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## LEGAL PROTECTION WITHIN THE SCHENGEN LEGAL FRAMEWORK

### Abstract

*This paper research legal protection within the Schengen legal framework. The Schengen acquis on the abolition of checks at common borders has grown out of its second initial purpose, i.e. to compensate for the loss of security due to the eliminated border checks. The respect for, and the application of, the rule of law in any state or federation of states starts with the very first state acts infringing fundamental rights of a person – not only with the possibility of legal remedies. This requires, first of all, a very good in-depth education and re-training of all those officers and civil servants who have the competence to take such measures, be it decisions or physical acts. Secondly, the permanent monitoring by competent superiors and external authorities is indispensable in order to meet the high standards of the rule of law respecting the particular rights addressed in this essay.*

**Key words:** Schengen, legal framework, legal protection, security, EU

## I INTRODUCTION

### 1. The European Union between a Federation of States and a Federal State

The European Union is neither a Federation of States nor a Federal State<sup>1</sup> yet it has important elements from both two types of these constitutional concepts. Already

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1 R. DANIEL KELEMANN, Built to Last? The Durability of EU Federalism, in: Making History: State of the European Union, Vol. 8, edited by HYPERLINK "/wiki/Sophie\_Meunier" Sophie-Meunier and Kate McNamara, Oxford University Press, p. 52 ff.

the first article of Treaty of the European Union<sup>2</sup> clarifies that the current structural principle of the “Union” is neither definite nor lasting but the momentary status in a process aiming at a federal state. It is considered to change from a lesser unified into a stronger unified entity beyond the present configuration.<sup>3</sup>

Art. 1 para 2 of the Treaty of the European Union reads:

“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

It is said that the title “Union” instead of “Federation” resulted because of the (single) opposition of the UK against the second one.

Therefore, the European Union is for the time being under the constitutional law perspective a legal construction *sui generis*, or – as it has been nicknamed – an “unidentified political object” (WEILER) or rather *aconstitutionally unidentified object* – since it is an unidentified political reality.

It is certainly more than an *intergovernmental organisation* but far from a *federal state* as well. In-between are as terms of the political science theory *confederation* and *federation*. The distinction of the two is fuzzy since the variety of practical examples contradicts any clear dividing line. The EU is arguably closest to what is termed a *confederation*. But it is hugely different to the legal construction of Switzerland, a *federal state* with the official name in English *Swiss Confederation* (derived from Latin *confoederatio*).

Yet, for our main subject it is not necessary to follow this particular issue more thoroughly, however it is important to keep in mind that the *European Union's changing fundamental legal basis* has far reaching consequences for all third countries cooperating in one form or another with the EU (partly except for free trade arrangements).

2 OJ C 83/01 of 30 March 2010.

3 More about the legal development of the EU from the Treaty of Maastricht (1992) to the Treaty of Lisbon (2007, in force since 1 December 2009) see: MARKUS H.F. MOHLER, *Polizeiliche-Zusammenarbeit Schweiz-EU*, in: *Sicherheit&Recht* 3/2013, 136 ff.

## 2. International Law Parameter

### a EU and International Law

EU Law, i.e. the law of the European Union or *Union law*, is internally *not* international law as such. It delimits itself from general international law primarily by two particularities:

- its (mostly) direct applicability in the members states without any national legislative act<sup>4</sup> and
- its priority before national law in the fields in which the EU has been conferred limited competence by its member states.<sup>5</sup>

It is to be stressed that the legal framework of the area of freedom, security and justice is part of the *Union law* with shared competences between the EU institutions and the member states.

However, the Treaty of the European Union (EU) and the Treaty on the Functioning of the European Union (TFEU) were subject to international law rules with regard to reservations to be made while acceding to them. The United Kingdom and Ireland<sup>6</sup> and Denmark<sup>7</sup> “shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three<sup>8</sup> of the Treaty on the Functioning of the European Union”. But all three countries benefit of an “opt-in”-clause.

### b Asymmetry

Usually international bi- or multinational treaties or conventions are to be negotiated *ab ovo* among the future partners without privileging a negotiator’s legal regulations as a common negotiating basis.<sup>9</sup> But this is not the case for third countries intending to conclude a treaty with the EU whether on a future accession or

4 Art. 288 of Treaty on the Functioning of the European Union (TFEU).

5 Art. 5 para. 1 and 2 of the Treaty of the European Union (TEU).

6 Protocol No. 21 to the TFEU.

7 Protocol No. 22 to the TFEU.

8 Area of Freedom, Security and Justice.

9 However, this was not the case for treaties between the USA and other countries on the Foreign Account Tax Compliance Act (FATCA) when the participant countries accepted astonishingly the basis of FATCA itself in one of two possibilities, *not* insisting on reciprocity.

strictly bilateral without accession intention. The negotiations start on the EU's legislation. Not only the negotiating process but also the final treaty is, therefore, *asymmetric*: Third countries have to adopt *Union law* as basis for any treaty with the EU.<sup>10</sup>

### c Dynamism

Not only are the legal fundamentals of the EU subject to permanent revisions<sup>11</sup> but also the Schengen acquis itself.<sup>12</sup> Its goal has been widened from the mere compensation of security losses because of the (initially gradual) abolition of internal border controls to fight serious forms of crimes committed in, or affecting, EU member states by close cooperation in order to achieve “the objective of offering citizens of the Union an area of freedom, security and justice without internal borders”.<sup>13</sup>

This means that a Schengen acquis association treaty of a third country with the EU is an international law treaty leading to an *imposed dynamism* according to the development of the provisions of the Schengen acquis: Third countries have to accept the new or changed provisions with an agreement which constitutes itself an additional international treaty each time or have to face the consequences.

The development of the Schengen acquis has proved to be intense with a high cadence: Since Switzerland signed the Schengen Association Treaty on 25 October 2004 153 new or changed provisions, frequently – up to the Lisbon Treaty as Council Framework Decisions or ordinances – were notified as binding further developments. Based on the TFEU the legislative acts are now *regulations, directives, and decisions*.<sup>14</sup> They all require in a third state the relevant procedure to integrate the new legal provisions in the appropriate form into the national legislation.

10 MOHLER (note 3), 138.

11 José Manuel Barroso, President of the European Commission, State of the Union 2012 address, 9 September 2012, clause 4.

12 Art. 87 clause 3 para. 4 TFEU; Protocol No. 19 to the TFEU, preamble para. 2, art. 5 para. 1. The Integration of the Schengen acquis was decided upon with the Treaty of Amsterdam of 2 October 1997; Protocol (OJ C 340/93 of 10 November 1997).

13 Protocol No. 19 to the TFEU, preamble, first para.

14 Status of 15 April 2014. According art. 288 TFEU there are now three forms of binding provisions: *regulation*, art. 288 para. 1 TFEU (the equivalent of a law), binding in its entirety and directly applicable, leaving no partial competence to the member states, *directive*, art. 288 para. 2 TFEU, defining the result to be achieved but leaving the member states to decide upon forms and methods according to their national legislation, and *decisions*, art. 288 para. 3 TFEU, is binding

## II INSTRUMENTS OF THE SCHENGEN-LEGAL FRAMEWORK REQUIRING LEGAL PROTECTION

As mentioned, the Schengen *acquis* on the abolition of checks at common borders has grown out of its second initial purpose, i.e. to compensate for the loss of security due to the eliminated border checks. According to art. 87(1) TFEU the Union “shall establish police cooperation involving all the Member States’ competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences”. This is a much wider objective than the initial one and in itself dynamic: Art. 67(3) TFEU stipulates that the Union “shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities...“.

It has to be mentioned here that *police cooperation* and therefore *the Schengen acquis* is governed by *shared competences* between the Union and its member states in a double sense:

- Part Three/Title V of the TFEU, Area of Freedom, Security and Justice, does “not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (art. 72 TFEU). These important tasks remain within the competence of each member state.
- Following art. 87(2) TFEU only the legislation on
  - the collection, storage, processing, analysis and exchange of relevant information
  - support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection and
  - common investigative techniques in relation to the detection of serious forms of organised crime

falls under the regime of the ordinary legislative procedure, i.e. the majority ruling both by Parliament and the Council.

The *operational cooperation* between the authorities, however, follows a special legislative procedure: The Council is required to act *unanimously*

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in its entirety only for those it is addressed to. Furthermore, *recommendations* and *opinions*, art. 288 para. 4 TFEU, have no binding force.

For the discussion of the questionable distinction between legislative and non-legislative acts both in the form of regulations, directives, and decisions (art. 297[1 and 2] TFEU) see J.H.H. WEILER, *The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?*, New York, 2006.

after consulting the European parliament (art. 87[3] TFEU).<sup>15</sup> This relates to a preserved core part of the sovereignty of the member states related to their internal public security and public order.(with few exceptions).

Before we discuss the necessity of legal remedies as one of the indispensable elements of a state under the rule of law we need to identify *state activities* within the Schengen acquis which *interfere with, or rather restrict, freedom rights*.

### **1. The Basic Rules of Police Cooperation according the Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 (Schengen Acquis)**

The basic regulations of what is today the *Schengen acquis* is still the Implementation Convention of 19 June 1990.<sup>16</sup>

*a* Information exchange in order to prevent or detect criminal offences (art. 39, 46)

The contracting parties “assist each other for the purpose of preventing and detecting criminal offences” on request for assistance (art. 39[1]) or without being so requested in order to “combat future crime or prevent offences against or threats to public policy and public security” (art. 46[1]). Such information contains in most instances at least some personal data under the protection of art. 8 ECHR, art. 7 and 8 of the Charter of Fundamental Rights of the EU and the respective national provisions. Furthermore, the exchange of personal data is comprised in the following police activities foreseen by the Implementation Convention:

*b* *Cross border* surveillance (art. 40)<sup>17</sup> if in clause 7 listed crimes are involved.

<sup>15</sup> There are two subsidiary and subsequent resolution clauses if the Council should not agree to a proposition unanimously (art. 87[3], subparagraph 2 and 3 TFEU), but they are not applicable for acts which constitute a development of the Schengen acquis (art. 87[3] subparagraph 4 TFEU).

<sup>16</sup> Referring to Council Decision 1999/435/EC of 20 May 1999, OJ L 239 of 22 September 2000. Further details (German language), see MARKUS H.F. MOHLER, Schengen und die Polizei, eine Einführung (Schengen and the Police, an Introduction, in: Breitenmoser/Gless/Lagodny (ed.), Schengen in der Praxis, Zürich/St. Gallen/Wien/Mainz 2009, 3 ff.

<sup>17</sup> Cf. also art. 17 (similar provision) of the Second Additional Protocol to the Convention on Mutual assistance in Criminal Matters, CETS N. 130 (accessed by Serbia on 26 April 2007, entered into force on 1 August 2007).

- c *Cross border hot pursuit* (art. 41) if in clause 4 listed crimes or generally extraditable crimes are involved (according to a declaration among neighbouring member states, clause 9).
- d *Controlled delivery* (art. 73)<sup>18</sup>, originally only with regard to illicit trafficking of narcotic drugs and psychotropic substances, by art. 12 of the EU Convention on Mutual Assistance in Criminal Matters between the Member States<sup>19</sup> later on extended on all extraditable offences.<sup>20</sup>
- e *The Schengen Information System (SIS)* (art. 93 ff.) providing automatic search procedures in order to gain access to alerts “on persons and property for the purposes of border checks and other police and customs checks carried out within the country in accordance with national law and, in the case of the specific category of alerts” with regard to visas, residence permits and other movement of persons issues. The SIS has meanwhile been improved by more efficient search criteria and a massive increase of computer capacity (SIS II).<sup>21</sup>

## **2. Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union<sup>22</sup>**

- a Type of information to be exchanged in a simplified way

Art. 3 lit. d stipulates that “any type of information or data which is held by law enforcement authorities and any type of information or data which is held by public

18 Cf. art. 18 of the Second Additional Protocol (note 17).

19 OJ C 197 of 12. 7. 2000, p. 1 ff.

20 The procedure to allow controlled deliveries follow the rules on mutual *judicial* assistance as opposed to information exchange (within limits), cross border observation and cross border hot pursuit which may be agreed upon by police authorities alone. However in urgent cases even a controlled delivery might be handled initially by the competent police services alone with the ordinary procedure following as soon as possible.

21 See Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205 of 7 August 2007, p. 63 ff.; Council Regulation (EU) No 1272/2012 and No. 1273/2012 of 20 December 2012 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast), OJ L 359 of 29 December 2012, p. 21 ff. and 32 ff., as well as Commission Implementing Decision of 26 February 2013 on the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II, (2013/115/EU), OJ L 71 of 14 March 2013, p. 1.

22 OJ L 386 of 29 December 2006, p. 89 ff.

authorities or by private entities and which is available to law enforcement authorities *without the taking of coercive measures*, in accordance with Article 1(5) is subject to the simplified exchange of data.

#### *b* Information exchange as on the national level

With this framework decision a huge step has been taken in the direction of a federal state solution. Art. 3(3) rules that all member states have to “ensure that conditions not stricter than those applicable at national level for providing and request in information and intelligence are applied for providing information and intelligence to competent law enforcement authorities of other Member States”. The passing of such information shall not be subject to a judicial agreement or authorisation by a judicial or other authority.

That means that with regard to any information which the police either already disposes of or may obtain without any coercive measures according to the pertinent Criminal Procedure Code has to be transferred to the competent police service of other Schengen member states on request (art. 5) or spontaneously (art. 7) for purposes according to art. 39 Implementation Convention.

#### *c* Time limits to provide requested information

In urgent cases and if the requested information is “held in a database directly accessible by a law enforcement authority” the answer has to be given within eight hours (art. 4[1]); non-compliance has to be announced and reasons given for (art. 4[2]).

If it is not an urgent request but the requested information or intelligence is held in a database directly accessible by a law enforcement authority the response should follow within one week (art. 4[3]).

In all other cases the requested police service is held to respond to the requesting competent law enforcement authority within 14 days (art. 4[4]).

#### *d* Intermediary Conclusion

Excluded from this regime are solely information which can be accessed by coercive measures according to the Criminal Procedure Code only for which the police has no competence under normal conditions. The time limits are pretty or rather very short.



Any consideration for data protection provisions in general and particularly with regard to criminal procedure requirements are ignored by this framework regulation. We will come back to these questions.

### 3. Legislation on the Acquisition and Possession of Weapons

The Union legislation on weapons has a long history. It started with Council Directive of 18 June 1991 on control of the acquisition and possession of weapons (91/477/EEC)<sup>23</sup> introducing categories of firearms (annex 1) as well as a *European firearms pass* (art. 12 and annex II), limiting, as minimal standard (art. 3) the acquisition and possession of weapons (art. 5 ff.) and regulating the movement of firearms within the community (art. 11 ff.).<sup>24</sup> The Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008<sup>25</sup> amends the original Council Directive the purpose of which was to compensate for the abolishment of internal border checks. It adapts now the Union legislation to the United Nations Protocol on the illicit manufacturing of and trafficking in firearms, their parts, components and ammunition, annexed to the Convention against transnational organised crime.<sup>26</sup>

The directive not only requires that “any firearm or part placed on the market” need to be “marked and registered in compliance with this Directive, or that it will be “deactivated” (art. 4 [1]) but also that the acquisition and possession of firearms is permitted only by persons who have good cause and who fulfil certain requirements (age, no danger to themselves, to public order or to public safety, art. 5). Member states have furthermore to ensure “the establishment and maintenance of a computerised data-filing system<sup>27</sup> ... which guarantees to authorised authorities access to the data-filing systems in which each firearm subject to this Directive shall be recorded” (art. 4[4]).

23 OJ L 256 of 13 September 1991, p. 51 ff.

24 Text of art. 11 (4) as corrected by OJ L 54, 5.3.1993, p. 22 (for “...to its territory may not be authorized...” must read: “...to its territory may be authorized ...”, i.e. “not” eliminated).

25 OJ L 179 of 8 May 2008, p. 5 ff.

26 See OJ L 280 of 24 October 2001, p. 5 (decision text: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001D0748>; accessed 11 April 2014), Text of the Protocol: [http://www.unodc.org/pdf/crime/a\\_res\\_55/255e.pdf](http://www.unodc.org/pdf/crime/a_res_55/255e.pdf), accessed: 11 April 2014; Serbia accessed the Protocol on 20 December 2005 ([https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-c&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en), accessed: 11 April 2014).

27 „This filing system shall record and maintain for not less than 20 years each firearm’s type, make, model, calibre and serial number, as well as the names and addresses of the supplier and the person acquiring or possessing the firearm.” (art. 4).

These regulations mean a serious infringement of personal freedom rights: A person who wants to buy or to possess a firearm needs to have a good cause and must not be a risk to him- or herself or to public security and, in case she or he gets the permission, will be recorded including a further transfer of the firearm to another person. This constitutes the pathetic contradiction to the US understanding and legislation with regard to the right to possess (and carry) firearms.

#### 4. Visa Code

As second compensation for the abolishment of the internal border checks the strict control of the access to the Schengen area has been one of the foremost concerns. Therefore the regulations leading to the VISA-Code<sup>28</sup> have been the most numerous and frequent developments of the Schengen acquis. It includes the Visa Information System (VIS) as a data base requiring biometric data as identifier (art. 13), furthermore strict regulations on the verification of entry conditions as well as a risk assessment in order to decide upon the issuing of a uniform Schengen visa (art. 21).

“Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State” (art. 32[3]). The use of this right is not as easy as the provision appears to grant.

#### 5. Schengen and Dublin Instruments not Discussed in this Lecture

Due to time constraints we are not going to discuss the Transfer of the so called “Prüm Treaty”<sup>29</sup> into the Union law<sup>30</sup>, the European arrest warrant,<sup>31</sup> and the

28 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243 of 15 September 2009, p. 1 ff.

29 Text see: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010900%202005%20INIT>, accessed: 12 April 2014.

30 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, L 210 of 6 August 2008, p. 1 ff., and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, L 210 of 6 August 2008, p. 12 ff.

31 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), L 190 of 18 July 2002, p. 1 ff., and Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mu-

Dublin provisions regulating the examination responsibilities for asylum applications.<sup>32</sup>

### III TYPES OF STATE ACTS – AND OMISSIONS - INFRINGING FUNDAMENTAL RIGHTS

#### 1. Form of State acts

Basically there are two types of state acts as parts of police activity to prevent a damaging behaviour or of a criminal investigation:

- physical acts
- omissions of physical acts<sup>33</sup>
- decisions in due form
- omissions of decisions.<sup>34</sup>

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tual recognition to decisions rendered in the absence of the person concerned at the trial, L 81 of 27 March 2009, p. 24 ff.

32 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01) (“Dublin Convention; OJ C 254 of 19 August 1997, p. 1 ff.); Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15 December 2000, p. 1 ff.; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003, p. 1 ff.; meanwhile: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (so called “Dublin-III- regulation), OJ L 180 of 29 June 2013, p. 31 ff., and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Eurodac-III), OJ L 180 of 29 June 2013, p. 1 ff.

33 Obligation to protect a fundamental right by a state act, see e.g. ECtHRCase Đorđević V. Croatia, no. 41526/10, 24 July 2012 (final). See my guest lecture at the University of Belgrade of 17 May 2012, Bases and Limits to Fight Terrorism as Set by the European Convention of Human Rights and Fundamental Freedoms ([www.recht-sicherheit.ch/Lehrveranstaltungen](http://www.recht-sicherheit.ch/Lehrveranstaltungen)).

34 Omitting a decision to act appropriately (e.g. informing on legal rights or to so the necessary to safe life).

Physical acts can again be subdivided in

- physical acts directed against a person or an object<sup>35</sup> and
- data processing either conventionally (oral or written) or electronically.

The focus in this context is on decisions and physical acts which are intended to, and cause, a *legal effect*.

Examples for physical acts directed against a person or an object *based on the Schengen legal framework*, i.e. police activities in another Schengen member country:

- cross border surveillance including taking pictures of, or videoing, the target person
- cross border hot pursuit including arrest (if permitted) and an immediate security frisking
- cross border controlled delivery including various evidence gathering activities
- joint patrols including (within the concrete limits) stopping and identifying a person.

Examples for decisions:

- responding to information requests concerning data of individuals
- spontaneous information concerning data of individuals
- requesting information concerning personal data
- entering personal data into the SIS II<sup>36</sup> and/or exchanging supplementary information<sup>37</sup> as well as issuing alerts<sup>38</sup>
  - the permission to use written information as evidence in a judicial procedure by the requesting party (art. 39[2] of the Implementation Convention)
  - granting or refusing visa or residents permits
  - granting or refusing the right to buy or to possess a firearm.

## 2. Recognisability

Some of both forms of state acts are immediately recognisable, some not or only later on. Yet the infringement of legal rights happens with the act itself immediately.

### *a* Immediately Recognisable State Acts

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35 The many different categories of physical acts following the administrative law dogmatic is not discussed here.

36 See e.g. art. 36, 21, 12 of the Council Decision 2007/533/JHA (cf. note 21).

37 See e.g. art. 8, 10(2), 11 of the Council Decision 2007/533/JHA (cf. note 21).

38 See e.g. art. 3(1) lit. c, 12(3), 18(2) of the Council Decision 2007/533/JHA (cf. note 21).

Immediately recognisable are, of course, the physical act of an arrest or a seizure, and decisions upon delivery. In such cases – if there is a legal remedy provided by law – a complaint or appeal may be filed right away within the legally defined period of time.

#### *b* Not Immediately Recognisable state Acts

The vast majority of not immediately recognisable state acts are steps of (electronic) data processing if they are not the published and known consequence of, say, a decision or an overt act such as the passport control at an airport.

The signing of an arrest or seizure warrant, the decision to enter personal data of a suspect or missed person into the SIS is not recognisable until the consequential physical act is performed. A cross border observation may be revealed only later on during a subsequent criminal procedure. Giving cross border oral or written personal information spontaneously or on request to another police will become known by the respective person only after he or she will be summoned and/or questioned by the competent authority.

#### *c* First Consequences

Whereas a correctly delivered decision or an overt physical act can be objected immediately by the concerned person this is not possible upon not communicated decisions and not overt physical acts. In case of an error in person by the authorities or an illegal procedure<sup>39</sup> this might lead to serious illicit infringements of fundamental and freedom rights which can be opposed only afterwards.

### **IV THE EUROPEAN LEGAL FRAMEWORK WITH REGARD TO THE PROTECTION OF INDIVIDUAL RIGHTS**

The European legal framework for the protection of individuals against illicit infringements of their fundamental and freedom rights is set up on different levels even beyond the Union law and the Schengen *acquis*.

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39 Cf. e.g. ECtHR *Nada v. Switzerland*, no 10593/08, of 12 September 2012.

## **1. World Wide Legal Sources related to the Protection of Fundamental Rights**

First, it has to be stressed that worldwide applicable legal sources are to be respected by all EU and national (either member or associate state) legislative and executive authorities.

### *a* The Protection by the Geneva Convention Relating to the Status of Refugees

*The Geneva Convention relating to the Status of Refugees* of 28 July 1951<sup>40</sup> has, of course, to be respected by all EU – and third countries – legislative and executive authorities (art. 78[1] TFEU).<sup>41</sup>

### *b* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984

Referring to the Schengen Implementation Agreement (Schengen acquis) the Decision of the Executive Committee of 27 October 1998<sup>42</sup> on the adoption of measures to fight illegal immigration emphasized the necessity to respect the *anti-torture convention of the UN*.<sup>43</sup>

## **2. The Council of Europe Legal Sources Relating to the Protection of Human and Fundamental Rights**

### *a* The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>44</sup> overarches – or is the human rights fundament for – all transnational, national, and subnational legal provisions and their application with a potential to infringe human rights and fundamental freedoms. The EU has currently

40 As amended by the New York Protocol of 31 January 1967.

41 Similarly art. 1, 21(5), 26(1), 28, 135 of the Schengen acquis.

42 See note 14 (p. 203).

43 The prohibition of torture, inhumane or degrading treatment or punishment is, of course, core provision of the ECHR (art. 3) as well as of the Charter of Fundamental Rights of the EU (art. 4).

44 CETS No. 005 (Council of Europe Treaty Series [<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>, accessed: 13 April 2014]).

still not accessed the ECHR but is in a final process to do so.<sup>45</sup> The final report of the negotiation group of the EU has been submitted on 10 June 2013.<sup>46</sup> The relation between the ECHR and the Court in Strasbourg and the EU will not be easy, neither from the substantive nor the procedural provisions' view point since the EU Charter of Fundamental Rights of the European Union<sup>47</sup> is not just congruent to the ECHR.

#### *b* The European Convention on Mutual Assistance in Criminal Matters

Art. 48(1) of the Schengen acquis (Implementation Convention) declares the European Convention on Mutual Assistance in criminal Matters<sup>48</sup> as *basic regulation* for such international judicial cooperation which is supplemented by the pertinent provisions of the Schengen acquis (art. 48 ff.).

#### *c* Second Additional Protocol to the Convention on Mutual assistance in Criminal Matters

The Second Additional Protocol to the Convention on Mutual assistance in Criminal Matters, CETS N. 130<sup>49</sup> contains in art. 26 data protection provisions restricting the use of transferred information which have to be respected as well.

#### *d* Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981

Several provisions of the Schengen acquis<sup>50</sup> refer to this convention to be observed with regard to its specific regulations on data quality (art. 5), special categories of data (art. 6<sup>51</sup>), data security (art. 7), the concerned person's rights (art. 8), and

45 Further reading: JÖRG POLAKIEWICZ, EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle? The draft accession agreement of 5 April 2013, September 2013: ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2331497](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331497), accessed: 13 April 2014).

46 [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf), accessed: 13 April 2014.

47 OJ C 364 of 18 December 2000, p. 1 ff.

48 Of 20 April 1959, CETS No. 030, accessed by Serbia 30 September 2002, entered into force on 29 December 2002.

49 Cf. note 15.

50 Art. 38(2) with regard to computerised asylum related data bases and art. 94(2), 115(1), 117(1), and 126(1) in connection with the SIS or specific data protection regulations.

51 Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life.

sanctions and remedies for violations of such provisions (art. 10), all understood as a minimal standard of the data protection regime (art. 11).

### **3. The European Union Law relating to the Protection of Human and Fundamental Rights**

#### *a* Primary EU Law

According to art. 6(1) TEU the Union recognises the *rights, freedoms and principles* of the *Charter of Fundamental Rights of the European Union* and declares it to be part of the *primary law*.<sup>52</sup>

#### *b* Council Framework Decision 2008/977/JHA of 27 November 2008 on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters<sup>53</sup>

Also this framework decision refers in considerations 40 and 41 to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal as mentioned before. This framework decision is only applicable if personal data are or have been transmitted or made available between member states (art. 1[1] lit. a). However, it is also considered as a development of the Schengen acquis<sup>54</sup> why it is applicable also in relation to third states associated to the Schengen acquis and to international organisations (art. 13, 26).

It contains provisions relating to the principles of lawfulness, proportionality, and purpose (art. 3), the duty to rectification, erasure, and blocking if conditions including time limits so require (art. 4 f., 9), the restrictions with regard to special categories of data,<sup>55</sup> automated individual decisions producing adverse legal effects for the data subject (art. 7), verification obligations (art. 8), logging and documentation (art. 10). Most important are the provisions establishing the *data subject's*

52 Cf. also preamble of Protocol No. 24 on asylum for nationals of member states of the European Union as well as Protocol No 30 and several declarations annexed to the final act of the intergovernmental conference which adopted the treaty of Lisbon, signed 13 December 2007 (OJ C 83 of 30 March 2010, p. 335 ff.).

53 OJ L 350 of 30 December 2008, p. 60 ff.; see also its forerunner Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23 November 1995, p. 31 ff.).

54 Considerations 45 ff.

55 Cf. note 51.



*rights* such as his or her information on request (art. 15), the official information of the data subject without request according to national legislation (art. 16), the subject's right of access (art. 17) and to rectification, erasure, and blocking (art. 18) as well as to compensation (art. 19). *The right to a judicial remedy for any breach of the rights guaranteed* to him or her is stipulated in art. 20.

#### **4. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to have a third Party informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty**

The title of this new directive is its program. It aims at improving the suspects or accused person's rights in criminal proceedings with precise provisions. Interestingly, it contradicts somehow art. 2(5) subpara, 2 TFEU stipulating that legally binding acts shall not entail harmonisation of member states' laws or regulations.<sup>56</sup> A directive is a legally binding act as to the result to be achieved (art. 288 para. 3 TFEU) yet leaving "to the national authorities the choice of form and methods".

#### **5. (Proposal for a) Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.**

This directive<sup>57</sup> aims at improving the data subject's rights as outlined before. It has been approved by the Commission and on 12 March 2014 by the Parliament in a first reading (with amendments).<sup>58</sup>

56 Cf. also art. 84 TFEU: „The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.”

57 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:PDF>, accessed on 14 April 2014.

58 [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=201285](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=201285), accessed: 14 April 2014.

## V FINAL OBSERVATIONS

### 1. Europe wide Law Enforcement System Requires Europe wide Legal Protection against Infringements of Fundamental Rights

The Schengen *acquis* has been establishing and is further developing a legal system for the prevention as well as for the detection and prosecution of serious crimes in the area of freedom, security, and justice (art. 67 ff. TFEU) which includes many provisions for restrictions of fundamental and human rights. Many of them are directly applicable in the member and associated states. With the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union<sup>59</sup> a regulation equal to a federal state has been introduced. On the other hand the *legal protection* remains still mainly part of the domain and responsibility of the individual states.<sup>60</sup> This constitutes a remarkable *asymmetry* not in favour of the legal protection which might not quite match the fair trial-requirement of art. 6(1) of the ECHR and art. 47 para. 2 of the Charter of Fundamental Rights of the EU. Yet, it is indispensable under the regime of the rule of law that the legal protection including legal remedies meet these requirements irrespective of the country having jurisdiction.

### 2. Different Legal Protection Instruments

There is a variety of *different sorts of legal protection* in the context of police cooperation to prevent serious crimes and mutual judicial assistance in criminal matters as elements of the Union law. A short (incomplete) overview on provisions intended to provide legal protection against illicit infringement of fundamental rights:

- Restrictions of *transferring information by police* (art. 39 of the Implementation Convention)
  - according to national laws only
  - within its competence only
  - to be used as evidence of the offence charged only with the consent of the competent judicial authority

<sup>59</sup> Cf. above II.2.

<sup>60</sup> Cf. RAINER J. SCHWEIZER, *Rechtsschutz in den Systemen von Schengen und Dublin*, in: Breitenmoser/Gless/Lagodny, *Rechtsschutz bei Schengen und Dublin*, Zürich/St. Gallen/Baden-Baden 2013, 2.

- *Cross border physical activities* only meeting the requirements (art. 40, 41, 43, 73 of the Implementation Convention)
- *Mutual assistance in criminal matters* (art. 48 of the Implementation Convention) based on the European Convention on Mutual Assistance in Criminal Matters.<sup>61</sup>
- Use of the **Schengen Information System (SIS II)**<sup>62</sup> according to restrictive regulations only such as
  - purpose and scope (art. 1[2] and 2)
  - limited categories of entries with limited content (art. 20, 23, 26 ff.)
  - limited supplementary information, purpose bound (art. 8, 28 ff.)
  - special regulations with regard to missing persons (art. 32 f.)
  - respecting the principle of proportionality (art. 21)
  - records keeping requirements (art. 12, 18)
  - general data processing rules (art. 46 ff.)
    1. quality of data
    2. applicability of the Council of Europe Data Protection Convention<sup>63</sup> (art. 57)
    3. rights to access, correction if inaccurate and deletion of unlawfully stored data (art. 58)
    4. legal remedies (art. 59)
  - Supervision by the Management Authorities (art. 61 f., 66).
- General data protection provisions<sup>64</sup>
  - protection of the fundamental rights and freedoms (art. 1)
  - principles of lawfulness, proportionality, and purpose (art. 3)<sup>65</sup>
  - self-managed rectification, erasure, and blocking by the competent agency (art. 4)
  - establishment of time limits for erasure and review (art. 5)

61 Cf. above IV.2.b.

62 Cf. above II.1.e referring to the Council Decision 2007/533/JHA.

63 Cf. above IV.2.d.

64 Cf. above IV.3.b.

65 The ECJ (Grand Chamber) declared Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC as invalid due to several counts of not complying with art. 7, 8, and 52(1) of the Charter of Fundamental Rights of the EU primarily (but not only) because of violating the principle of proportionality.

- narrower limits with regard to processing special categories of data (art. 6)
  - narrow limits for automated individual decisions with potential adverse legal effects (art. 7)
  - verification of quality of data which are transmitted or made available (art. 8)
  - time limits imposed by the requested state for the receiving country with regard transmitted data (art. 9)
  - logging and documentation (records, art. 10)
  - limits and requirements for the recipient country with regard to processing received data (art. 10)
  - applicability of national legal restrictions of the transmitting country in the receiving country (art. 12)
  - limited transfer of data to international organisations, third states, and to private parties (art. 13 f.)
  - data subject's rights
    1. spontaneous information of the data subject by the competent agency (art. 16)
    2. right of access on request (art. 17)
    3. right to rectification, erasure, and blocking (art. 18)
    4. right to compensation (art. 19)
    5. right to a judicial remedy (art. 20)
  - Data processing management
    1. confidentiality of processing (art. 21)
    2. security of processing (art. 22)
    3. prior consultation before implementing a new filing system (art. 23)
    4. penalties for the violation of these data protection provisions (art. 24)
  - Supervision
    1. Establishment of one or more public complete independent supervisory authorities (art. 25).<sup>66</sup>
- Finally national law may declare the *inadmissibility for illicitly obtained judicial evidence*<sup>67</sup> in a criminal procedure.

<sup>66</sup> The ECJ (Grand Chamber) has issued a judgment (C-288/12) on 8 April 2014 declaring “that, by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data”.

<sup>67</sup> Cf. SABINE GLESS, *Rechtsschutz durch Beweisverbote?*, in: Breitenmoser/Gless/Lagodny, *seenote* 54, p. 13 ff.

- Most recently, i.e. on 16 April 2014, the European Parliament approved new search and rescue rules to prevent death at sea. Eventually, this regulation which will be binding for all FRONTEX operations aims at the EU's compliance with the ECHR, the Charter of Fundamental rights of the EU, the Geneva Convention relating to the status of refugees including the non-refoulement principle.<sup>68</sup>

### 3. Remaining Problems

The European Union sets very high standards for the protection of fundamental rights. Yet the implementation of all the relevant provisions remain partly being difficult, problematic.

*a* First, the entire legal order, from worldwide applicable legal sources, Council of Europe Conventions<sup>69</sup> and Union Law to the respective national legislation, all in some way dependent from, or referring to, each other, appears somehow as chaotic. Even for trained lawyers it is very difficult not only to find in a certain case the really pertinent provisions but even more so to determine their mutual significance or priority, particularly concerning limits of protection.

*b* The Union legislation with regard to legal remedies is not always as clear as it would deem necessary for the practical use. The judgment of the ECJ (Grand Chamber) of 3 October 2013<sup>70</sup> on the meaning of art. 263 para. 4 TFEU is a recent example.

*c* The implementation of the Union laws on the protection of fundamental and other legal rights falls, as mentioned, mainly into the competence of the member states. The laws on the recourse to law vary from country to country. In view of the envisaged mobility precisely by the abolishing of the internal borders on the one hand side and the reinforcement of the external borders and their control according

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68 Cf. press release of the EU parliament of 16. April 2014 (<http://www.europarl.europa.eu/news/en/news-room/content/20140411IPR43463/html/Migrants-Parliament-approves-search-and-rescue-rules-to-prevent-deaths-at-sea>, accessed: 26 April 2014).

69 Including formally not binding but relevant soft law such as the Recommendation No. R (87) 15 of the Committee of Ministers to Members States Regulating the Use of Personal Data in the Police Sector, adopted on 17 September 1987 ([http://www.privacycommission.be/sites/privacycommission/files/documents/recommendation\\_87\\_15.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/recommendation_87_15.pdf), accessed: 15 April 2014).

70 C-583/11 P, see # 41 ff.

to the Schengen acquis the *same* access to courts in all member countries would be favourable: The procedural fundamental rights should be same and equally applied.<sup>71</sup>

*d* Some practical Questions

- To know the facts: To have the right to access a database is fundamental. But to know to which other data bases the particular information was transferred and how it was further processed appears almost impossible.<sup>72</sup> How and to whom to file a request for access to all data bases possibly retaining the interesting personal data in several countries?
- How, when and to whom file a complaint because of a physical act directed against a person or an object in any country?
- How, where and by whom to file a complaint in case of alleged non-compliance with the new regulation on search and rescue rules to prevent death at sea if there were casualties?
- How can the provided rights under the regime of data protection be respected and granted with the extremely short required responding periods according to the framework decision on the simplified exchange of information?<sup>73</sup>
- Are sufficient interpreters everywhere at disposition in order to be able to file a complaint or to instruct a lawyer accurately?<sup>74</sup>
- How to launch recourse in the *requesting* state with reasonable effort effectively and in due time being in the receiving country or outside of it on the other side of the external border?

The respect for, and the application of, the rule of law in any state or federation of states starts with the very first state acts infringing fundamental rights of a person – not only with the possibility of legal remedies. This requires, first of all, a very good in-depth education and re-training of all those officers and civil servants who have the competence to take such measures, be it decisions or physical acts. Secondly, the permanent monitoring by competent superiors and external authorities is indispensable in order to meet the high standards of the rule of law respecting the particular rights addressed in this essay.

71 SCHWEIZER (note60), 3.

72 Cf. SCHWEIZER (note60), 6.

73 Cf. above II.2.

74 Cf. SCHWEIZER (note60), 10.

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**Documents:**

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- Council Decision 2007/533
- Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, L 210 of 6 August 2008.
- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), L 190 of 18 July 2002.
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- Second Additional Protocol to the Convention on Mutual assistance in Criminal Matters, CETS N.
- TFEU: „The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.”
- The prohibition of torture, inhumane or degrading treatment or punishment is, of course, core provision of the ECHR
- Treaty on the Functioning of the European Union (TFEU) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:PDF> Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast)

## PРАВНА ЗАШТИТА U OKVIRU ŠENGENSKOG PРАВNOG OKVIRA

### Apstrakt

*Ovaj rad istražuje pravnu zaštitu u okviru Šengenskog pravnog okvira. Šengenske pravne tekovine vezane za ukidanje provera na zajedničkim graničnim prelazima potekle su iz druge po redu od njegovih prvobitnih namena, odnosno da nadoknadi gubitak bezbednosti usled eliminacije graničnih provera. Poštovanje i primena vladavine prava u bilo kojoj državi ili federaciji država počinje sa upravo onim prvim državnim aktima koji krše osnovna prava jedne osobe – ne samo sa mogućnošću pravnih lekova. To zahteva, pre svega, veoma dobru temeljnu edukaciju i preobrazovanje svih onih policajaca i državnih službenika koji imaju ovlašćenja da preduzimaju takve mere, bilo da se radi o donošenju odluka ili preduzimanju fizičkih radnji. Kao drugo, stalni nadzor od strane nadležnih i spoljnih organa vlasti neophodan je kako bi se ispunili visoki standardi vladavine prava koji poštuju posebna prava kojima se ovaj esej bavi.*

**Ključne reči:** Šengen, pravni okvir, pravna zaštita, bezbednost, EU