# Scope of the Schengen acquis

Mathematical precision or political flexibility ?

*Session 3 of Conference „Schengen: quo vadis“, Egmont Palace, Brussels, 27 June 2023*

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# Intro

Context:

- EU fellowship at EUI. Research project: „*Guide to Schengen Law*“
- Based on literature and key informant interviews of 25 „Schengen veterans“

Focus of this presentation:

1. *History*: How was the substantive scope of Schengen acquis defined and what shaped its current design ? (8 slides)
2. *Status quo* (4 slides)
3. *Outlook* (2 slides)

# History 1

1960 Benelux Convention + 1962 Benelux Treaty on judicial cooperation: Blueprint + source of inspiration

1984 Saarbrücken + 1985 Schengen Agreement: Political trigger, but soft law only

1990 Convention Implementing the Schengen Agreement (CISA): Legal "backbone" of Schengen. Defines its scope:

- Variety of core + flanking measures: internal + external border, visa, free movement of TCNs, return, carriers liability, responsibility for asylum seekers, SIS, police cooperation, judicial cooperation, ne bis in idem, extradition, firearms, drugs, data protection, transport of goods;

- Choice of "flanking measures" not necessarily resulting from an overriding Schengen logic; also outcome of political negotiations between five Signatories

- Immigration + substantive asylum law outside scope of Schengen from beginning

# History 2

- Free movement rules = “business basis” for Schengen, but outside its formal legal scope

- Some “hot” topics were not yet “hot” for the five signatories in 1985, therefore:

either lacking from CISA (solidarity in situations of migratory pressure; responsibility for irregular migrants)

or regulated in a manner which does not fit todays migratory landscape (responsibility criteria for asylum seekers).

→ *„Freedom“ + „Security“ elements have been present in Schengen as two sides of one coin from the outset (even before 9/11).*

→ *Conceptually, free movement of own citizens was driver and free movement of others an ancillary component*

→ *Five States designed, 35 years ago, rules that are today applicable to all (incl Dublin)*

# History 3

- Article 134+142 CISA → Preference for Community approach. CISA "lost" parts of its substance already at early stage ("*lost children I*"):

- Art 4 CISA → Baggage Regulation 3925/91/EEC
- Art 10(2) CISA → Uniform Visa Format Regulation (EC) No 1683/95
- Art 28-38 CISA → 1990 Dublin Convention
- Art 77-90 CISA → Firearms Directive 91/477/EEC
- Art 120-125 CISA → EC acquis on transport and movement of goods

Philosophy behind: → Schengen is a laboratory. Its rules should gradually be accepted by all Member States via EC/EU law.

# History 4

1999 “Amsterdamisation”: Amsterdam Treaty + Schengen Protocol + Protocols on DK and UK/IE + No/Icl Schengen Association Agreement.

Implemented by:

- Council Decision 1999/435/EC (defining Schengen acquis),
- Council Decision 1999/436/EC (determining legal basis),
- Council Decision 1999/437/EC (Schengen-relatedness for purposes of NO/Icl Association Agreement).

→ Replacing one sin (intergovernmentalism) by another sin (variable geometry)

# History 5

Change of philosophy !

→ Before 1999, scope of Schengen acquis was flexible. Since 1999 it became "static/frozen" (at least formally).

→ Created two worlds: the Schengen world and the broader JHA world.

→ Finality of ultimately merging the Schengen world with the broader JHA world was left aside.

→ Legal debates on Schengen-relatedness of new legal developments became permanent feature.

# History 6

Absence of mathematical precision in legal frame agreed in 1999:

- No precise indication on Schengen-relatedness of first generation of "*lost children of Schengen*" (firearms, visa-format, Dublin,..)
- Uncertainty, whether criteria fixed in Decision 1999/437 apply only for NO/Icl, or also vis-à-vis DK, IE/UK, CH/Lie.
- Uncertainty, whether there are different concepts of Schengen-relatedness (for associated States, DK, UK/IE).
- Uncertainty, as to whether a legal act can be Schengen-related and non-Schengen related at the same time (hybrid legal act).

→ led to persistent legal debates – until today.

# History 7

→ In practice, determination of Schengen-relatedness became a political, rather than substance-based decision.

Key role of Council Legal Service in years after 1999. Restrictive Coreper doctrine on Schengen-relatedness (doc 12164/99):

*The mere fact that it (Schengen relatedness) would be desirable or practical … would not be sufficient …. It should be essential in terms of the realization of the objectives of Schengen co-operation: abolition of checks on persons at internal borders and the taking of inevitable and essential flanking measures ….*

Juxtaposition of: *narrow objective of establishing an area of free movement of persons …., as distinct from the much wider objective of …. the creation of an area of freedom, security and justice.*

→ Consequences: Parts of police cooperation (Europol, Prüm); extradition (EAW) + legal assistance (EEW), readmission + many others became „normal“ Union law. („lost children II“)

# History 8

## Reasons for the restrictive line for determining Schengen-relatedness ?

Research interview replies to this question show a surprising variety. They are convergent in so far as they consider that developments were rather based on political than on legal considerations. However, not less than five differing political reasons were mentioned:

1. Allowing the UK to participate. (*"More interest to have London aboard than Reykjavik."*)

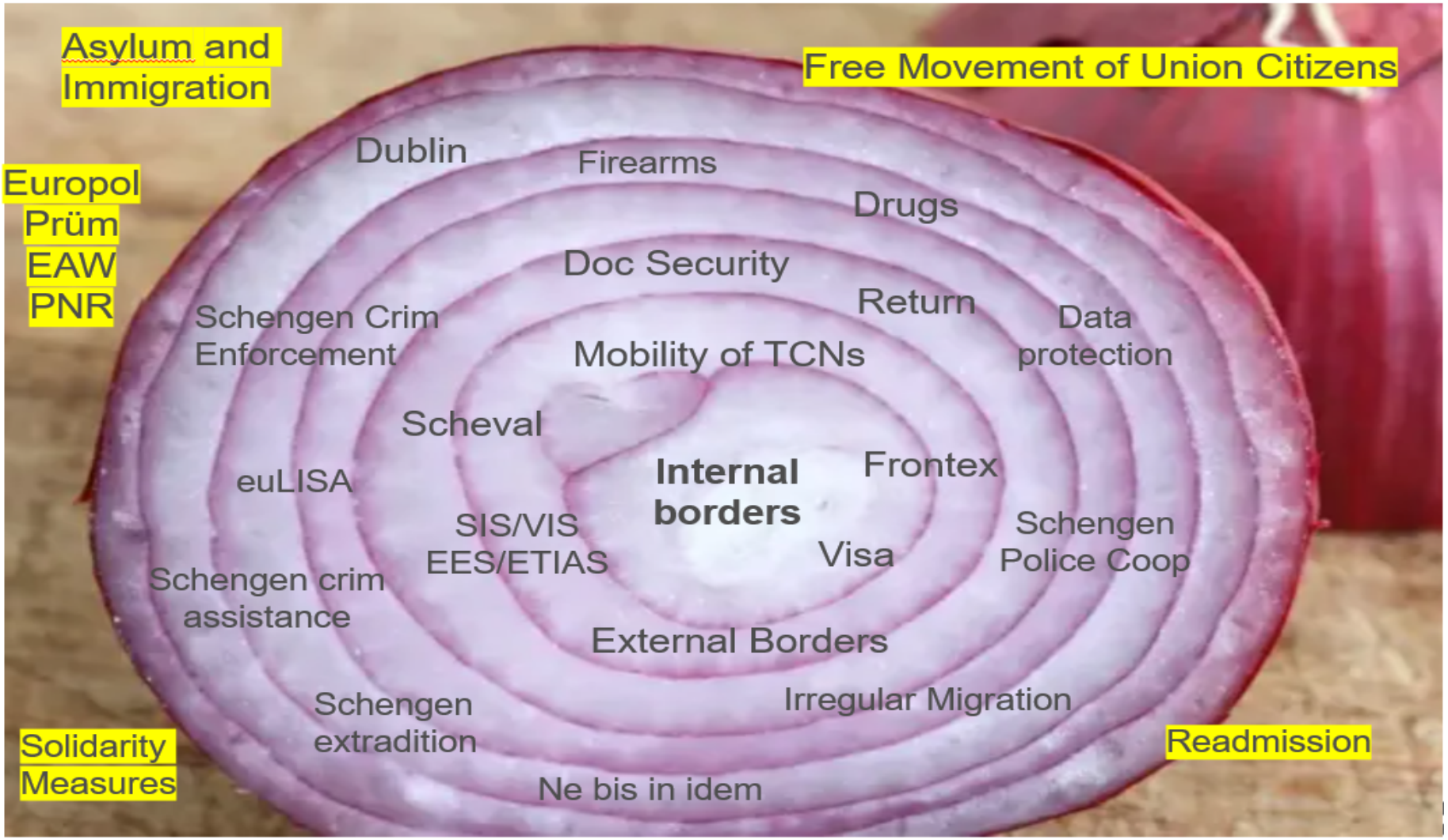
2. Preventing non-Member States from joining the whole/broader JHA field without becoming Member State.

3. Accelerate decision-making (*"Avoid time-consuming consultation of Mixed Committee."*)

4. Limit mutual recognition to Member States only

5. Limit the number of legal acts which might be applied on instalments (under two-step approach applicable to Schengen acquis for new Member States).

# Status quo – onion or coherent ensemble ?



# Status quo – layers of the onion

1. The inner layers: Internal + external borders, visa, short-term mobility of TCNs, Schengen IT-systems (SIS, VIS, EES, ETIAS), Scheval, Frontex.

2. The outer layers: Return, document security, irregular migration, responsibility for asylum seekers/Dublin (?), (Schengen) police cooperation, (Schengen) judicial cooperation, (Schengen) drugs, firearms, (Schengen) data protection

3. The aura: Asylum, free movement, readmission, solidarity measures, responsibility for irregular migrants

# Status quo - Agencies

Labelled as Schengen-related: FRONTEX

Labelled as hybrid (partly Schengen-related, partly non-Schengen-related): eu-LISA

Labelled as not Schengen-related:

EUAA (DK + NO/Icl/CH/Lie enjoy special observer status)
EUROPOL (DK+NO/Icl/CH/Lie participate via bilateral operational agreements)
CEPOL (NO/Icl/CH/Lie cooperate via bilateral working arrangements
EUROJUST (DK+NO/Icl/CH/Lie participate via bilateral working arrangements)
EMCDDA (DK participates as MS; No+CH participate on basis of agreements)
→ piecemeal inclusion of NO/Icl/CH/Lie into the wider JHA field.

# Status quo – legal complexity

Legal complexity has become a plague.

- consumes time and administrative resources: parallel proposals and need to split proposals; parallel agreements to ensure Dublin/ Eurodac participation; parallel agreements in external relations (visa, readmission, status agreements).

- delays political decision-making. Example: Forty pages Council Legal Service opinion on the "variable geometry" aspects of the proposed migration Pact (Council document 6357/21)

- undermines legal certainty. Example: Absence of consolidated version of CISA creates problems to learn which provisions of it are still in force, and which are not.

# Outlook - options for reducing complexity

## Research interview replies indicate three possible ways forward:

Accept the historically grown situation, as it stands today (*"Maybe we simply have to live with this historically grown legal complexity?")*

Broadening the concept of Schengen-relatedness, orienting itself on the scope of the Schengen Implementing Convention, notably in a post-Brexit political landscape. (*"Brexit marks a new era indeed. Added value of labelling more acts as Schengen-related may be existent for Denmark, and the Schengen Associated States.")*

In other replies, a contrary proposal was made, namely, to completely abandon the concept of Schengen acquis, and to treat it just like normal Union law. *("One may think about doing away with special labelling of Schengen acquis and treat it just like normal Union law, with special derogation for Ireland to maintain the CTA; and involving Schengen Associated States via an extended EEA. Evaluation could be replaced by a broader "JHA evaluation" under Article 70 TFEU.")*

# Outlook - options for reducing complexity

## How to proceed ? Suggestions made in research interview:

*The withdrawal of the United Kingdom offers a window of opportunity to carry out a broader horizontal assessment of the concept of Schengen-relatedness now.*

*Such Schengen reflections could be carried out jointly by Council, Commission, and the most affected States (i.e., Denmark, Ireland, and Schengen Associated States) in a "friends of Schengen Group".*

*Based on a political agreement on the line to follow, a clarifying Council Decision might be proposed, together with an "omnibus proposal", declaring as Schengen-related (or not-Schengen-related) those legal acts which would fall under the scope of this renewed understanding.*

*As a complement, a more far-reaching long-term perspective, involving a change of Primary Law, could also be developed and recommended.*