development of EU policies on the movement of people attempting to enter this 'area', as, in order for 'safety' to be maintained, it has to be closely monitored through border controls, police involvement and repressive measures against illegal immigration. At the same time, it implies that while the EU is the 'safe(r)', 'inside' area, its prospective future members must be equally safe in order to enter without undermining the security of the 'inside'.

It comes as no surprise therefore that the implementation by the candidate countries of Central and Eastern Europe (CEE) of the EU *acquis* on illegal immigration is central to the enlargement negotiations. This was not the case at the early stages of negotiations, with a relative delay in the introduction of asylum and immigration matters into the structured dialogue between the EU and the candidate countries. This delay has been attributed to the member states' concern at the time to retain sovereignty over these matters, the obscure legal nature of the relevant *acquis* post-Maastricht and, unlike matters such as trade or human rights, the impact of such policies on the external relations of the candidate countries and their policies towards foreigners (Lavenex 1998: 285). This situation however gradually changed, largely due to German concerns over the control of Germany's eastern border (Marshall 2000). It has indeed been argued that fears over the massive influx of immigrants from the East influenced heavily the incorporation of the Schengen *acquis* in the Amsterdam Treaty (Friis and Jarosz 2000: 50). The relevant Protocol to the Treaty expressly stipulates that 'for the purposes of the negotiations for the admission of new member states into the EU, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission' (Article 8).

It is thus largely in the context of a 'securitisation' of the candidate countries that the demands for policy alignment are made. The feature of these states as transit countries for illegal immigrants is highlighted to demonstrate that, if they do not conform with the relevant *acquis*, they constitute threats to the security of the Union and the safety of its citizens. The predominance of the Schengen repressive logic in the context of enlargement is also reflected in the Tampere conclusions, reiterating that 'as a consequence of the integration of the Schengen *acquis* into the Union, the candidate countries must accept in full that *acquis* and further measures building upon it', stressing also the 'importance of the effective control of the Union's future external borders by specialised trained professionals' (para. 25). Border controls, visas and restrictive measures are thus what the candidate countries have to introduce in order to comply with the *acquis*. The fulfillment of these conditions, which have been imposed unilaterally by the EU, is a *sine qua non* condition for their accession to the Union.

## Illegal immigration in Central and Eastern Europe: myths and realities

The considerable extension of the EU illegal immigration *acquis* and its central position in accession negotiations are based on the general perception of the EU being threatened by masses of immigrants coming from or via the candidate countries, changing population numbers and importing criminality. Hard evidence to unequivocally substantiate such generalised fears, however, is hard to find. The recent Council Action Plan to combat illegal immigration and trafficking of human beings in the EU accepts the 'widely shared assessment that the level of legal as well as illegal immigration is significant and cannot be neglected', but further concedes that 'by definition it is impossible to have a clear picture of the scale of the phenomenon of illegal immigration in the Member States of the European Union' (para. 41). The latest Europol *Annual Report*, on the other hand, makes a general reference to the increase of organised illegal immigration to the EU (Europol 2000). On the part of CEE, official statistics on migration are only slowly becoming available. This is not helpful in an already complicated situation, as it is accepted that reliable statistics on illegal immigration are in general hard to come by, even in countries with good statistical sources and systems (IOM 2000: 29; Salt 2000: 38).

The primary way of 'measuring' illegal immigration, applied also by the CEE, is retaining border apprehension data, with the indicator being 'illegal crossing events'. This is the case in the Czech Republic, where illegal immigration statistics are based on the numbers of detained persons who have crossed the border illegally. This number in 1999 was 32,325, a significant decrease from 1998 (44,672) which is however attributed to the calming of the situation in Kosovo and the subsequent decrease of refugee flows from that region. The prevailing point of entry to the country was the Czech–Slovak border, while an increase was also observed in crossings out of the Czech border towards Austria and Poland (Ministry of the Interior, Czech Republic 1999). This increase of crossings at the Czech–Polish border is also confirmed by the Polish Border Guard, whose data rely also on illegal border crossings: their number in 1999 was 8,883, with the largest number of apprehensions of people attempting to leave Poland taking place at the Polish–German border (Polish Border Guard 2000).

It is evident however that these numbers are far from reliable, as not only are border crossings by persons applying for asylum counted as illegal, but multiple events can occur for a single person who is arrested, sent back and then tries to enter again (IOM 2000: 37). Nor do they take into account apprehensions in the interior of the country (IOM 2000: 241), let alone cases of undetected crossings. For that reason border data are based on estimates, which are normally based on the views of officials and can be far from convergent. It has been reported for instance that, in Poland, estimates of percentages of foreigners smuggled on the basis of those apprehended vary from 20 to 90 per cent (IOM 2000: 241).

Notwithstanding these difficulties, it is widely accepted that the countries examined in this paper are transit countries of illegal immigration. In the context of trafficking in human beings, IOM refers to East–West 'land' routes including one going through Russia, the Baltics and Poland and one through Ukraine, the Balkans and the Czech and Slovak Republics (IOM 2000: 91–2). This concurs with data from the Czech Ministry of Interior stating that, in 1999, 31 per cent

of aliens crossing the border out of the Czech Republic did so on the same day of their arrival in the country, while another 37 per cent tried to do so 2–5 days after having entered Czech territory. A report by the Council of Europe (2000), on the other hand, highlights Germany as a target country for transit migrants through the Czech Republic and Poland, and Austria as a target through its neighbouring states (including the Czech and Slovak Republics). This is confirmed by the OECD: ‘since the strengthening of the border controls between Austria and Hungary, transit migrants passing through Hungary are tending now to pass through the more permeable Slovak Republic border in the hope of reaching Germany’ (OECD 2001: 39). The situation may be changing, however, as it has lately been reported that there is increasing evidence that both Poland and the Czech Republic are becoming countries of destination rather than transit (Henderson 2001a; IOM 2000: 275; OECD 2001: 41; Polish Border Guard 2000). It is this shift, rather than reinforced border controls, that may partially explain the decrease in illegal border crossings between Poland and Germany.

These ambiguities have not changed the perception of the CEE states as exporters of illegal immigration and criminality to the EU – at least in government discourse – and especially in the countries currently sharing the Eastern border of the EU. As a representative of the German Ministry of Interior has noted:

The issue of internal security in connection with EU enlargement is a very central issue in Germany, and we can only consider an opening of the present EU eastern frontier if the new EU external border standards meet the old standards ... Only under this condition would it be possible to win over the critical public in Germany for the enlargement process. There must be no increase in crime or illegal immigration as a result of enlargement (Lehnguth in House of Lords 1999–2000: 12).

Fears of the enlargement effects in Germany are not exhausted in the crime/migration nexus. As another witness noted in the same inquiry, ‘the most sensitive issue’ for public opinion in Germany is labour migration, or the possibility of opening up the German labour market to Polish migrants (Deubner in House of Lords 1999–2000: 14). It has been argued that these concerns may be exaggerated, as ‘not only are total numbers of labour migrants likely to be lower than early predictions suggested, but most economic studies show that an influx of migrants has little effect on the general level of wages and is not usually accompanied by an increase in unemployment’ (Dehaene and Krok-Paszowska 2001: 97–8). Fears of EU countries (in particular Germany and Austria) being flooded with workers from the East have however resulted in the imposition of a transitional period lasting up to seven years after accession during which free movement of CEE citizens in the current EU member states will be limited. It would be interesting to see whether the perceived ‘economic’ threat is predominant in relation to the perceived ‘criminal’ threat from migration that the German Ministry of Interior advocates.

This securitisation of immigration does not seem to correspond to perceptions of the phenomenon in CEE countries themselves. It is interesting to note that both the Czech and Slovak Ministries of Interior refer in their statistics to illegal migration (*nelegalni/a migracie/a*) and not illegal immigration. The emphasis is thus placed on the transitory character of illegal movement (migration), rather than on immigration which has an end point (Henderson 2001a). Accepting that movement is transitory means that the issue is not going to stay in the country and thus will not cause permanent problems. Perhaps this can explain reports

stating that the importance to the state of trafficking in human beings is grossly underestimated in Poland, though the study suggests that this is maybe symptomatic of CEE countries struggling with a wide range of issues, rendering trafficking a lower priority issue (IOM 2000: 293).

Fieldwork suggests that this difference in hierarchy is also present in the Czech and Slovak Republics, where there are two separate security discourses: an indigenous one taught by reality and an external one imposed by the EU. The external discourse relates to border security, trafficking of women and children, terrorism, drug and human smuggling, all of which are 'transit' phenomena ending up in EU member states. The internal discourse relates to immigration ending in them as destination countries (mostly Ukrainians and particularly in the Czech Republic), Russian organised crime and political corruption. This leads to a difference in the perceptions of borders between these countries and the EU (Henderson 2001b).

### **Meeting the standards? The implementation of the illegal immigration *acquis* in the Czech and Slovak Republics and Poland**

In order to comply with the requirements imposed by the EU, the candidate countries proceeded with the restructuring of their administrative and police organisations relating to matters of illegal immigration, as well as with the adoption of a multitude of relevant legislative measures. Along with providing the framework for the functioning of the bodies granted competences regarding illegal immigration and border controls, such measures reflect national policies on related issues such as the status and entry of aliens and the granting of visas. The steps taken by the candidate countries are to a great extent unprecedented and have led to major changes at both the organisational and the legal level. The basis for their examination here will be the annual progress reports by the Commission on enlargement. This will highlight the 'top-down' approach in the adoption of these measures by the candidate countries, which are constantly evaluated and expected to meet targets set by the EU.

#### *The Czech Republic*

A landmark effort to align Czech national policy with the *acquis* has been the Aliens Law of 1999 (Act no. 326, 30 November 1999). The Act, which came into force on 1 January 2000, contains a long list of provisions on entry, residence, visas and border controls, its detailed character acting as a safeguard against the discretionary use of the provisions by the authorities (Drbohlav and Barsovà 2001: 62). According to section 161 of the Act, its administration is entrusted to the police, who are competent to regulate the entry, residence and exit of an alien in the country. The section refers to an evident hierarchical structure of the competent departments which are: the Police Presidium; the Head Office of Foreign (Alien) and Border Police of the Presidium; departments of foreign and border police and offices of foreign police in districts and border crossings; and sections of border police.

While the Police Presidium is responsible for issues such as the legal regulation of detention and decisions on some cases of expulsion appeals, the other bodies have a wide range of competences, which to a considerable extent overlap. All three bodies for instance can carry out a residential control (sections

163(b), 164(b) and 165(f)), while both the Foreign and Border Police and the Section of Border Police can carry out border controls (sections 164(p) and 165(f)). The Foreign (Alien) and Border Police are in general competent to take decisions on the granting of leave, residence, visas and travel documents of aliens, as well as decisions on the imposition and procedure of administrative expulsion (section 164), while appeals against such decisions are, according to section 163, dealt with by its Head of Office. The Section of Border Police on the other hand has the main task of securing the Czech border, but is also granted the far-reaching competence of investigating offences pursuant to the Act (section 165 (a) and (d) respectively).

From July 2000, the responsibility for the Border Police was transferred from the district to the regional level. This change has resulted in the supervision of both Foreign (Alien) and Border Police by the same regional police officer, something that will facilitate co-ordination and communication between the bodies and ensure coherence in policies, especially in view of the bodies' overlapping tasks. At the same time, the Department of Immigration and State Border Protection of the Ministry of Interior has merged with the Refugees Department to create the new Department for Asylum and Migration Policies (Commission of the European Communities 2000a). Parallel to the reorganisation of border control, and with a view to align national legislation with the stringent EU conditions, the Czech government introduced in June 2000 visa requirements for nationals of Russia, Belarus and Ukraine (de Tinguy 2001: 13).

Measures have also been introduced regarding the protection of personal data and their use by the police. Section 158(1) of the 1999 Alien Act includes a list of data maintained by the police pursuant to the Act, such as information on matters related to an alien's entry, stay and departure from the country, visa or other travel document application and the commission of offences. The police however can be entitled to operate other information systems as well, provided that this is a necessary condition for the performance of their tasks according to the Act (158(2)). Notwithstanding the express reference to such a proportionality test, the range of 'other' data remains unspecified and thus potentially broad. At the same time, using a similarly general wording, the Act extends the use of data by providing that information maintained by the police may be merged with information from other sources 'if it is necessary to perform tasks imposed by this Act' (section 154(4)).

These provisions may challenge various data protection principles. In this respect, the Czech Republic has adopted a Personal Data Protection Act, which came into force in June 2000. In September of the same year the 1981 Council of Europe Convention on the Protection of Individuals with regard to the Automatic Processing of Personal Data was signed and the Office for Personal Data Protection became operational (Commission of the European Communities 2000a). An amendment to the Police Act regulates data protection in police matters, as required for participation in Schengen and Europol (Commission of the European Communities 2001a).

### *The Slovak Republic*

The organisational structures regarding border controls in the Slovak Republic are to some extent similar to those in the neighbouring Czech Republic. May 2000 saw the establishment of the Border and Foreigners Office, which is



responsible for granting various forms of stay to foreign nationals, while being at the same time the appeal body for decisions made by first-instance bodies of the police force concerning visas, the granting of stay and expulsions. The green border is patrolled by officers of Border Police departments, while other border crossing points are patrolled by officers of the Aliens Police department in collaboration with the competent customs bodies. In November 1999, the Slovak government also approved a concept for the protection of the future EU external borders, with the aim of restructuring the border guards and improving the infrastructure of the border crossing points (Commission of the European Communities 2000b). April 2001 saw the new organisational structure of the Border and Aliens Police come into force. According to the Commission, this constitutes an important step towards a more coherent and Schengen-compatible border security (Commission of the European Communities 2001b).

Following sustained pressure, in 2000 the Slovak government adopted a series of measures aiming at complying with the EU *acquis* on visa policy. The adoption of Resolution 140/2000 of 15 March 2000 terminated the agreement between the governments of the Czechoslovak Socialist Republic and the USSR on the conditions of reciprocal travel of their citizens, and the attached protocol to the agreement relating to Ukraine (both of 17 December 1981). Both were terminated with effect from 28 June 2000, signifying that Ukrainian nationals are now in need of a visa to enter Slovakia. The situation regarding nationals of Russia and Belarus is now similar, as the agreements on reciprocal visa-free regimes were terminated from 1 January 2001 (Ministry of the Interior, Slovak Republic 2001).

Significant steps have also been made regarding data protection. Protection against unauthorised collection, publication or other misuse of personal data is guaranteed in the Constitution of the Slovak Republic. The relevant Council of Europe Convention entered into force on 1 January 2001 and constitutes the main secondary legislative framework along with Act no. 52/1998 on the protection of personal data in information systems. This Act, aiming to correspond to the provisions of the Council of Europe Convention and the EC directive regarding the processing and free movement of personal data, will be further amended with the new version entering into force on 1 January 2003. The Act also provides for an independent control body entrusted with data protection supervision – the Commissioner for the Protection of Personal Data in Information Systems, acting within the framework of the Inspection Unit for the Protection of Personal Data (Ministry of the Interior, Slovak Republic 2001).

Such rules, however, are not applicable to police information systems. This exemption applies to the databases of both the Police Force and the Ministry of Interior. Such full exemption raises significant concerns of accountability and legitimacy of the system, especially when viewed in the light of State powers in criminal investigations. This is reflected in particular by the institution of the Police Force Presidium, which consists of various directorates including aliens and border police. The President of this body is appointed by the government, allowing thus for significant political interference in investigations and prosecutions by the government, as the Presidium lies between the criminal police and the prosecutor.

### *Poland*

The Aliens Act of 1997, which was substantially amended in 2001, regulates the

activities of the Polish Border Guard. Four organisational units at the central level co-ordinate the local activities of 12 regional branches of the Guard, whose main competences are: to control passenger traffic at check-points; to monitor other areas of the state border and to prevent border crossing in points other than the check-points; to process the cases of apprehended migrants; and to process the cases of readmitted migrants (Okólski 1999a). The Border Guards are also entrusted with the tasks of Immigration Officers, in that they can evaluate travel documents, annul visas and determine the validity of tourist vouchers; and they have the power to deny entry even when they are presented with valid documents, should they not be convinced of the real purpose of entry (Brigadier-General Bienkowski in House of Lords 1999–2000: 30). In the summer of 2000 Poland adopted an Integrated Border Management Strategy until the end of 2002.

The adoption of this strategy by the Ministry of Interior addressed the lack of action by the Inter-Ministerial Group for Migration Affairs, set up as early as 1997 and chaired by this Ministry. As was mentioned in 1999, not even an inaugural meeting of the Group had taken place in these two years, raising significant issues with regard to the co-ordination of migration policies (Okólski 1999b). Issues of co-ordination beyond the Ministerial level are also important bearing in mind the need for co-operation between the regionally-based border guards and the centralised police. Already instances have been reported where the Border Guards exceeded their powers of control at the border by executing raids in the interior of the country (Okólski 1999a).

The role of the Border Guard was changed considerably by a 2001 amendment of the 1990 legislation. The new provisions extend the powers of the Border Guard both in geographical and authorisation terms; the competence of the Border Guards for combating crimes has been extended and they have been granted 'police-type' operational powers for border protection, border traffic, combating corruption, control of correspondence, wire tapping and controlled delivery. They can now operate not only on the border but throughout Poland, and have access to public databases (Commission of the European Communities 2001c). This extension seems to grant the Border Guard the powers of a fully-fledged law enforcement body.

An area of controversy is the Polish policy on visas. The EU visa regime has not been met with enthusiasm in Poland, willing to maintain its existing links with neighbouring countries, especially the Ukraine. Thus far Poland has introduced a visa regime towards Russia and Belarus, but no requirement for a visa – or even tourist vouchers – exists towards Ukraine. Recently the Polish Government has authorised the Ministry of Foreign Affairs to start bilateral negotiations on the cancelling of visa-free travel from Ukraine to Poland (Commission of the European Communities 2000c). In order to strike a balance between the demands of the EU and its Eastern neighbours, Poland is also contemplating making use of the Schengen provision permitting national visas which allow the bearer to travel, not in the whole of the EU, but only within a single country (Under-Secretary of State Stachanczyk in House of Lords 1999–2000: 28).

The General Inspection for personal data protection is the independent supervisory authority for personal data. Special data protection legislation exists, but Poland had yet to ratify, in November 2000, the relevant Council of Europe Convention (Commission of the European Communities 2000c). Data protection

legislation is not applicable regarding police data, particularly that concerning organised and international crime in cases where the State Security Office is involved. Such exemption causes concern, especially in view of the prospect of the establishment of a unit modelled on the UK National Criminal Intelligence Service (NCIS), which would co-ordinate the action of bodies answering to the Ministry of Finance (such as the Customs and Tax Office) and those answering to the Ministry of Internal Affairs and Administration (such as the police and border guards) (Stachanczyk in House of Lords 1999–2000: 29).

### *Progress or problems?*

It appears that all three countries under examination have been responding to EU pressure in a comprehensive manner, by adopting in a short period a wide range of legislative measures, often introducing new legal concepts and daring to change administrative and organisational structures at both the central and the regional level. The major problems in this transformation are mostly related to the complicated task of achieving efficient border controls. The main problems facing the candidate countries are the lack of co-ordination and communication between the various authorities responsible for border controls and between the various administrations, and at times the lack of autonomy of the border guards. Such problems are inextricably linked with the lack of resources at the border, as border guards have to perform their tasks with inadequate salaries, equipment and infrastructure, a situation that also creates obstacles to the demilitarisation of the borders. The lack of coherence in national policies is further exacerbated by diverging views from the Ministries of the Interior, responsible for implementing the freedom, security and justice *acquis*, and other ministries such as the Ministry of Foreign Affairs and the Ministry of Labour, on the general policy on legal and illegal immigration. Both the lack of resources and the diverging policies are clear reflections of the challenging and contested nature of the EU illegal immigration *acquis* and its acceptance by the candidate countries.

## **The challenges of implementation**

The very nature of the *acquis* on illegal immigration and border controls bears significant implications not only for the stringently regulated and potentially restricted movement of people but also ultimately for relationships between neighbouring countries which may be disrupted. The challenges regarding its implementation are thus manifold, extending beyond the level of legal alignment with the EU requirements. Clearly evident in this respect is the *symbolic challenge*: in countries where being able to cross borders freely is a relatively recent achievement, the symbolic importance of the re-imposition of a border as a factor inhibiting this newly-acquired freedom is significant. While the ultimate aim is the abolition of borders within the candidate countries that will become EU members, restrictions still exist between them and non-candidate neighbouring countries; but also, in view of the prospect of enlargement in waves, between candidate countries themselves. Such problems are clearly illustrated in the case of the Czech–Slovak accession, where the potential EU entry of the Czech Republic prior to the Slovak Republic could signify the building of a Schengen border between these two countries that, until recently, used to be one. Such a

prospect will probably be avoided, in view of the costs involved in building a border which would become obsolete once Slovakia becomes a member, and in view of pressure by both countries towards simultaneous entry to the Schengen system, but EU pressure on the intensification of controls in the Czech–Slovak border still remains.

Such developments lead to the *socio-political challenge* inherent in the imposition of strict border controls in neighbouring countries, which is also reflected by the implementation of the EU visa regime. The country where the issue has arisen most prominently is Hungary, in view of the ethnic Hungarians' living in countries whose nationals are in need of a visa, such as Romania, Ukraine and the former Yugoslav Republics, or where the EU is pushing for tight border controls, such as Slovakia (Fowler 2001; Grabbe 2000). In order not to disrupt links with these populations, Hungary has not imposed visas on these countries, while at the same time, by the recently-adopted Status Law, granting them special privileges regarding access to the Hungarian education system and market (Kuepper 2001). This not only contradicts the relevant *acquis*, but can be a source of discrimination between the nationals of the countries involved.

A similar issue is raised regarding the population of Polish origin living in Ukraine, Belarus and Lithuania. Poland has a vested interest in maintaining ties with these countries and its unwillingness to impose a visa requirement on Ukrainian nationals is a clear sign. Such reluctance can further be explained on the basis of the Polish commitment to 'Europeanise' Ukraine, by linking it to Western European institutions and ultimately perhaps to the EU. The 'Europeanisation' of Ukraine and the strengthening of its independence has thus been an integral part of Polish *Ostpolitik* (Wolczuk 2001), something that is also reflected in the conflict between the Polish Ministry of Interior and the Ministry of Foreign Affairs regarding the implementation of the illegal immigration *acquis*. In view of the ties between the two countries, such implementation attains the character of foreign policy not only for Poland, but also for neighbouring Ukraine and other peripheral states, to the extent that they perceive being included or excluded in Europe as expressed by the European Union (Grabbe 2000: 527–8). The outcome of the EU restrictive policy on enlargement has the potential to lead to anticipatory equivalent measures in non-candidate countries (Grabbe 2001: 69–70) and has already resulted in the announcement in October 2000 by Ukraine of the annulment of the readmission agreement concluded with Slovakia (which has been recalled after the 'softening' of the Slovak visa regime), and in the imposition by Russia of visas to the nationals of all countries that require them for Russian nationals, leading the Russian press to talk about 'visa wars' (de Tinguy 2001: 18–19).

Along with socio-political considerations, the existence of traditional close links between the countries of Central and Eastern Europe brings into the fore the considerable *economic challenge* in the implementation of the illegal immigration *acquis*, as strict borders have the potential to disrupt well-established economic ties. The example of the border regions of Poland and Ukraine is eloquent in this respect. According to an official from the Lublin region of Poland, 30–40 per cent of small and medium enterprises in the region live by commerce with the Ukraine (Zieba in House of Lords 1999–2000: 21). The importance of these ties for the economic development of parts of both neighbouring countries has led to the governments seeking solutions to counter the

restrictions that a Schengen border may impose. The Polish Ministry of Foreign Affairs has expressed the desire to maintain a special relationship with countries such as Lithuania and Ukraine (Okólski 1999b), while according to Ukrainian officials the country is examining the possibility of establishing a special regime of free movement of businessmen or residents in the border zone between the two countries (Pawlyczko and Zaharczuk in House of Lords 1999–2000: 40). Such a move may be contrary to the *acquis* and may discriminate against other Ukrainian nationals; at the same time, however, it appears to be a balance against the adverse consequences of tight border controls, which may range from economic stagnation of border regions and a fall in tourism, to far-reaching effects such as the increase of permanent emigration from Belarus and Ukraine as a result of the lack of opportunities for temporary migration to neighbouring countries (Streltsova 2001: 75–8).

No less significant is the *legal challenge* surrounding the implementation of the *acquis*. The candidate countries are called to adopt measures which, emanating from a security rationale, are mostly repressive and focus on control. The progress of implementation is judged on the basis of the effectiveness of such controls, with the counter-balancing emphasis on data protection guarantees being welcome, but also constituting a pragmatic necessity towards the facilitation of EU-wide police co-operation. The protection of human rights and the upholding of fundamental legal principles, though emphasised in other chapters of the accession negotiations, are largely absent from the Justice and Home Affairs chapter. In view of the multiplication and extension of systems of control and data gathering the *acquis* entails, the emphasis on the respect of human rights is essential, especially in countries with a long history of authoritarian rule and police omnipotence.

Further problems in this respect are caused by, on the one hand, the ever-growing volume of the illegal immigration *acquis* (Monar 2001), and on the other the vague character of many of its components (Anderson 2000). Although great emphasis is placed by the EU on the reorganisation and efficiency of border controls, no single model of border guards or police organisation exists at EU level. At the same time, and despite the prioritisation of the fight against illegal immigration, agreement on common EU definitions and penalties for phenomena that candidate countries are asked to fight such as the trafficking of human beings has proved elusive. On the other hand, the expansion of repressive policies – which currently in the EU include the broad imposition of carriers' liability and the equally broad criminalisation of facilitation of unauthorised entry, movement and residence – may have adverse effects for basic humanitarian principles such as the granting of asylum (Mitsilegas 2002). Along with undermining such principles, tight border controls may result in the increase of both the volume of human trafficking and the profits from this activity (Amato and Batt 1999; de Tinguy 2001).

The imposition of a plethora of legislation falls upon a further *organisational challenge*. Legislation may be difficult to implement by organisational structures that are not clearly defined, with overlapping or conflicting competence (as seen above; this may happen for instance between different ministries – such as Interior and Foreign Affairs – with different political priorities). Frequent changes in the internal organisation of ministries, police forces and border guards or in the imposed standards may cause confusion in implementation. Problems may occur also in cases of bodies (such as courts or border guards)

which are untrained, understaffed and underpaid, in which case the attainment of standards may be hindered by corruption (Monar 2000: 39–42).

These challenges can all be viewed under the prism of the *challenge of perceptions*: illegal immigration phenomena and the need to contain them are at times not perceived in the same manner by the EU and candidate countries, with considerable differences existing between the various CEE. Human trafficking for instance is not considered as a distinct cause of concern, separate from illegal immigration, in Poland (Okólski 1999a); and, perhaps because of Poland's nature as a transit country for illegal immigration, neither is it considered as grave a crime as (for instance) drug trafficking in the Czech Republic (IOM Prague nd). Similar discrepancies exist with regard to border controls: while Poland is, as seen above, sensitive regarding the tightening of its border with Ukraine (in a recent poll 59 per cent of Poles believed that introducing visas would have negative effects for Poland's Eastern neighbours – Wolczuk and Piorko 2001), the situation is not the same on the Slovak–Ukrainian border (Duleba 2000). The Polish agenda regarding the 'Europeanisation' of Ukraine is not necessarily shared by other candidate countries, neither is the Hungarian 'minorities' agenda. And it is difficult for the Czech and Slovak Republics to share the EU's concern regarding the permeability of their border, due to their historic and political links. This may also be due to the questioning of the axiom that most illegal immigrants appeared in one of the two countries by crossing the green border – as many of them may have overstayed their legal stay or used forged travel documents (Henderson 2001a). Such differentiation is not negligible, as it demonstrates the difficulties in imposing uniform EU standards in the whole CEE region and highlights the prospect of significant diversity in implementation.

## Conclusion

The implementation of the EU illegal immigration *acquis* in the candidate countries of Central and Eastern Europe is a complex task. Such complexity is inextricably linked on the one hand with the volume and nature of the *acquis*, and on the other with the specific realities in the implementing countries. The candidate countries have been called to implement in a relatively short period of time a multitude of provisions and standards extending from the organisation of border guards and police forces to the imposition of visa requirements, changes in criminal codes and the establishment of sophisticated systems of data exchange and protection. These standards are by no means fixed, as the post-Tampere period has been linked with the production of new laws and standards against illegal immigration at the EU level. Candidate countries thus have to face a target that is moving extremely fast and they have to respond constantly to the ever-increasing – and at times vague – demands of the European Union in the field. These measures are permeated by a security logic that is prominent in both the Amsterdam Treaty and the Tampere conclusions and leads to a highly repressive approach towards the containment of illegal immigration. The uncritical adoption of such an approach by the candidate countries may present them with the prospect, just a few years after the collapse of authoritarian government, of constructing new borders and new obstacles to freedom, while re-emphasising the centrality of control, policing and data gathering. Caution is necessary so that the spirit of these measures does not undermine the establish-

ment, stabilisation and normal functioning of fundamental freedoms and human rights and is combined with the humanitarian concern of the right to asylum.

The demanding task of achieving respect and understanding of human rights with a repressive approach to the movement of people from 'unwanted' countries becomes even more complicated in Central and Eastern Europe bearing in mind that these 'unwanted' countries are linked with the candidate countries by well-established economic, social and political ties. As long as both countries in such a link are candidates for EU accession, the short-term problems that may arise, acute as they may be, will at some stage be resolved through the eventual accession of countries from all 'waves' in the EU – though such problems may be exacerbated should the gap between the accession of countries in different waves increase. More complex is the situation regarding the 'outsiders', such as the Ukraine and Russia. A tight border has the potential, in disregarding existing links, to cause economic stagnation in border regions in both candidates and 'outsiders', deterioration in bilateral relations, and isolation of the 'outsiders' from the European Union, which has a vested interest to co-operate and eventually include them (Light *et al.* 2000). Overlooking such realities could be the cause for considerable diversity in the implementation of the *acquis* in the candidate countries, each of them attempting to take into account the needs of their Eastern neighbours.

In view of these complexities, the implementation of the growing illegal immigration *acquis* in order to enable the first wave of candidate countries to become full members of the Schengen zone upon EU accession – possibly in two years' time – seems a Herculean task. Bearing in mind that EU members Greece and Italy spent seven years from their signature of the Schengen agreement to their actual participation in the Schengen operational system, a similar scenario appears increasingly possible for the candidate countries as well. Should that happen, it has been argued that the candidate countries could be required to implement part of the *acquis* by the time of the accession, and the rest prior to full accession in the Schengen system (Monar 2001; Sie Dhian Ho and Philippart 2001). This two-stage process seems to have been accepted by the EU. In the first stage, by their accession to the EU, candidate countries will be required to meet minimum standards for border controls and introduce preparations for full Schengen membership. In the second stage, post-accession, monitoring of these steps will eventually lead – when it is judged that the new member state can take on full Schengen membership – to the lifting of internal border controls.

This solution could stop the CEE's compliance with Schengen being used to delay enlargement as a whole. On the other hand, however, it would multiply border controls within the EU and prolong the current climate of distrust towards the candidate countries. The latter will continue to be monitored post-accession in terms that are far from clear-cut: it is not evident what is an acceptable Schengen standard for candidate countries to attain in either stage. These standards can further prove to be a moving target, in view of the prospect of developing the Schengen Information System in the form of SIS II. In a perpetual reproduction of the 'Schengen' logic, the prospect of an inclusive Europe still seems distant.

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