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Introduction: Ensuring freedom of movement and managing the external borders

Following the second Irish referendum, the Lisbon Treaty entered into force on 1st December 2009, putting an end to a long constitutional debate over the future of EU institutions and decision-making. The new Treaty has been warmly welcomed by academics and practitioners working in the field of “Justice and Home Affairs” (JHA), since it is in theory, a step towards more communitisation. The extension of co-decision to the old third pillar as well as the extension of unanimity in the Council, in spite of some exceptions, is indeed a noteworthy development.

Historically, EU border management policy has been closely intertwined with the development of a Schengen zone, the creation of the single market and the enforcement of the concepts of freedom of movement of people, capital, services and goods. Combined with European integration and enlargement, this development defies the traditional notion of state borders. The creation of a JHA policy, which encompasses border management, is a by-product of the lifting of internal borders between the Schengen signatories and the need to propose “compensatory measures” to combat transnational crimes of all types. However, the Schengen zone has considerably expanded since the 1985 Convention, which was signed by France, Germany and the Benelux countries. The Schengen *acquis* was integrated within the *acquis* communautaire in 1997 with the Amsterdam Treaty, providing the European Union with shared competence over the external borders. Nonetheless, it remains a very fragmented zone, with different means of participation for countries like Ireland, the United Kingdom (UK) and Denmark.¹

The development of a Schengen zone and of the internal market has had quite a significant impact upon EU citizens. It has given rise to intra-mobility within the EU territory and created new generations of Erasmus students and of European citizens travelling easily with Eurostar, Thalys, and other means of transport. This EU intra-mobility has naturally led to the development of cross-border rights, such as in the field of student exchange and labour migration. The practice nonetheless shows that there is still some way to go before this no-border space is materialised. Intra-mobility is still impaired by “the persistence of national ‘cultural’

1. Until Lisbon, the UK and Ireland had an opt-out arrangement from Schengen, and therefore from the Schengen external border control. As for Denmark, until Lisbon, it was involved in the old third pillar decisions, but did not participate in any decisions with a supranational implication, which involved the JHA areas transferred after Amsterdam to the first pillar, namely immigration, asylum, judicial cooperation in civil matters and border control.

barriers rooted in the preservation of welfare protections – especially in terms of child care, housing or retirement benefits” (Favell and Guiraudon, 2009; 563). It is also no surprise that in the aftermath of the 2004 and 2007 enlargements, labour migration was restricted with the imposition of transitional schemes on Eastern countries for up to seven years. While it is expected that all labour restrictions will be lifted for economic migrants from EU-8² by 30 April 2011, and for Bulgaria and Romania on 1st January 2014, freedom of movement is not yet a full reality within the EU.³

As well as the necessity to ease freedom of movement for EU citizens and immigrants within the EU, there is also the challenge of controlling the Schengen borders, which include 8,000 km of external land borders and nearly 43,000 km of external sea borders.⁴ This is complicated by the fact that the EU has not yet been able to fully develop common asylum and migratory policies. Border management, asylum and migratory policies impact considerably on, and are fundamentally tied to, third countries, and the countries of transit and origin in particular. The Lisbon Treaty itself emphasises this paradox by underlining that the objective of the Union is to “ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, *which is fair towards third-country nationals*” (article 67).⁵

The development of border management policies by the EU and its member states is therefore historically embedded in the development of the internal market, and has acquired a security dimension over the years. It is intimately linked to the construction of an EU citizenship and to the flow of migrants, both within and from outside the EU (Zapata-Barrero, 2010). Individuals are at the heart of those policies, whether they are EU citizens or third-country nationals within the EU or crossing borders.

This double movement of strengthening freedom of movement and managing external borders will continue in a new institutional setting with the Lisbon Treaty, set out in the first part of this chapter. However in order to reflect upon those policies and to contribute to the debate on improving their design, this chapter shows that to date there has been a discrepancy between policies and practice. To start with, the concept of integrated border management is challenged by the proliferation of member states’ agreements with third countries. This therefore leads to the multiplication of legal loopholes, and the difficulty in implementation of international conventions. This challenge is also identified when it comes to the impact of border management policies upon developing countries and third countries’ nationals.

2. Malta and Cyprus were exempted from labour restrictions in 2004. This is why only eight out of ten countries were affected by those measures.

3. So far, Austria and Germany have declared their intention to leave those restrictions in place until 2011, while Belgium, Denmark, France, Luxembourg and the Netherlands gradually lifted those restrictions between 2006 and 2009. The other EU member states removed those restrictions earlier.

4. DG JLS

5. Emphasis added by the author.

The Lisbon Treaty: the new context for bordering processes

The Lisbon Treaty introduces important modifications, which will influence the EU’s border management policies in the future. The most significant one is the removal of the pillar structure that was introduced with the Maastricht Treaty. While initially conceived as a third pillar policy, governed by intergovernmental decision-making, visa, asylum and border issues were subsequently transferred to the first pillar. This led to a fragmentation of the Area of Freedom, Security and Justice (AFSJ), which was then governed by various decision-making methods and log-

ics. Following the Amsterdam Treaty and the end of the transition period on 1st May 2004, border management effectively became a shared competence between the EU and its member states. Other aspects related to integrated border management remained under the third pillar, such as police and judicial cooperation in criminal matters in particular. The abolition of the pillars raises the question as to whether it will lead to better designed border management policies and possibly to better “policy coherence” with migration and development policies.

The abolition of the pillars does not guarantee a full “communitisation” of JHA policies. Such a sensitive political integration, intertwined with the notions of citizenship, security and political community, will continue to be equally driven by member states’ preferences as well as by a culture of “intensive intergovernmentalism”.⁶ Intergovernmentalism and supranationalism are a pre-requisite to each other, and essential elements of border management policies (Schout and Wolff, 2010). These features of JHA integration are likely to persist, since policies in the field of the AFSJ remain a shared competence of the EU and its member states, and a series of exceptions are enshrined in the Treaty.

JHA politics are being altered by the extension of the European Parliament’s power. Co-decision, the so-called “ordinary legislative procedure” applies to new legislation in the field of police and judicial cooperation in criminal matters, which was the old third pillar previously governed by intergovernmental decision-making. However, this will apply only to new co-decided pieces of legislation, since the old third pillar acquis is subject to a five-year transition period. Article 10 of Protocol 35 of the Treaty on the Functioning of the European Union (TFEU) stipulates that the EU has until 1st December 2014 to convert its old third pillar legislative acquis to co-decided instruments. In particular, the European Parliament Committee on Civil Liberties (the Libe Committee) has beefed up its role in the field of JHA as illustrated by the institutional battle over the Passenger Name Records (PNR) or the SWIFT issues. The Council and the European Parliament are co-deciding on a series of JHA policies. Short-stay visas and residence permits,⁷ legal immigration,⁸ judicial cooperation in criminal matters,⁹ and the rules governing Eurojust and Europol,¹⁰ as well as civil protection¹¹ are now governed by the “ordinary legislative procedure”.

Border checks as well as legal migration policies which were formerly decided by unanimity in the Council now fall under the ordinary legislative procedure.¹² This means that future rules concerning the conditions of entry and residence, standards on the issue by member states of long-term visas and residence permits, including those for the purpose of family reunification and the definition of the rights of third-country nationals residing legally in a member state, will be co-decided by the Council and the European Parliament.¹³ However, member states retain the right to determine the volumes of admission of third country nationals coming to seek work on their territory. In that respect, both the Commission and the European Parliament cannot fully control legal migratory policies. In addition, other relevant measures are still partly governed by the “intergovernmental method”. Measures such as passports, identity cards and residence permits continue to be decided by member states unanimously after consultation of the European Parliament.¹⁴ Other important policies that remain subject to unanimity are family law with cross-border implications,¹⁵ the establishment of a European Public Prosecutor’s Office¹⁶ and operational police cooperation.¹⁷

6. Intensive transgovernmentalism refers to a mode of governance that “underlines the prominent role of bureaucrats and state officials below the level of government representatives in establishing networks with their counterparts in other member states that develop a certain degree of autonomy in decision-making and implementation.” (Wallace 2000 in Lavenex, 2007; 769).

7. Article 77, TFEU

8. Article 79, TFEU

9. Articles 82, 83 and 84, TFEU

10. Articles 85 and 88 TFEU, respectively.

11. Article 196, TFEU

12. Article 77§2, TFEU

13. Article 79, TFEU

14. Article 77§3, TFEU

15. Article 81, TFEU

16. Article 86, TFEU.

17. Article 87, TFEU

A study of the new governance of JHA decision-making leads to the conclusion that member states are decisive actors in migratory and bordering processes at EU level. This is not really surprising given that the “process of bordering” (Zapata-Barrero, 2010) is commonly associated with the construction of a national community. Social practices and policy design at EU level reflect this fundamental relationship between member states and the recent involvement of the supranational level in this bordering process. However, beyond a scale approach that opposes supranational and intergovernmental aspects of JHA governance, we have already shown elsewhere that both aspects of JHA governance are pre-requisite of each other (Schout and Wolff, 2010).

When it comes to external relations and border management, protocol 23 of the Treaty reaffirms that measures developed at EU level “shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements”. In other words, member states continue to be competent in controlling their external borders, especially when managing their borders via bilateral agreements concluded with third countries. This is in line with current practices of EU member states that have concluded agreements with North African countries to perform border management activities, as shown in section 3.

EU border management policy continues to be uneven in its implementation, since the Lisbon Treaty provides the UK and Ireland with an opt-out on border management, asylum, immigration and cooperation in judicial civil matters, as was the case under the Nice Treaty.¹⁸ An opt-in on individual legislative proposals is now also possible for Ireland and the UK.¹⁹ This means that different immigration standards could continue to apply in the EU. As for Denmark, the Lisbon Treaty offers the possibility to opt-in to JHA policies after a public referendum, enabling Denmark to opt-in to each new legislative proposal.

A final noteworthy development for the future of the EU ‘bordering process’ is the legal value gained by the European Charter of Fundamental Rights and Freedoms. Article 19 of the Charter re-iterates the principle of *non-refoulement*. Similarly, the possibility opened by the Treaty to the accession of the EU to the European Convention on Human Rights would provide EU citizens with new juridical remedies if successful. Monitoring the relationship between the Luxembourg and Strasbourg Courts will be worthwhile over the coming years. In this respect, the recent case brought by a group of sub-Saharan migrants before the Strasbourg Court after having been returned to Libya by the Italian coastguard may be influential (Shenkel, 2010). However, as always, such an accession would retain an *à la carte* flavour, since the UK the Czech Republic and Poland have asked for a derogation.²⁰

Integrated border management: a concept at odds with practice?

Further to the evolving decision-making process, EU border management policies are also significantly shaped by the concept of “integrated border management”. This policy concept is linked to the development of an EU internal security strategy, as well as strengthening of the mandate of Frontex. This section nonetheless shows that integrated border management is at odds with the reality of different member states’ interests and priorities, as well as the multiplication of grey areas.

18. However it is important to note that in December 2004, the Council decided that the UK could start implementing Schengen cooperation elements related to police and judicial criminal matters, except the Schengen Information System. See the Council decision of 22 December 2004 on the implementation of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (2004/926/EC).

19. Protocol 19 of the Lisbon Treaty provides that the Council would then decide by unanimity of the rest of its members to allow the UK and Ireland to take part in the JHA acquis. Protocol 20 of the Treaty stipulates that both countries, which are not part of the Schengen area, can continue to control people entering their territories.

20. Protocol no.30, TFEU.

The concept of integrated border management

Integrated border management appears as a relatively straightforward concept to implement, supported by technologies and increased coordination, as if it was a “clean problem susceptible to bureaucratic, managerialist solutions” (Marenin, 2010; 8). The Stockholm Programme further pursues the materialization of this concept, linking it to the development of an EU internal security strategy and the strengthening of Frontex.

An internal security strategy, based on the model of the 2003 European Security Strategy, was adopted by the European Council in February 2010. The document highlights the need to further operationalise cooperation and the inter-operability of agencies like Frontex, Europol and Eurojust. It calls for further exploitation of synergies between the different law enforcement and border authorities, as well as with judicial authorities (Council, 2010a). The establishment of the Standing Committee on Internal Security (COSI)²¹ supports such an integrated and horizontal approach. This committee covers law enforcement and border management authorities for the first time, as well as judicial authorities where appropriate, to provide assessment on EU and national security as well as priorities in the field of operational cooperation.

The strategy also highlights the “important role” that integrated border management can play for security. At the EU level, this concept implies a broad policy mix. Frontex is one of the many agents implementing this integrated border management concept, but policy packages regarding the entry/exit and crossing of borders by third country nationals are also included. For the Commission, which presented this policy mix in a Communication in 2008, integrated border management combines control mechanisms, measures at EU borders, cooperation with neighbouring countries to tackle illegal migration and the facilitation of border crossing for *bona fide* travellers (European Commission, 2008).²² Surveillance and biometric technologies, which have been commented on elsewhere (Wolff, 2008; Bigo and Jeandesboz, 2009), play a central role in this process. The finalisation of Eurosur and the introduction of automated border controls are some of the future short-term steps to be taken. The full operationalisation of SIS II, which has been delayed for years, as well as the rollout of the VIS system, are other objectives of the Stockholm Programme that would support an IBM policy. The creation of an administration for large-scale IT systems will similarly play a fundamental role.

As shown by previous research, Frontex is an agency that arose from a compromise between the Commission’s ambition to create a European Corps of Border Guards, and the reluctance of the member states to devolve too much of their sovereign competences to the supranational level (Carrera, 2007; Wolff, 2008). It is therefore not surprising that the impact assessment carried out to amend the Frontex regulation, concluded that operational cooperation in the field of border management was still “inefficient and insufficient, especially for operational solidarity” (European Commission, 2010). The impact assessment further raises the problem of voluntary contributions for Frontex equipment, the lack of human resources (the agency needs to make *ad hoc* requests to each member states when preparing an operation), insufficient coordination and follow-up of joint operations, and the exact role of Frontex in return operations. Two additional drawbacks are the absence of a mandate to evaluate or react on shortcomings in the implementation of EC law and fundamental rights, as well as the issue of granting Frontex the right to

collect and store personal data (European Commission, 2010; 2), which could entail the risk of duplication with Europol.

The amended draft regulation coincided with the adoption by the JHA Council of February 2010 of a list of '29 measures on reinforcing the protection of the external borders and combating illegal immigration'. Following a French initiative, the document bears a similar analysis to the one carried out by the Commission and insists on providing Frontex with a stronger mandate to organise joint returns flights, to develop an Erasmus-style programme for border authorities in order to lay down a "European culture of border guards of the Member States", and also to foster the use of technologies and the completion of Eurosur (Council of the EU, 2010b).

The M.A.D.R.I.D. report makes the assessment that there is a "growing risk of abuse of travel documents and false declarations about identity, nationality and routing with the aim of both evading border controls, and also frustrating return procedures" at the external borders. Risk assessment also highlights "the increasing risk of use of legal channels to enter the EU with the objective of overstaying" (Council of the EU, 2010c; 9).

Those policy proposals show that the EU and its member states are moving in the direction of further operationalisation of border management and JHA policies. While many developments have taken place over the years through 'intensive transgovernmentalism', on an informal and ad-hoc basis between law enforcement and border agents, it seems that the Lisbon and the Stockholm Programme will enable increased 'interoperability' and operational cooperation. Those are seen as solutions to palliate the problem of implementation and mutual trust that are intrinsic to JHA policies.

Informal practices with third countries: the multiplication of grey areas?

It is precisely in this "operationalisation" that integrated border management faces a different reality. On the ground, member states' informal practices third countries have blossomed, leading to many uncertainties over the legal framework in which Frontex and member states' operations are taking place. Bordering processes are therefore the result of different member states and EU institutions' interests, as the concept of burden-sharing or solidarity has not yet become a reality within the Area of Freedom, Security and Justice (Thielemann, 2008; Wolff, 2008).

Apart from the principles of solidarity and burden-sharing, another important principle of border management is respect for the principle of *non-refoulement*.²³ With the intensification of patrolling in the Mediterranean and the emergence of Frontex as a new actor in border management, this principle of international law comes under strain: "supranational, national and local actors find themselves in a phase of legal insecurity and negotiation. The border-ocean between Europe and Africa has become a contested field of EU policy-making" (Klepp, 2008; 4). An additional grey area concerns the interception of migrants at sea and the implementation of international sea law. While it is clear that migrants have the right to apply for asylum reach the territorial waters of a state, the situation seems to be different when migrants are on the "high seas". In addition, member states have different interpretations of the principle of *non-refoulement* (European Commission, 2009).

21. Article 71, TFEU

22. The 2008 Communication also proposes a series of border management tools, such as an Electronic System of Travel Authorisation (ESTA), an entry/exit registration system and automated gates.

23. This principle is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees which reads as follows: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The multiplication of bilateral agreements between the EU, its member states and third countries to control immigration and co-operate on border management has opened a Pandora's box with many uncertainties regarding the legal, political and humanitarian aspects of those relationships. Countries like Italy, Spain or Malta are 'Europeanising' their immigration, asylum and border management concerns at EU level, while at the same time developing a complex network of bilateral relationships with North African and African countries. These practices, like the agreements between Italy and Libya signed in 2003 and 2007, contribute to the complexity of the EU migratory, asylum and border management policies. Southern EU member states "on different levels (...) are remodelling the EU-refugee regime through their 'frontline perspective', pressuring for their positions in European decision-making forums and formalizing informal practices established in the border regions" (Klepp, 2008; 19).

There are many who argue that the parallel conclusion of agreements is actually putting the international principles at risk. At the same time, it has been shown that "ad-hoc politics on an administrative level can be very productive, leaving the democratic decision process out or behind" (Klepp, 2008; 10). Intensive transgovernmentalism and operational cooperation are two elements in the construction of EU's internal security, and the cooperation took place in the well-established legal framework of the European Treaties. Meanwhile, the external dimension of migration and border management raises legal and political issues.

Several initiatives have been taken in order to palliate those uncertainties. Between 2007 and 2008, a group of experts consisting of member states' representatives, Frontex, the Office of the UN High Commissioner for Refugees as and IOM met regularly to produce draft guidelines for Frontex operations at sea. The guidelines were aimed at ensuring a uniform implementation of international law by EU member states when taking part in Frontex's missions, as well as creating a basis for EU law to enable one member state to carry out surveillance of maritime borders in another member state.²⁴

However, the group of experts was at odds on the issues of human rights and refugee's rights, the role of Frontex as well as the prior identification of the places of disembarkation for the migrants (European Commission, 2009). The ability of the Commission to adopt border surveillance implementing measures as allowed by article 12 of the Schengen Borders Code was also challenged by the member states.²⁵ However, the Commission, based on a mandate of the JHA Council of June 2009, proceeded with the formulation of guidelines. Following the examination by the member states, the European Parliament decided that migrants rescued at sea could only be disembarked in the country hosting the mission and not in the nearest port, as was the practice previously. This would have meant that migrants with serious medical problems rescued at sea near Lampedusa would have had to travel further to Malta, the country hosting most of the Frontex's missions, in order to be disembarked.

As a consequence, the Maltese government decided that it would not host any future Frontex missions and it pulled out of the Nautilus mission, renamed "Chronos", which was planned in the Sicily-Malta-Libya strait. Frontex decided to cancel the €9M mission. Although there are strong suspicions that this is linked to the ruling on guidelines at sea, the Maltese government officially argued that it was due to the sharp decline in the arrival of illegal migrants on their shores following joint Italian-Libyan patrols. As a result, the

24. <http://migrantsatsea.wordpress.com/2010/02/05/background-note-pertaining-to-proposed-guidelines-for-frontex-operations-at-sea/>

25. Commonly known as the comitology procedure.

number of migrants coming from Libya to Malta halved between 2008 and 2009 (Agence Europe, 2010).

So far, this chapter has shown that the development of an operational integrated border management at a policy level was somewhat at odds with the reality of border management operations and practices of member states. Current policies are hindered by the reality of operations and the legal loopholes that are created by informal and ad-hoc cooperation with third countries.

A final feature that is nonetheless often overlooked is the interspersion of border management policies with development policies and their impact on the EU bordering process. While border management policies have been constructed with an internal objective and are based on practical cooperation with third countries, the global development perspective is sometimes overlooked by integrated border management. Further horizontal integration of border management policies with migration and asylum policies should be promoted, as should cooperation between the experts in the field and the authorities.

Beyond the EU's borders: between security and development needs

EU border management cannot be circumscribed to the mere control of external borders, but needs to be considered in the broader context of the EU's external relations. The way the EU designs its border management policies with its neighbours mirrors the construction process of a European identity. "The emergence of a European policy is not simply the outcome of a collective decision of Europeans, but rather is rendered possible by acts of immigrants, who, paradoxically, constitute the borders of the European policy in the very process of crossing them" (Lindhal, 2009; 3). This "bordering process" is itself closely linked to relations with migrants and third countries. EU policies have so far favoured an external dimension of the JHA, whereby border management has acquired a pivotal role. While a global approach to migration has been promoted in partnership with Mediterranean and African countries, work still needs to be done to respond to the realities of development needs. Migration and bordering processes must not only be approached from a security perspective, but also be considered as vectors of development in themselves.

At policy level, the emergence of an Area of Freedom, Security and Justice has had an external impact on the EU's relationship with its neighbours. While the EU's Internal Security Strategy has only been adopted in 2010, the external dimension of the JHA has been developed since the late 1990s (Wolff et al., 2009), and now takes the form of a reasonable structured framework of cooperation with third countries. Action Oriented Papers, the European Neighbourhood Action Plan and Swift and PNR agreements have been developed. This is part of the phenomenon of blurring of internal and external security extensively described in the literature (Bigo, 2000; Lavenex, 2006; Wichmann, 2007; Wolff et al. 2009; Balzacq, 2008; Kurowska and Pawlak, 2009). EU neighbours have become vital partners in fighting transnational crime, which could spill over into the EU territory. At the same time, the EU has also been influenced by a global move to tackle terrorism following 9/11, and this has acted as a catalyst for fostering the development of EU police and judicial cooperation, both internally and externally.

What is relatively new is that this external dimension of JHA has had a significant impact on the EU's development policy. It has been mainstreamed into development cooperation and its funding instruments. A prime example of this mainstreaming is the Cotonou agreement which includes a readmission agreement clause in article 13: "each Member State of the European Union shall accept the return and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities; each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities".²⁶ This clause has not yet been fully implemented, since it needs to be based on bilateral agreements with each of the ACP states, which the EU is trying to actively pursue within the Global Approach on Migration (Council of the European Union, 2005).

External aid instruments such as AENEAS, the Thematic programme on Migration and Asylum, and projects and budget support to developing countries have focused increasingly on issues such as migration management, borders, or more comprehensively on "security sector reform," which often involves the reform of law enforcement agencies. Projects for the promotion of the rule of law, which are focused on strengthening the independence of the judiciary, can also be considered as part of the external dimension of JHA since in the long run they are also a factor in increasing judicial cooperation with the EU (Wolff, 2009; Wichmann, 2009). This process has taken place in parallel with an international debate on the role of security sector reform within development aid. These policies help to foster good governance and the rule of law in developing countries, and in fragile states in particular, and especially by the Security Sector Reform agenda (Schroeder, 2009). However, the problem emerges when security is pursued via development cooperation, and because border management and control policies are being financed from EU aid that normally ought to pursue the Millennium Development Goals and the objective of reducing poverty.

In order to materialize such partnerships, border management has been incrementally introduced into EU development policy and even into ESDP missions. In the Eastern and Southern neighbourhood, the promotion and support of capacity-building in border management is a way of dealing with both illegal migration and all sorts of smuggling (arms, drugs, human beings, etc...). Support is provided to Ukraine and Moldova via an EU Border Assistance Mission. This mission aims to reform customs and border guards, and has a budget of €40M over the 2005-2009 period.

Central Asia has benefited from a Border Management Programme (BOMCA) which is actually the largest programme of EC assistance to the region, with a budget of around €25.6M from 2003 until 2010.²⁷ This programme, which was implemented in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, was focused on enhancing border security as well as legal trade and transit by promoting the adoption of modern border management methods. The programme involved advice to policy-makers on how to initiate legislation and reforms, the renovation and equipping of training centres for border agencies, including an integrated border management component in the national curricula of central Asian border guards, and also the provision of practical training and advice on the ground to border agency staff.²⁸

26. Partnership Agreement between the members of the African, Caribbean and Pacific Countries of states and the European Community.2000. Available at http://ec.europa.eu/development/geographical/cotonou/cotonoudoc_en.cfm

27. The total budget is actually €27.7M, with participation by the UNDP.

28. Further information is available on the website of the project : <http://bomca.eu-bomca.kg/>

Strategic priority is nonetheless given to the countries from the Mediterranean rim, with whom “a stronger partnership with third countries of transit and origin is necessary, based on reciprocal requirements and operational support, including border control, fight against organised crime, return and readmission” (Council, 2009; 71). Two projects in Libya were adopted in 2008. A €2M project aimed at improving the Libyan authorities’ capacity to prevent irregular immigration, while a second project of €3.5M focused on assisting them in managing “the registration, reception and treatment, in line with the international standards, of the irregular migrant apprehended nearby the Southern borders of the country, and to promote the establishment of a system of assisted voluntary return for stranded migrants willing to return, and of resettlement, for asylum seekers and migrants in need of international protection”²⁹ These micro-projects are illustrative of the acceleration of the EU’s cooperation with Libya. The most recent JHA Council conclusions of February 2010 indeed reiterated the need to pursue dialogue on migration with Libya. The Council called for the establishment of “a cooperation agenda between the European Union and Libya with a view to including initiatives on maritime cooperation, border management (including possibilities for the development of an integrated surveillance system), international protection, effective return and readmission of irregular migrants and issues of mobility of persons” (Council, 2010b).

When dealing with its neighbours, and especially the southern neighbours with whom the EU has the mandate to negotiate readmission agreements, it is interesting to note that the most recent mid-term review of the aid given to Morocco stressed that in the event of negotiations on a readmission agreement being successful, then cooperation on migration would gain importance. In particular, the document discusses specific instruments that will accompany the return process, such as socio-economic integration.³⁰

EU development aid is therefore used to support border and migration management projects in neighbouring countries. This evolution is linked to the framing of a “migration-development nexus” (Sorensen et al., 2003) that would balance the “migration-security nexus”. Several documents testify to this gradual acknowledgement by the EU. Countries from the South have made their voice heard on the international stage when carrying this message. Compared to the 1990s, when talking about migration and border management was still taboo, in particular by the Southern partners which primarily saw themselves as countries of emigration, there is a global trend towards finding common policies for common challenges. The Global Approach to Migration, which deals with the external dimension of EU migration policy, is the main framework in which the EU has established a comprehensive dialogue with North Africa and African countries, and in particular on the need to promote a development angle.

Nevertheless, in spite of the gradual diffusion of a migration-development nexus, studies have shown that both policy frameworks remain quite strong and that “the main focus of recent initiatives is still on the aspect of immigration control and proposals for measures pertinent for development remain not only very vague but also non-committal and discretionary” (Lavenex and Kunz, 2008; 452). The new development framework co-exists with the pre-existing security framework, thereby mirroring hurdles in policy coordination. Future border management policies, apart from integrated border management, could strive to integrate more development needs of third countries. Third countries

29. ec.europa.eu/europeaid/documents/aap/2009/af_aap_2009_dci-migr.pdf

30. Mid-Term Review p.5
http://ec.europa.eu/external_relations/morocco/docs/index_en.htm

do not need only to manage migrants but also trade flows, customs and sometimes conflicts on their borders. Border management policies should evolve from a control approach towards an approach that takes into account the need, in Southern countries in particular, to foster regional economic integration, free trade areas and human movement in general, by means of a more horizontal and comprehensive approach. In that respect, the Stockholm programme plans to ease the conditions for remittance flows and to work more closely with diaspora groups. There is also some hope in the fact that “the emphasis on external relations and the shift in focus toward the needs of European labor markets suggests that migration is no longer just simply a Justice, Liberty, and Security policy, but an integral part of foreign policy, employment and social affairs, and a host of other policy areas, such as trade, education, and finance.” (Colett, 2010).

The creation of a European External Action Service (EEAS) constitutes a new window of opportunity that could trigger further coordination between development cooperation, security and the EU’s foreign policy. As this chapter went to press, it was nonetheless difficult to come to any firm conclusion, since the structure of the EEAS is still unclear. It is nonetheless a decisive moment for rethinking the policy priorities of the EU in its external relations and therefore how this will impact upon the “bordering process”. This bordering process is indeed not only the outcome of the EU’s internal decisions (Zapata-Barrero, 2010), but is also the mirror of the EU’s relations with its neighbours and migrants. The EU bordering process is as much driven by an inside-out mechanism as by an outside-in mechanism. In that sense, the link between border and migratory policies and EU development cooperation should be explored further, and approached on a comprehensive basis.

Conclusion

As an investigation of the post-Lisbon decision-making process in the field of migration and border management, this chapter has shown that the development of integrated border management from a policy perspective is sometimes at odds with practice. First, member states have multiplied operational agreements with third countries. The latter, in conjunction with EU operational agreements (i.e. Frontex working arrangements) have raised a great deal of legal issues in terms of the implementation of international human rights and sea conventions. Second, the external dimension of border management and the conclusion of agreements with third countries has been pursued via development aid instruments. However, paradoxically it appears that migration and human movement is not yet fully understood from a development perspective. Policy thus seems once again not to match development needs and complex patterns of human movements.

This tendency is likely to continue in a post-Lisbon era, with a trend towards further operationalisation of border and JHA policies, as well as towards more policy coherence with the concept of integrated border management. The Stockholm programme and recent initiatives have started to address these grey areas, and to ensure that this bordering process remains in line with international norms. This chapter has shown that the EU bordering process is closely linked to EU development aid. This has led to competing frameworks between development and security needs. The redefinition of EU’s external relations priorities with the creation of an embryo of European diplomacy, as well as the

attention given to citizenship and fundamental rights with the Charter of Fundamental Rights, the creation of a post of Commissioner for fundamental rights, justice and citizenship points to future windows of opportunities for re-conceptualising the relationship between borders, citizenship, migrants and external relations.

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