The Treaty of Lisbon and the European Border Control Regime

Marianne Takle *Norwegian Social Research (NOVA)*

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Abstract

The question raised in the article is how the new provisions of the Lisbon Treaty and the Stockholm programme concerning the EU's asylum and migration policy might consolidate existing trends within the European border control regime. The regime is defined by a combination of three features: (i) a harmonisation of categories among the EU/Schengen member states, (ii) a growing use of new technology in networked databases and (iii) an increasing sorting of individuals based on security concerns. Although none of these features is new, the combination gives a new impetus to the European border control regime. The article concludes that the Lisbon Treaty and the Stockholm programme consolidate and strengthen existing trends. This implies that policies on border control, asylum, immigration, judicial cooperation and police cooperation are consolidated in a broader approach to border control, and that there is a strengthening of EU foreign policy within the European border control regime. The boundaries between previously dispersed policy areas are blurred. The combination of different aspects of security and various levels of authority requires coordination of policies with substantially different goals, and goes beyond mere border control.

Keywords

INTRODUCTION

The Treaty of Lisbon, which came into force on 1 December 2009, lays a new legal foundation for the European border control regime. The Treaty brings together formerly dispersed policies on Justice and Home Affairs under one heading, "Area of Freedom, Security and Justice" (AFSJ). Together with provisions concerning border control, asylum, and immigration, it covers judicial cooperation both in civil and in criminal matters and police cooperation. Moreover, the EU member states underline the political importance of the AFSJ by moving it up the list of the EU's fundamental objectives, now ranking it higher than Economic Monetary Union, the internal market and the Common Foreign and Security Policy (European Parliament and Council 2008a). The Lisbon Treaty's new provisions concerning the asylum and migration policy were confirmed by the Stockholm programme on 11 December 2009 (European Council 2009a). While Lisbon lays a new legal foundation for the European border control regime, Stockholm defines political guidelines for legislative and operational planning within the AFSJ from 2010 to 2014.

In this article I analyse the Lisbon Treaty and the Stockholm programme within the framework of more general changes concerning the development of a new European border control regime: which borders it covers, how they are defined and how the control is carried out. The question I raise is how the Lisbon Treaty and the Stockholm programme might consolidate existing trends within the European border control regime.

The point of departure for the analysis of the existing trends within the European border control regime builds on scholars such as Bigo and Guild (2005, 2010), Bigo *et al.* (2010a), Geddes (2005), Huysmans (2006) and Lyon (2007, 2009), who have challenged the classical concept of border control. Bigo and Guild (2005; 2010) argue, for example, that in the EU the traditional border control of everybody at the territorial border is being replaced by an ever increasing filtering process of individuals before they arrive at the physical border, and that the control has become more targeted. This implies the focus of control is delocalised from the borders of the states. There are new

types of control both inside and outside the EU and Schengen territory, and control of the Schengen border is located at different places for different groups of individuals.

Inspired by how these scholars describe the changed relations between border and control, I define the European border control regime through a combination of three features. Firstly, we can observe an increased harmonisation of categories among the EU/Schengen member states. This implies that the member states apply the same criteria to those whom they allow to reside on European territory, and there is a complex category system of persons that relates to different forms of exclusion in the EU (Bigo *et al*. 2010a, Buckel and Wissel 2010). Secondly, there is a growing use of new technology in networked databases, with open access for a number of EU authorities and member states within the whole field of AFSJ. This reshapes control according to digital communication, which is less constrained by geography (Lyon 2009). Thirdly, there is an increasing sorting of individuals' access to the EU/Schengen territory based on security concerns (Huysmans 2006, van Munster 2009). The EU's desire to eliminate terrorism, to control immigration and to combat international organised crime implies that the distinction between immigrants and potentially "risky" groups becomes unclear, and internal and external security are seen as inseparable. Although none of these features is new, the combination gives a new impetus to the European border control regime.

My main argument is that the combination of these features of the European border control regime results in the boundaries between previously dispersed policy areas becoming blurred. This implies that policies on border control, asylum, immigration, judicial cooperation and police cooperation are consolidated in a comprehensive approach to border control, and that there is a strengthening of EU foreign policy in the European border control regime. The combination of different aspects of security and various levels of authority requires coordination of policies with substantially different goals, and goes beyond mere border control. These changes in the European border control regime define the background for my analysis of how the new legal and political foundations, along with the Lisbon Treaty and the Stockholm programme, might consolidate and even strengthen existing trends.

In addition to studying the Lisbon Treaty and the Stockholm programme, I include secondary legislation where appropriate. On the basis of analyses of the reasons for policies and actions, the decisions of principle behind the EU's asylum and migration policy are discussed in relation to the definition of European borders and their control. The evidence is based on analysis of public documents from EU institutions.

The article is divided into four sections. The first two sections present the article's theoretical framework. The first section discusses how the relationship between control and borders has changed. The second section describes the existing trends within the European border control regime with the harmonisation of categories, the use of networked databases and the sorting of individuals based on security concerns. The third and the fourth sections examine how the Lisbon Treaty and the Stockholm programme lay new provisions concerning the EU's asylum and migration policy, and analyse how these might consolidate existing trends within the European border control regime. The third section analyses the new legal and political provisions within the AFSJ, and the fourth section examines how the EU's external policy is defined within the AFSJ.

CONTROL AND BORDERS

In the twentieth century, border control was a central characteristic of state sovereignty. According to this principle, a state's sovereignty depends on a harmonious relationship between territory (geography), bureaucracy (state) and people (national identity). A physical border encircles the territory, and a necessary condition of statehood is that the state has a monopoly over both the legitimate use of violence within the territory and

the legitimate means of movement into and out of its territory. The concepts of inclusion and exclusion from territory, bureaucracy and people are inherent in the citizen/immigrant divide, and they are based on the existence of a physical border (Preuss 1995). National identification documents such as passports are based on this idea, and passports make it possible to distinguish citizens from non-citizens. The distinction between citizen and immigrant is particularly visible at the borders, which are barriers to entry and exit.

In the twenty-first century, scholars have challenged this classical concept of border control (see Bigo, 2002; Geddes, 2005; Guild, 2009; Bigo and Guild, 2005, 2010; Lyon, 2007, 2009; Huysmans, 2006; and Salter, 2004, 2007). Bigo *et al.* (2010:3a) emphasise that the EU's casual approach to borders permits a rethink about the meaning of exclusion and inclusion as embedded in state border practices. When the state's capacity to control entry and exit of an individual is moved away from the border of the territory, Bigo *et al.* (2010:19a) argue that if it is to be exercised at all, it must find other venues. Indeed, as they further argue, when the borders remain for some purposes but not for others, one must modify the very idea of border control.

The need to rethink the relationship between control and borders is related to two major changes that have taken place since 1995. One was the enlargement of the EU that led to substantial change in its size and shape. The 2004 and 2007 enlargements incorporated 12 new states with 130 million inhabitants, as well as causing an eastward and southward shifting of EU and Schengen external borders. The EU's increased activities in the field of asylum and migration at the turn of the millennium can be understood as a growing wish for control of the new and more complex external borders to the South and East once the enlargements were implemented. Since the mid-2000s, the EU has been working on developing and improving the refugee and migration policies of the new member states (Angenendt, 2008). A decisive factor in this process is that many of these states had little or no experience of migration. In practice, this enlargement policy implied that efforts were intensified to harmonise asylum rights, regulate labour migration, combat illegal immigration, establish partnerships with third-party countries, establish return programmes and intensify border controls. Labour migration and political and judicial cooperation in criminal matters continued to be decided at the national level.

The other main change was the abolition of control of the borders between most of the EU member states, and a change in the division of authority between the member states and the EU institutions. This was related to the establishment of an internal market and, gradually, one without internal border control between five of its member states with the implementation of the Schengen Agreement in 1995. Later, in 1999, the Schengen Agreement was incorporated into the EU legal framework, and the establishment of a common external border control system was handed over to the EU. In practice, this policy entailed the gradual incorporation of asylum and migration policy into the body of the treaties. The EU institutions were gradually placed in the driving seat regarding the control of external borders. By the turn of the millennium, the Schengen system included all EU members except the UK and Ireland. Since 2001 Denmark, Norway and Iceland have participated through special agreements. In 2006 the Schengen Border Code was adopted, and the following year nine of the new member states were included in the Schengen agreement. Switzerland was included in 2008, while Bulgaria, Romania and Cyprus have not been admitted.

The abolition of internal borders among Schengen members and the new definition of the members' common external borders are reflected in the Schengen Borders Code. The Borders Code defines the internal and external borders in relation to each other, as external borders are only defined in the context of internal borders. According to the Code "internal borders" means: (a) the common land borders, including river and lake borders, of the member states; (b) the airports of the member states for internal flights; (c) sea, river and lake ports of the member states for regular ferry connections. In

contrast, "external borders" means the member states' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders (European Parliament and Council 2006).

There is a huge contrast in the Borders Code's definition of border control related to internal and external borders. The Borders Code states the abolition of border control at internal borders shall not affect the exercise of police powers under national law. As long as this does not have an effect equivalent to border checks, the police may exercise their powers in border zones in the same way as elsewhere in their territory. By contrast, the crossing of Schengen external borders is criminalised if it is done at places other than border crossing points or at times other than the fixed opening hours. The Borders Code states such action should lead to penalties enforced in accordance with that country's national law. The Borders Code specifies that the penalties must be "effective, proportionate and dissuasive". There are several exceptions, for example, in connection with pleasure boating, coastal fishing or for individuals who are in an unforeseen emergency situation.

The Borders Code states all travellers should be treated equally when crossing an internal border, but there are different levels of control for EU-citizens and Third Country Nationals (TCNs) when crossing an external border. When crossing an external border, EU-citizens undergo a minimum check, which is carried out to establish their identity on the basis of their travel documents. By contrast, TCNs are subject to thorough checks. For stays not exceeding three months per six-month period, a TCN must: possess a valid travel document and a valid visa if required; justify the purpose of his/her intended stay; not have an alert issued for him/her in the Schengen Information System (SIS); and not be considered a threat to public policy, internal security, public health or the international relations of EU countries. Moreover, the travel documents of TCNs are systematically stamped upon entry and exit (*ibid* 2006).

THREE FEATURES OF THE EUROPEAN BORDER CONTROL REGIME

Based on these changed relations between border and control, I define the European border control regime through a combination of three features: i) harmonisation of categories among the EU/Schengen member states; ii) the use of new technology in networked databases; iii) and sorting of individuals based on security concerns.

None of these features is new. The harmonisation of common European categories has been a crucial part of the European integration process since it started in the 1950s. The networked databases have been in use for several decades, and as Chou (2009) argues, the security concern has been central to migration policy since the 1980s. The major concern in this article is how the combination of the three features defines the European border control regime. Nevertheless, each has its own dynamics.

Harmonisation of Categories

The first feature is how the harmonisation of the European states categories, which is evident in the European asylum and migration policy, implies that the various European states apply the same categories and sorting systems. Historically, state categorisation of people into different groups is not new. The modern western nation state has retained historical categories in national registers, especially those related to military service, taxation, permanent residence, social insurance and related benefits. The central category in the modern nation state is citizenship. The identification of the individual and categorisation as a citizen was intended to guarantee access to citizenship rights (Preuss 1995; Marshall 1998). In the European integration process, the main category is still citizenship in a European state, and the main distinction is between EU-citizen and TCN.

According to Bigo *et al.* (2010a) the understanding of the divide between the citizen, the essential participant in (national) community, and the foreigner has become exceptionally complex in Europe. The authors (2010:17) present a typology that comprises eleven categories of persons that relate to these different forms of exclusion in the EU. The construction of common categories in the EU's refugee and migration policy relates to the main distinction between TCNs who are inside or outside the common external Schengen borders. Those who are inside are categorised as TCNs with three month or long term resident status, refugees and illegal immigrants. Those who are outside the Schengen territory are divided into two main groups: those who require visas to enter the Schengen territory for a three-month stay (including those on the visa white list and black list) and those who do not. A valid Schengen visa allows admission to the whole Schengen territory for three months.

A new aspect of the EU's categories of persons is that all EU member states have agreed upon aims to apply the same categories and sorting system in relation to the European border control regime. Although we can observe that European countries have different practices in relation to migrants (Morris 2003), there is a general agreement to apply the same categories in the EU. This can be seen in the harmonisation of Community statistics on migration and international protection (European Parliament and Council 2007). The EU's aim with this harmonisation is to establish common rules for the collection and compilation of Community statistics on immigration to and emigration from the member state territories. This includes flows from the territory of one member state to that of another member state, and flows between a member state and the territory of a third country. It also includes common statistics on administrative and judicial procedures and processes in the member states relating to immigration, granting of permission to reside, citizenship, asylum and other forms of international protection and the prevention of illegal immigration (European Parliament and Council 2010b; 2010c).

The EU's classification system not only defines certain groups and determines whether an immigrant does or does not have access to European states' territory and rights, but it can also justify how the European states control migration flows across European borders. The EU has established an increased level of detail in the control of individuals, and this control is separated from any obvious relationship with borders. Instead, the control relates exclusively to the individual, or group of individuals, and the various categories of people have different access to move freely within the Schengen territory (Guild 2005, 2009).

Inside the territory, control takes the form of identification and policing functions, and these are achievable through methods of storing, combining and sharing data, and by linking them to electronic ID cards and passports (Glaessner and Lorenz, 2005). Schengen countries have intensified internal police activities and identity checks of potentially undesirable individuals (Guild 2009). This makes it possible to identify and track each individual within the EU territory. For the "wrong" individual this might lead to expulsion. Outside the territory, the control can be found at work within the territory of the other states by return agreements, through visa rules and on the high seas. The control takes different forms of remote control where the Schengen countries check the identity of people who want to enter or transit through their territory before they travel, instead of checking them at the border (Bigo and Guild 2010: 27). The EU's system of categories is important because it validates the uneven treatment immigrants receive. Today, the control of European borders is to a large extent based on common EU categorisation of individuals.

The use of Networked Databases

The second feature of the European border control regime relates to the use of new technologies, and particularly to how the sorting system is strengthened. The new technologies make it easier to place individuals into various categories, and they consequently have different access to rights. According to Lyon (2007, 2009:15) the growing computer-assisted capacity of social sorting makes surveillance easier. He (2009:42) argues that the real surveillance power lies in the possibility of discriminating between different categories for differential treatment. While Lyon has analysed the technologies of control and the categorisation and sorting of individuals related to them, this may be applied to how networked databases are used for control in the EU and Schengen area (Buckel and Wissel 2010). Technology not only enables control of the European border, but it also reshapes the control according to digital communication, which is less constrained by geography. Since the data is stored in common European databases, the European states are able to access this data in any place. The regulation of access to territory does not need to take place at the territorial border, but can also occur before the person arrives at the European territory and after the person has arrived in this territory. This implies that the bureaucratic logic of categorisation and administration is combined with networked databases.

At the operational level of the networked databases, the boundaries between asylum and migration issues, border control, criminal law and counter terrorism have become blurred. This can be seen in the way databases have open access for a number of EU authorities within the whole AFSJ (European Commission 2005). The European border control regime depends on a variety of transnational information flows, particularly the ones based on the Schengen Agreement, the Dublin convention, the Eurodac system and the Visa Information System (VIS).

The SIS became operational in 1995. It contains data on persons wanted for arrest or extradition, missing persons, people who have been refused entry, stolen vehicles and firearms, stolen or misappropriated identity cards. This information can be used to refuse entry to recorded people at the borders or it can lead to the refusal of their visa applications at embassies. The second generation of Schengen Information System (SIS II) (scheduled to become operational in the first quarter of 2013) will contain biometric data (photographs and fingerprints) (European Commission 2012). It is designed to become not only a reporting system but also an investigation system with open access for a number of EU authorities within the field of Justice and Home Affairs, such as Europol and Eurojust. Eurodac, operational since 2003, collects the fingerprints of all individuals aged over 14, who apply for asylum in an EU country, or who are found illegally present in EU territory. The system aims to prevent so-called asylum shopping by harmonising responses to asylum claims within the EU. The planned VIS, operational since December 2010, contains the biometric data of persons who have applied for a visa to any member state. The plan is to integrate this into SIS II.

These networked databases facilitate the rapid identification of people and connection to common European categories. Biometric data in particular identifies people more accurately, and sorts them into common categories. This technology facilitates the storage of huge amounts of information about people in the territory, and it enables automatic and continuous information sharing among the participating states. The connection to the searchable databases enables the authorities to access people's existing records extremely rapidly. As Lyon (2007: 162) argues:

> The 'surveillance' dimension of (inter)national security arrangements has everything to do with 'social sorting.' That is, they are coded to categorize personal data such that people classified may be treated differently.

While surveillance categories are sometimes elastic (Lyon 2009:40), the opportunities for discretion become more limited because the administrative identification involves an

automatic system for social recognition and sorting. The application of strict categories and criteria may have serious consequences for individuals who are sorted into a category where they do not belong.

Sorting of individuals based on Security Concerns

The third feature is that the EU's border control regime is based on security and safety concerns, which are not only based on a distinction between citizens and non-citizens, but also on a distinction between safe and potentially "risky" individuals. The EU's desire to eliminate terrorism, to control immigration and to combat international organised crime implies that the distinction between immigrants and the potentially "risky" groups is unclear. EU documents often use a sorting based on categories such as "organised terrorists", "lone wolves" and "illegal immigrants" (European Commission 2006; 2010b). These categories are related to bureaucratic and political construction of threats, which has led to a process of securitisation of migration in the EU (Huysmans 2006; Noxolo and Huysmans 2009; van Munster 2009).

It is difficult to identify an "organised terrorist" or an "illegal immigrant". However, in the EU, there seems to be a growing belief that security problems are best resolved by technical solutions (Huysmans 2006). It is decisive for the sorting system that the administrations in European countries to a large extent rely on databases. The integration of the databases, and the way they are used to identify immigrants and to investigate criminality, show a link between migration and security. The security demands have been transformed into extraterritorial immigration control, aiming to prevent individuals from accessing the actual physical Schengen border (Mitsilegas 2010: 51). According to Bigo *et al.* (2010b: 60) there seems to be a trend where information systems that were introduced to manage movements across borders are increasingly becoming criminal management systems. This means movements of TCNs across borders are more and more conceived and treated as a security issue and a potentially criminal activity. Moreover, by using a wide spectrum of technologies and measures, immigration checks at airports abroad are effectively moving control to outside the Schengen area (Salter 2007). The strengthening of the external Schengen borders means that control is exercised before an individual reaches the territorial borders, and the control can be found at work within the territory of the other states (Bigo and Guild 2010).

In parallel with the work being done by the member states on establishing a common, supranational refugee and migration policy within the EU, attempts are also being made to coordinate political agreements with third-party states (Chou 2006). The external dimension of the EU's refugee and migration policy, or the global approach to migration, covers cooperation agreements, return agreements, visa facilitation, financial support and establishment of bilateral and multilateral forums for discussing migration. With this policy the EU establishes an extraterritorial border control (Ryan and Mitsilegas eds 2010). The EU exerts considerable pressure on some neighbours, such as Turkey, the Balkan states, former Soviet republics and North African states, to improve their border control. By using aid and trade as financial incentives, the EU has signed repatriation agreements with a number of third countries, which will accept back illegal immigrants coming from or having lived in those countries. As Ryan (2010: 37) argues, strategies of extraterritorial border control enable destination states to free themselves from legal guarantees, which otherwise would be available to migrants. With the extraterritorial control, the states avoid international obligations concerning non-refoulment.

Frontex is a typical example of how the EU establishes an extraterritorial border control. Frontex was established as an external border agency in 2004, and one of its main tasks is to coordinate operational cooperation between member states in the field of management of external borders (European Parliament and Council 2004). Frontex has

for example coordinated several joint operations both at land and at sea, including Poseidon in the Aegean Sea Region, Hera in the Canary Islands, and Nautilus around Malta and the Italian islands of Lampedusa and Sicily. The purpose of these operations is to reinforce border control activities in relation to the illegal migration flows mainly coming from West and North African countries (Frontex 2009). The objective is to turn away illegal immigrants before they enter European territory (Bigo and Guild 2010). When refugees are stopped in international waters, the international law of the sea applies, and individuals do not have access to EU member states' rights (Guild 2009). This practice at the operational level confirms a distinction between the legally constructed EU inside and the extra-legal outside (Buckel and Wissel 2010). According to Léonard (2010) most activities of Frontex contribute to the securitisation of asylum and migration in the EU, although she concludes that the role of Frontex as a securitising actor in itself should not be overestimated, as it is a rather weak actor.

The European Border Surveillance System (Eurosur) is another instrument within the European border control regime, which is based on a gradual upgrading of national border surveillance systems. The main purpose is to prevent unauthorised border crossings, counter cross-border criminality and support measures against persons who have crossed the border illegally. The aim is to create a common information sharing environment among the relevant national authorities (European Commission 2008).

A third form of extraterritorial check is visa policy. The EU has concluded visa facilitation and readmission agreements with several states (Trauner and Kruse 2008). The visa application process takes place at the embassies of European countries. The decision is taken when the individual is potentially far from their common or individual borders (Guild 2009). The Visa Code came into force 5 April 2010, and contains rules for the processing of applications and requirements for obtaining a visa (European Parliament and Council 2009). The Visa Code covers visas issued for stays not exceeding 90 days in any 180 days period. Legislation on the issuance of visas for stays beyond 90 days remains in the national competence. The visa application process is based on the VIS (European Council 2004). Since the VIS will contain biometrical data of visa applicants and is scheduled to be integrated into SIS II, it will be centralised in the networked databases (European Parliament and Council 2008b). The consulates, police authorities from member states and Europol will have access to the databases, and the use of VIS crosses the boundaries between asylum and migration issues, border control, criminal law and counter terrorism. This shows how the boundaries between previously dispersed policy areas have become blurred.

In summary, the combination of these three features (the harmonisation of categories among the EU/Schengen member states, the use of new technology in networked databases and the sorting based on security concerns) gives a new impetus to the European border control regime. This implies that policies on border control, asylum, immigration, judicial cooperation and police cooperation are consolidated in a broader approach to border control. Moreover, the combination of the three features leads to a strengthening of the EU's external policy in the European border control regime. The trends to combine different aspects of security and various levels of authority require a coordination of policies with substantially different goals, and goes beyond the traditional control at the physical border. Based on these changes in the European border control regime, the following two sections examine how the Lisbon Treaty and the Stockholm programme might consolidate and even strengthen these existing trends.

NEW LEGAL AND POLITICAL PROVISIONS WITHIN THE AFSJ

While policy based on the Lisbon Treaty means continuing pursuit and implementation of decisions that were adopted during the 1990s and 2000s, the Treaty also provides the EU with an improved constitutional framework (Monar 2010). Moreover, it provides for a

reshaping of the balance among the institutions in the area (Kaunert 2010). The Lisbon Treaty abolishes the "pillar structure" introduced by the Maastricht Treaty (1993), which placed the internal market in the first pillar, Common Foreign and Security Policy in the second and Justice and Home Affairs in the third pillar. Decisions within the first pillar were based on community method in the EU institutions, which implies a much higher degree of integration both with regard to the institutional rules (majority voting, the Commission's right of initiative and enforcement powers, the full co-legislative powers of the European Parliament and the judicial review of the Court of Justice) and also with regard to the applicable legal doctrines (supremacy, direct effect and the implied powers). In contrast, the second and third pillars were in principle regarded as a matter of the member states and the areas were mainly dealt with intergovernmentally. With the abolition of this structure, areas of responsibility previously under the third pillar, such as judicial cooperation and criminal matters and police cooperation, are now treated under the same rules as the internal market.

This amendment is the continuation of a political process which has been in progress since the Amsterdam Treaty (1999), where more and more decisions concerning aspects of the rules on short term visas and residence permits, asylum policy, illegal immigration and judicial cooperation in civil matters have been made on the basis of the community method in the EU. The Nice Treaty (2003) introduced the community method for the asylum area from 2005. The main areas that with the Lisbon Treaty move from unanimity in the Council of the EU and only consultation in the European Parliament to majority voting are legal immigration, judicial cooperation on criminal matters, Eurojust, non-operational police cooperation, Europol, civil protection and some of the rules on short stay visas and residence permits. Also with the Lisbon Treaty, there are some areas that remain subject to unanimity, such as passports and identity cards, family law and operational police cooperation.

With the Lisbon Treaty, policies in most of the AFSJ areas are subject to the same decision-making procedure. This implies that policies on border control, asylum, immigration, judicial cooperation and police cooperation are consolidated in a comprehensive approach to border control. The decision procedure is qualified majority voting in the Council of the EU, full co-legislative powers of the European Parliament and the judicial review of the European Court of Justice. The Lisbon Treaty provides a new legal basis for European legislation in this area and widens the competences of the ECJ. There is a transitional period and the power of the ECJ and the Commission become applicable to the former third pillar on 1 December 2014.

In addition, the Lisbon Treaty converts the EU Charter of Fundamental Rights into a legally binding bill of rights for the EU (European Parliament, Council and Commission 2007). The Charter has the same legal status as the EU treaties, but it only applies to member states when they are implementing EU law, and does not extend the competences of the EU beyond those given to it elsewhere in the treaties. Although the Charter of Fundamental Rights of the EU already mirrors and develops the content of the European Convention of Human Rights (ECHR) in the EU, the EU is considering an EU accession to the ECHR. The main impact will be the possibility of challenging EU acts before the European Court of Human Rights (ECtHR) if they breach the fundamental rights of an individual.

The Lisbon Treaty's chapter on "policies on border checks, asylum and immigration" confirms the main distinction between EU-citizens and TCNs (European Parliament and Council 2008a: Article 77-80). Regarding TCNs the chapter refers to two main policy areas: the policy on asylum and subsidiary protection, and the policy on immigration. The aim of developing a common policy on asylum, subsidiary protection and temporary protection is confirmed in the Lisbon Treaty (*ibid*: Article 78). It aims to introduce a uniform status of asylum and subsidiary protection for TCNs, valid throughout the EU. By introducing the "uniform standard" in contrast to the former "minimum standard", the Lisbon Treaty strengthens the harmonisation of the EU's policy on asylum. The Lisbon

Treaty also includes the requirement of solidarity among the member states by emphasising that:

> In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament (European Parliament and Council 2008a: Article 78 (3)).

Solidarity and fair sharing of responsibility, including its financial implications, among the member states is also stated as a general principle for all policies related to border checks, asylum and immigration (*ibid*: Article 80) . Cooperation in the field of asylum policy is based on confidence in other states' asylum procedures, and this means everyone shares responsibility for the actions of others (European Parliament and Council 2003). The Mediterranean states are facing particular problems because they form the EU's external border in the south, where the migration flow is greatest (Aubarell, Zapata-Barrero and Aragall 2009). The states in southern Europe have therefore argued for burden sharing and a redistribution of refugees to states in northern Europe (Thielemann, Williams and Boswell 2010). This poses a problem as long as the member states have different bureaucratic categories and divergent practices with respect to the aim of minimum standards and, according to the Lisbon Treaty, uniform standards. The central aim of this policy is to establish common categories and practice by implementing a Common European Asylum System (CEAS) in all member states (which for the most part covers the Dublin agreement, the reception directive, the status directive and the procedure directive).

In relation to immigration policy the Lisbon Treaty aims to develop a common immigration policy intended to achieve three targets: the efficient management of migration flows; fair treatment of TCNs residing legally in member states; and the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings (European Parliament and Council 2008a: Article 79). According to the Lisbon Treaty, the policy related to the conditions of entry and residence, including removal and repatriation, is decided at the European level. In contrast, the Lisbon Treaty states there are no aims to harmonise the laws and regulations of the member states policy on the integration of TCNs. This is still seen as a national concern.

The Lisbon Treaty puts the member states in a position to determine volumes of admission of TCNs moving from third countries to their territory to seek work (*ibid*: Article 79 (5)). It remains unclear how to interpret this division of competences between the EU institutions and the member states (Hailbronner 2010), but member states still want to maintain control of immigration quotas. One may question if this will have any practical consequences as long as member states cannot control movement across the internal Schengen borders. The aim to abolish any controls on persons, whatever their nationality, when crossing internal borders is also emphasised in the Lisbon Treaty (*ibid*: Article 77).

Within the legal framework of the Lisbon Treaty, the Stockholm programme defines a five-year plan for strategic guidelines for legislative and operational planning within the AFSJ (European Council 2009a). The decisions on justice and home affairs policy under the Stockholm Programme (2009) expand on the Tampere programme (1999) and the Hague programme (2004). While the Tampere programme introduced a five-year plan for a CEAS, the Hague programme introduced a new five-year plan for renewing the goals from the Tampere programme. The Stockholm programme also follows the major lines from the EU Immigration Pact (2008), but differs in the details (European Council 2008).

One main characteristic of the Stockholm programme is that it connects the asylum and migration policy to other policy areas. Migration policy is discussed as the question of the labour market needs to be decided within each member state, and as a contribution to the EU's economic development. This is related to the Blue Card Directive, which is a fast track procedure for issuing special combined residence and work permits to highly qualified TCNs (European Council 2009b). Although the asylum policy is connected to internal harmonisation through the establishment of a CEAS, it is largely discussed as a question of development and foreign policy (Collett 2009). The Stockholm programme focuses on the need for legal and political coherence within the AFSJ. It gives priority to the protection of the lives and safety of European citizens and to the tackling of organised crime and terrorism, and it emphasises the AFSJ must be a single area in which fundamental rights are protected.

The Stockholm programme emphasises the further development of digital systems that differentiate among groups of travellers. Firstly, an EU entry/exit system will register the entry time and place, length of authorised stay, entry and exit information of all visiting persons who are not citizens of the EU, including those who do not need a visa for entering the EU. Secondly, a European Electronic System of Travel Authorisation (ESTA) will be used to collect personal and passport information before the departure of TCNs who are not subject to a visa requirement. Thirdly, an Automated Border Control System will be used both by EU citizens and by TCNs who have achieved a "Registered Traveller Status", and this will be based on their travel history. Biometrics is increasingly used at airports and borders to speed up the travel of these groups. Many of these control systems were controversial only ten years ago, but have now become a part of the EU's vision for the twenty-first century (Hobbing 2010). The Stockholm programme calls for an integrated approach where security professionals share a common culture, pool information as effectively as possible and have the right technological infrastructure to support them. It stresses the need to enhance mutual trust between all professionals at national and EU levels (European Council 2009a: 37).

In summary, the trend to treat movements of TCNs across borders increasingly as a security issue is legitimised by the Lisbon Treaty's aim to consolidate EU policy on asylum and migration issues, border control, criminal matters and counter terrorism. The Lisbon Treaty also legitimises the pattern at the operative level, in which the boundaries of these policy areas have become blurred. Furthermore the Stockholm programme confirms the consolidation of these policy areas with its focus on the usefulness of technology for collecting, processing and sharing information among national authorities and other European institutions within the AFSJ.

However, following the Lisbon Treaty's entry into force, the transformation of the EU Charter of Fundamental Rights into a legally binding bill of rights is important for the balancing of individual rights and security. The Stockholm programme places a stronger emphasis on the rights of the individual, although the envisaged implementation action is often vague in substance and without any deadlines (Monar 2010: 158). Moreover, the Lisbon Treaty states that everyone has the right to the protection of personal data. As O'Neill (2010) shows, both the data protection and data security regimes for the EU law enforcement agencies were highly fragmented in the (pre-Lisbon) third pillar. The Lisbon Treaty might bring changes to data protection. It states the EU institutions shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by EU institutions, bodies, offices and agencies, and by the member states (European Parliament and Council 2008a: Article 16(1) and (2)). The Stockholm programme underlines that the information technology systems shall be developed and used according to the principles of data protection and data security (European Council 2009a: 18 pp.).

It is important that the European Parliament has gained increased influence as a co-legislator in the area (Kaunert 2010: 173). With the involvement of the European Parliament in all these areas one may expect transparent discussions and due

consideration of expertise, especially in data protection matters. The scope and impact of the Court's activities in these areas is likely to increase significantly in future (Guild and Carrera 2010:51).

THE EU'S EXTERNAL POLICY WITHIN THE AFSJ

One of the aims of the Lisbon Treaty is to increase the coherence and the visibility of the EU's external actions. The Lisbon Treaty established a permanent President of the European Council. Previously, this position rotated among the heads of governments of the member states. Moreover, the Lisbon Treaty established a new High Representative for the EU in foreign affairs and security policy, and this person is also Vice-President of the Commission. The Lisbon Treaty defines the EU as a legal personality, which can enter into international agreements (European Parliament and Council 2008a: Article 47). These changes strengthen the EU's voice in relation to third countries and in international organisations.

In the chapter that deals with policies on border checks, asylum and immigration, the Lisbon Treaty states the EU may conclude agreements with third countries for the readmission to their countries of origin or provenance of TCNs who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the member states (*ibid*: Article 79 (3)). This is important for the question of whether the EU and/or the member states are entitled to conclude agreements with third states in matters of immigration policy. The question of competence to conclude agreements with third states is important for the EU's increasing emphasis on partnership with third countries in the global approach to migration (Hailbronner 2010).

To ensure that operational cooperation on internal security is promoted and strengthened within the EU, the Lisbon Treaty aims to introduce a new Standing Committee on Internal Security (COSI). It shall facilitate coordination of the action of member states' competent authorities. The priorities are developing, monitoring and implementing an Internal Security Strategy.

The Stockholm programme specifies how the Lisbon Treaty enables the EU to act with increased strength internationally, but there is little new of substance on the global approach to migration (European Council 2009a). It mainly reiterates and affirms the global approach to migration, although two lines of argumentation are especially interesting. Firstly, the Stockholm programme underlines the need to increase the integration of the external dimension of the AFSJ into the general policies of the EU. By referring to the 2008 European Security Strategy report, the Stockholm programme states that internal and external security are inseparable. It specifies that the European Security and Defence Policy (ESDP), and many external actions of the AFSJ, have shared or complementary objectives, and it encourages greater cooperation between these policy fields. It emphasises that ESDP missions make an important contribution to the EU's internal security in their efforts to support the fight against serious transnational crime outside the EU, and states: "Addressing threats, even far away from our continent, is essential to protecting Europe and its citizens" (*ibid*). Secondly, the Stockholm programme states that the Lisbon Treaty offers new possibilities for the EU to act more efficiently in external relations. It also states that the new legal basis under the Lisbon Treaty for concluding international agreements ensures the EU can negotiate more effectively with key partners. In the Stockholm programme the Council of the EU argues that it intends to capitalise on all these new instruments to the fullest extent. Moreover, it states that with regard to the AFSJ, the EU will have a single external relations policy, and specifies that the EU and the member states must work in partnership with third countries.

These two lines of argumentation affirm the willingness to merge external aspects of the AFSJ into the EU's foreign policy, and make use of the infrastructure that is in place. With the integration of border control into EU external relations, control can take place before an immigrant reaches the EU/Schengen border. The integration of internal and external security is the outcome of a process that has been evolving since the 1970s (Geddes 2005; Chou 2009). One innovative element in the Stockholm programme relates to the provisions made for the adoption of a comprehensive EU internal security strategy (Monar 2010: 159). This strategy shall, according to the Stockholm programme, include clear divisions of responsibilities between the EU and the member states, reflect a shared vision of today's challenges and respect fundamental rights. The Stockholm programme sees the implementation of the internal security strategy as one of the priority tasks of COSI, and states COSI shall cover security aspects of other policy areas within AFSJ and take into account the external security strategy (European Council 2005). It defines threats such as terrorism and organised crime, drug trafficking, corruption, trafficking in human beings, smuggling of persons and trafficking in arms, and underlines: "In a global world, crime knows no borders" (European Council 2009a: 35). The Internal Security Strategy was adopted in February 2010, and together with the Stockholm programme it lays the foundations for further integration of the internal and external aspects of EU security (European Council 2010a; 2010b; 2011).

At the operational level, the Stockholm programme states that priorities in external relations should inform and guide the work of relevant EU agencies such as the European Asylum Support Office (EASO), Frontex and Eurosur. EASO is a new institution, which was first suggested in the EU Pact on Immigration and Asylum in 2008, and formally established in May 2010 (European Parliament and Council 2010a). It is designed to facilitate, coordinate and strengthen practical cooperation between member states on aspects of asylum, and to help to improve the implementation of the external dimension of the CEAS. One aim is to coordinate the activities of EASO and Frontex. The Stockholm programme also emphasises the continued development of Eurosur at the Southern and Eastern borders. Moreover, according to the Stockholm programme the entry into force of the Visa Code and the gradual roll-out of VIS will create important new opportunities for further developing the common visa policy.

According to the Stockholm programme, the implementation of the global approach to migration needs to be accelerated by the strategic use of all its existing instruments and improved by increased coordination. The strategy of enlisting the co-operation of third countries in the task of border policing further highlights the blurring of boundaries between internal and external security policies, and the merging of foreign policy, migration management and development aid. The Stockholm programme specifies countries in Africa and Eastern and South-Eastern Europe as the areas to cooperate with, and underlines that a dialogue and cooperation should be further developed with countries in Asia and Latin America. These third party states consist mostly of countries that have considerably poorer resources and human rights records than the European states (Aubarell, Zapata-Barrero and Aragall 2009).

Libya is an example of the accuracy of predictions (Lavenex 2006: 346) that the external migration agenda could be caught up by the wider and more diverse context of EU external relations. Libya is (or was) central to the EU's global approach to migration because of those migrants transiting through North Africa and Libya into Europe. An agreement on migration cooperation between the EU Commission and Libya from October 2010, aims to establish a protection system able to deal with asylum seekers and refugees in line with international standards, but it does not include any promises from the Libyan side. In the agreement both sides agree on a number of initiatives on a border surveillance system, mobility-related issues, smuggling and trafficking in human beings, and dialogue on refugees and international protection. The EU promises to support Libya in its efforts to establish an integrated surveillance system along the Libyan land borders, strengthen the cooperation between Libya and the neighbouring

countries and to develop Libyan patrolling capacities in its territorial waters and on the high seas (European Commission 2010a). However, after the revolt started in March 2011, thousands of people arrived by boat in Italy and Malta from Libya. Moreover, hundreds of displaced people have been crossing back into Libya from Tunisia and Egypt with the intention of boarding boats to reach Europe (European Commission 2011b; UNHCR 2011). The blurred boundaries between foreign policy and border control require a use of political instruments that goes beyond the traditional control of territorial borders.

In summary, the Lisbon Treaty and the Stockholm programme confirm existing policies and lay new legal and political foundations for a further integration of policies in the AFSJ and the EU's foreign policy. This integration is related to changing definitions of what kinds of actions and threats should be classified as internal security questions and to what extent these threats are defined as external. The Stockholm programme states that cross-border crime has become an urgent challenge, which requires a clear and comprehensive response. It also emphasises that actions at the European level, combined with better coordination with actions at regional and national levels, are essential for protection from transnational threats. The EU's border control regime combines at least two forms of security. Security is defined both in terms of radical violence to the sovereignty and functional integrity of the state, and as a question of protecting the legal and social order in various sites within the state (Huysmans and Buonfino 2008). While the first refers to fundamental exceptions and crises such as 9/11, the second is a more continuous and bureaucratic policy with the introduction of policing technologies and surveillance systems. Such a combination of different aspects of security requires coordination of policies at various levels of authority, despite their substantially different goals.

CONCLUSION

The legal provision in the Lisbon Treaty combined with the political and operational guidelines in the Stockholm programme lay the foundation for further development of the European border control regime. The main characteristic of this foundation is the merging of asylum and migration policy within a broader management of border control within the AFSJ. The Lisbon Treaty lays the legal basis for a consolidation of the asylum and migration policy and judicial cooperation both in civil and in criminal matters and police cooperation. With the Lisbon Treaty's provisions to give the EU a voice in relation to third countries and international organisations, it also lays the foundation for a strengthening of the global approach to migration as a part of the EU's foreign policy. With the integration of border control into EU external relations, control can take place before an immigrant reaches the physical EU/Schengen border. The Stockholm programme confirms this merging with other policy areas. It presents political and operational guidelines for both the further consolidation of AFSJ and the strengthening of EU foreign policy in the European border control regime.

The Lisbon Treaty and the Stockholm programme both confirm previously established political processes at the operational level. They are legal and political documents that legitimise existing policies related to the European border control regime. These policies are characterised by a combination of the harmonisation of categories among the EU/Schengen member states, the use of new technology and the sorting of individuals based on security concerns. The use of technology for collecting, processing and sharing information among national authorities and European institutions leads to blurred boundaries among asylum and migration issues, border control, criminal law, counter terrorism and foreign policy. There seems to be a pattern whereby databases that were originally introduced to manage movements across borders are increasingly being used in criminal matters and as an integrated part of security policy. This changing use of information systems is related to new definitions of which kinds of actions and threats

should be classified as internal security questions and to what extent these threats are defined as external. Migration has increasingly been defined as a security concern, and the distinction between internal and external policy has become blurred. Such a combination of different aspects of security and various levels of authority requires careful coordination of policies with substantially different goals and goes beyond mere border control.

The way the Lisbon Treaty and the Stockholm programme confirm and legitimise existing policies at the operational level can lead to a strengthening of these current tendencies. The Lisbon Treaty may, however, also lead to more coherent decision-making processes in relation to the European border control regime. With the involvement of the European Parliament and the impact of the European Court of Justice in all AFSJ areas, one may expect transparent discussions and due consideration of expertise. This is especially important in relation to data protection matters. Moreover, the transformation of the EU Charter of Fundamental Rights into a legally binding bill of rights is significant for the balancing of individual rights and security. This balancing should, however, not remain limited to issues of ethical considerations since the developments in these fields started at the operational bureaucratic level, and were later confirmed at the legal and political level with the Lisbon Treaty and the Stockholm programme.

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