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SELECT COMMITTEE ON  
THE EUROPEAN UNION

PROPOSALS FOR A EUROPEAN  
BORDER GUARD

WITH EVIDENCE

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# TWENTY-NINTH REPORT

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1 JULY 2003

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By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

## PROPOSALS FOR A EUROPEAN BORDER GUARD

COM(2002) 233 final

Towards integrated management of the external borders of the Member States of the European Union

Effective management of the EU's external borders is a matter of concern to all the Member States.

Enlargement will require radical changes to the arrangements for controlling the eastern border of the EU and place a heavy responsibility on the new Member States there.

There is a need for increased practical co-operation between Member States, and for financial arrangements to ensure that the Member States who are responsible for the longest borders do not bear a disproportionate burden.

The United Kingdom's participation in measures to strengthen external border controls is welcome. In the light of its present opt-out from Schengen, it would be wise for the Government to consider applying the common (Schengen) manual on checks at external borders.

The case for a centrally managed, multi-national European Border Guard has not been made.

New EU structures responsible for co-ordinating border control activities should be subject to parliamentary scrutiny and data protection safeguards.

Clear legal rules applying to joint operations must be established, including rules on the powers of border guards and the remedies available to individuals when those powers are exceeded.

## CHAPTER 1: INTRODUCTION

**Historical background**

1. National frontiers are hugely symbolic. They define the territory over which a state exercises sovereignty; they are an integral part of its identity; and they traditionally represent the point at which a person seeking to enter the country must demonstrate their admissibility.

2. It is hardly surprising, therefore, that the arrangements for managing the external frontiers of the European Union (EU) have been a major preoccupation for the Member States since the early 1980s, when the Schengen members started to develop the idea of an area without internal frontiers, which was enshrined in the Schengen Agreement of 1985. This idea was taken up by the Community as a whole in 1986 in creating the Single Market, which the Single European Act defined as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”.<sup>1</sup>

3. This provision led to a long-running disagreement between the United Kingdom and Ireland on the one hand and the Commission and most of the other Member States on the other about whether it required the United Kingdom and Ireland to remove systematic controls on persons at their frontiers with other Member States. This dispute was not resolved until the Treaty of Amsterdam in 1997, when the United Kingdom and Ireland secured agreement to a Protocol to the Treaty entitling them to continue to exercise controls on persons at their frontiers with other Member States.<sup>2</sup>

4. Throughout this period a constant theme of the debate has been that the removal of controls at internal frontiers requires “compensating” or “flanking” measures to strengthen controls at the external frontier. Measures of this kind developed by the Schengen Member States, which formalised their agreement in the 1990 Schengen Convention, include:

- the Schengen Manual, detailing procedures to be followed at the external frontier;
- a common Schengen visa list;<sup>3</sup>
- the computerised Schengen Information System (SIS), primarily a database of “inadmissible aliens”;
- the cross-posting of liaison officers;
- common training projects; and
- joint operations.

5. Although Schengen was the driving force for these initiatives, there was some parallel activity within the EU as a whole, notably the abortive draft External Frontiers Convention, drawn up following the Single European Act, which sought to replicate for the Community generally the compensating measures developed by Schengen. The Convention eventually foundered on a disagreement between the United Kingdom and Spain on its application to Gibraltar, and on the inherent underlying conflict between the participation of the United Kingdom and Ireland in such arrangements and the retention of controls at their frontiers with other Member States.

6. At the level of practical cooperation, however, there have been a number of EU-wide developments, including recommendations agreed in 1997 on effective control practices at the external border for applicant countries, and in 1998 on the provision of forgery detection equipment; and the launching in 1998 of the Odysseus programme, which provided funding for common training measures, exchanges and studies in the area of external border crossings and controls.<sup>4</sup> Bilateral and multilateral cooperation has also continued, for example between the United Kingdom and France in the Channel area.

7. In 1997 the Treaty of Amsterdam brought the Schengen system into the European Union by incorporating the Schengen *acquis* into the EU Treaties. Since then increasing concern about illegal immigration and cross-border crime—and the implications of enlargement of the EU—have focused more attention on external border controls. In 1999 the Tampere European Council highlighted the relevance of external borders for strategies for combating cross-border EU crime and illegal immigration; and in the accession negotiations concerns over security at the new post-enlargement

<sup>1</sup> Article 14, TEC.

<sup>2</sup> Protocol 3 to the Treaty.

<sup>3</sup> Comprising one list of third countries whose nationals must be in possession of a visa when crossing the Schengen external border and another of those whose nationals are exempt from that requirement.

<sup>4</sup> Now replaced by the ARGO programme.

external borders featured prominently. (The new Member States will be required to adopt the full Schengen *acquis*. Border controls between them and the existing Member States will, however, not be removed on accession, but only when the existing Schengen Members<sup>5</sup> are satisfied that adequate controls at the external border are in place.)

8. The Draft Constitutional Treaty prepared by the Convention on the Future of Europe provides a specific legal base for “the gradual introduction of an integrated management system for external borders”.<sup>6</sup> The precise meaning of that term, the extent to which there is a need for closer co-operation between the Member States in controlling the EU’s external border, and, in particular, whether that co-operation should extend to the establishment of a European Border Guard are the subject of this report.

### Previous reports

9. The Committee has undertaken two related inquiries in recent years: *Schengen and the United Kingdom’s Border Controls* and *Enlargement and EU external frontiers*.<sup>7</sup> In revisiting the conclusions of those reports we were struck by the pace of change since then, particularly in the preparedness of the Accession States. Some of the conclusions we reached then still hold good, such as the importance of close ties between new Member States and their eastern neighbours, and the fact that frontier controls cannot bear the full weight of ensuring security in the EU, and we shall re-emphasize them in this report. Other conclusions, however, in particular that there was little likelihood of a multinational force being acceptable to the new Member States and that burden-sharing was likely to be unacceptable to some Member States, may now call for some qualification. We also took account of the report of the House of Commons Home Affairs Committee on border controls, which among other things, recommended closer integration of United Kingdom border services.<sup>8</sup>

### Conduct of the inquiry

10. This inquiry was undertaken by Sub-Committee F of the Select Committee on the European Union, whose membership is shown at Appendix 1. We issued a call for evidence in January 2003, which is reproduced at Appendix 2. To see and discuss at first hand some of the issues arising at an existing external EU land border, members of the Sub-Committee visited the German/Polish border at Frankfurt an der Oder and had useful discussions in Berlin and Warsaw with members of the German and Polish Interior Ministries and Border Guards. We also received valuable written and oral evidence from a wide range of witnesses, a list of whom is at Appendix 3, to all of whom we would like to record our gratitude. We were again indebted for wise advice to our Specialist Adviser, Professor Jörg Monar, Co-Director of the Sussex European Institute, University of Sussex, who has assisted us in several previous inquiries.

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<sup>5</sup> All the EU Member States other than Ireland and the United Kingdom.

<sup>6</sup> Article III-161(1)(c) in the text of 27 May 2003 (Conv 725/03). For an analysis of the provisions of the draft Treaty relating to Justice and Home Affairs see *The Future of Europe: Constitutional Treaty—Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)*, 16th Report 2002-03, HL Paper 81.

<sup>7</sup> 7th Report 1998-99, HL Paper 37; 17th Report 1999-2000, HL Paper 110.

<sup>8</sup> *Border Controls*, 1st report 2000-01, HC 163.

## CHAPTER 2: THE NATURE AND PURPOSE OF BORDER CONTROLS

11. As we noted at the outset of this report, national borders have a hugely symbolic importance in defining a country's territory; and border controls have historically been an important expression of sovereign control over a nation's boundaries. Hence the significance of the decision in the Single European Act to create an area without internal frontiers and of the measures taken by the Schengen States to abolish internal frontier controls. Border controls on people may have lost some of their original importance as a result of modern developments stemming from the increase in the volume and diversity of global travel. These developments have made it necessary to rely to a greater extent on other means of control, both before arrival at the border (in the form of visa regimes and carrier liability) and after entry (in the form of identity card systems and other internal controls), and on approaches based more on targeted intelligence than on systematic checks. Yet they continue to be the primary instrument in enforcing rules on access to the national territory of both goods and people.

12. As we explained in Chapter 1, strengthening external frontiers has in recent years been seen not only as necessary to compensate for the removal of internal frontier controls, but also as an increasingly high political priority in its own right in the fight against illegal immigration and cross-border crime, including people-smuggling.

13. Some of our witnesses, while acknowledging the symbolic importance of border controls questioned their practical efficacy, in view of the difficulty of policing long land and sea borders. The Immigration Law Practitioners' Association categorised most existing systems of border management as based on either military or police models, the former focused on keeping people out and the latter pre-occupied with security and the identification of criminals. They argued for a more rights-based model akin to that which applies at the internal frontiers of the EU, which recognises that the majority of those crossing borders have an entitlement to do so.<sup>9</sup> Others pointed out that the significance of controls at the border itself had diminished as the border had been "pushed back" to countries of origin by the extension of visa regimes and carrier sanctions, described by Dr Guiraudon, research fellow at the National Center for Scientific Research in Lille, as "the two cornerstones of remote migration control".<sup>10</sup>

14. As an instrument to counter illegal immigration and cross-border crime, border controls clearly have their limitations. They can never be 100 per cent effective: totally sealed and controlled land and sea borders are neither feasible nor desirable.<sup>11</sup> It will always be possible for determined people to find ways across long land or sea borders, and sophisticated criminals and facilitators of illegal immigration also find ways of avoiding detection even at guarded crossing points and airports, for example by using forged documents. Most illegal immigrants arriving in the United Kingdom by land or sea will have crossed an external EU border; and we were told by the German Border Guard that 50 per cent of illegal immigrants detected in Germany had entered from another Schengen country.<sup>12</sup>

15. It also needs to be borne in mind that an unintended consequence of more stringent controls at border crossings is that more illegal immigrants may resort to criminal groups of people-smugglers to assist them to cross the border.

16. For these reasons **border controls cannot bear the full weight of ensuring security in the EU, but relaxed or inefficient controls will clearly tend to increase the risks of illegal immigration and cross-border crime.** It is significant that the Schengen countries felt obliged to adopt a wide range of compensatory measures after they went ahead with the abolition of internal border controls between them. These included, among other things, an upgrading of controls on persons within the national territories of the Schengen Member States to compensate for the elimination of controls at internal borders.<sup>13</sup>

17. It would be wrong therefore to dismiss the value of border controls and regard them as of only symbolic significance. Given the limited number of entry points, they represent the most appropriate place at which to check the admissibility of the people and goods entering the country. This is most apparent for air traffic where there is relatively little opportunity to enter other than through authorised

<sup>9</sup> p 53.

<sup>10</sup> p 89.

<sup>11</sup> We were told by Mr Järviö, the Director General, International Security Affairs in the Finnish Ministry of the Interior that it was possible to control the Finnish frontier with Russia to the extent that there were only 44 illegal immigrants crossing the border into Finland in a year, all of whom were apprehended (Q 7). But the geography of the Finnish/Russian border makes it unlikely that such results could be achieved more generally.

<sup>12</sup> Q 52.

<sup>13</sup> The Schengen provisions also allow for the temporary re-introduction of border controls at internal Schengen borders for national security reasons, a provision which has been invoked on a number of occasions.



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airports. Land and sea borders do not lend themselves to such tight controls, but the vast majority of traffic still enters via the authorised crossing/entry points.

18. Borders are natural points at which to make checks on entry to a country and that is why a wide range of checks is made there, not only on people but on goods for customs, health, plant health and other purposes; and to enforce rules on prohibited and restricted goods. The border is also a natural focus of police activity, as it provides an opportunity to check people arriving and it is also the place where by definition the act of smuggling takes place. Border controls therefore have a role to play in combating illegal immigration and various forms of cross-border crime ranging from small scale smuggling to organised crime and international terrorism. Border controls fulfil this role, not only through the controls actually carried out, which each year lead to the detection of large numbers of people seeking to cross illegally or suspected of criminal offences, but also through the deterrent effect they have on at least some people who would otherwise seek to enter the territory illegally.

## CHAPTER 3: INTEGRATED BORDER MANAGEMENT AND A EUROPEAN BORDER GUARD

**Origin of the proposal**

## THE IMPLICATIONS OF ENLARGEMENT

19. During 2001 it became clear to the Member States that the external border control capabilities of the future new Member States would not meet EU/Schengen standards by the time of their accession in 2004, and that substantial help by the EU would be needed beyond that date as well as in the run-up to accession. It was decided that, although the new Member States would apply Schengen controls from the date of accession, their borders with existing Member States would remain in place until an evaluation by the existing Schengen States found that their controls met Schengen standards. The sum of €970 million<sup>14</sup> was allocated at the Copenhagen European Council to enable them to meet these standards as soon as possible.<sup>15</sup> Mr Diwell, the German State Secretary, estimated that this transitional period would last about two years (“maybe longer”), i.e. until 2006, which is when the enlarged version of the Schengen Information System (“SIS II”) is due to be implemented.<sup>16</sup>

20. The implications of enlargement for the management of the EU’s external border are very great. In the Mediterranean the EU’s external border will be extended to Cyprus and Malta, but by far the most significant change will be at the EU’s eastern frontier, where all the other applicant countries are situated. The EU’s border there will be extended by 3000 kilometres<sup>17</sup> and the responsibility for controlling it will pass from the existing Member States to some of the new Member States—Hungary, Poland, Slovakia and the three Baltic States.<sup>18</sup> Up to the time of the collapse of the Soviet Union their border guards had a very different role, since, as one of our witnesses put it, their borders with the Soviet bloc countries were policed by the authorities on the other side “trying to stop people coming out”.<sup>19</sup> For many of these countries enlargement will, as the National Criminal Intelligence Service (NCIS) pointed out, require a reallocation of resources from their western to their eastern borders while maintaining their commitment at their western border during the transitional period.<sup>20</sup> We were told, however, by Colonel Kasiński, the Deputy Commander in Chief of the Polish Border Guard, that the Polish authorities were not planning to relocate officers because of the cost and that about 70 per cent of their current officers would stay on the western and southern borders “doing other things”.

21. There will be major changes for some of the existing Member States as well, especially Austria and Germany, whose long external land borders (except those with Switzerland) will become internal EU borders, with major implications for their border guard services. (Italy’s external land border will also become an internal one.) However, the fact that a border becomes an internal Schengen border does not mean that no police activity will take place there. One of our witnesses from the German Border Police described the patrols routinely undertaken with the French Border Police along the German/French border.<sup>21</sup>

## PRELIMINARY STUDIES

22. Member States’ concerns about the implications of enlargement<sup>22</sup> coincided with more general concerns about external border security and their perception of its importance in combating illegal immigration, which were reinforced by the events of 11 September 2001. This led several Member States to support the idea of setting up a common European Border Police. The main arguments in favour of doing so were that it would provide an instrument of solidarity for sharing the burden of controlling external borders in the enlarged Union; allow for better use of personnel and technical resources as well as of available expertise; and at the same time mark a step forward for political integration. In October 2001 a group of countries under Italian leadership—Belgium, France, Germany, Italy and Spain—undertook a feasibility study on a “European Border Police”. The study

<sup>14</sup> £674 million.

<sup>15</sup> Q 16.

<sup>16</sup> Q 27.

<sup>17</sup> p 37.

<sup>18</sup> The Czech Republic and Slovenia will not have an external land border.

<sup>19</sup> Mr Faull, Q 186.

<sup>20</sup> p 94.

<sup>21</sup> Q 29.

<sup>22</sup> In their evidence to us the Home Office identified a number of key concerns, including migration pressure on the external borders of the Accession States, the difficulty of policing “green borders”, the activities of organised crime groups, and the risks of corruption (p 37).

was backed by the European Commission and financed on an 80 per cent basis under the EU Odysseus Programme. Other Member States, including the United Kingdom, agreed that more co-operation on external border issues was needed, but expressed reservations about the idea of creating a European Border Police force. In a separate initiative another group of countries—Austria, Belgium and Finland—organised a workshop on Police and Border Security in November 2001, which identified 12 areas to be developed within EU structures under the direction of the heads of Member States' Border Guards.<sup>23</sup>

#### COUNCIL AND COMMISSION VIEWS

23. In December 2001 the Laeken European Council arrived at a carefully worded compromise on co-operation on external border issues. It gave the Council and the European Commission a mandate to work out “arrangements for co-operation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created”.<sup>24</sup> The term “European Border Police” or “European Border Guard”, although already used by some Member States' governments, did not appear in the mandate.

24. In response to the Laeken mandate the European Commission presented to the Council and the European Parliament on 7 May 2002 a Communication on the way “towards an integrated management of external borders”<sup>25</sup>. Based on an analysis of the main challenges at external borders and the current state of co-operation between Member States, the Communication proposed a gradual move towards a common management of external borders. It foresaw the main stages as being:

- consolidation and codification of common rules and standards for external border controls;
- the creation of an “External Borders Practitioners Common Unit” and various other co-operation mechanisms;
- financial burden-sharing mechanisms; and—finally
- a “European Corps of Border Guards”.

25. With its more long-term approach to the creation of a European Border Guard the Commission had made an effort to satisfy both the advocates of such a project and the sceptics, placing a lot of emphasis on the practical progress which could be achieved in various fields in the meantime. As all the Member States could find much in the Communication which they were able to support, its reception was broadly positive, although several Member States rejected the Commission's view that integrated border management should ultimately lead to the creation of a Corps of European Border Guards.

26. In May 2002 the results of the Italian-led feasibility study on the creation of a European Border Police was presented at a Ministerial Conference in Rome under the auspices of the Spanish Presidency.<sup>26</sup> The feasibility study did not come out clearly for or against the creation of a European Border Guard. It advocated instead a complex network of national border police forces, which would be linked by a number of important common elements such as special “centres” as “knots” of the network, common units for special tasks, a common risk analysis and financing mechanism and a common curriculum. The study was filled with detailed operational and organisational assessments and some more abstract arguments but it was lacking in clarity and forceful central ideas.

27. In the meantime the Council had come under pressure to act. In the run-up to the Seville European Council, where illegal immigration and the problem of policing maritime borders were due to be high on the agenda, the Prime Minister wrote to the Spanish Prime Minister calling, among other things, for Seville to give “a remit for urgent action to strengthen the EU's borders”;<sup>27</sup> and the President of the Commission wrote calling for the development of the concept of “an integrated and comprehensive ‘border strategy’”.<sup>28</sup>

#### THE JUNE 2002 ACTION PLAN

28. Spurred on by these initiatives the Council agreed in June 2002 on a “Plan for the management of the external borders of the Member States”, which took up most of the analysis and the proposals in

<sup>23</sup> p 1.

<sup>24</sup> Paragraph 42 of the Conclusions.

<sup>25</sup> COM(2002) 233 final.

<sup>26</sup> *Feasibility study for the setting up of a “European Border Police”, Final Report, Rome, May 2002.*

<sup>27</sup> Letter of 16 May 2002.

<sup>28</sup> Letter of 3 June 2002.

the Commission Communication, and added some of the elements of the Italian led feasibility study (such as the idea of creating a network structure).<sup>29</sup> The Council Action Plan differs from the Commission Communication mainly in placing less emphasis on common legislation and financing and in referring only in rather vague terms to a later “possible decision” on the setting up of a European Corps of Border Guards, which would support but not replace national border police forces.<sup>30</sup> Yet it leaves the door open for the eventual development of such a Corps and provides for a very broad range of measures on:

- common operational co-ordination and co-operation mechanisms
- common integrated risk analysis
- personnel and inter-operational equipment
- a common body of legislation
- burden-sharing between the Member States and the Union.

29. Most of these measures are subject to precise deadlines. Several are quite ambitious and clearly go some way in the direction of the gradual establishment of a European Border Guard. This applies, in particular, to the envisaged creation—within five years—of “common units” at particularly sensitive land and sea borders, in the context of which border guard officers of other Member States could be vested with the competence to control persons and conduct joint patrols together with national officers.<sup>31</sup> Yet the Action Plan leaves the Member States a lot of options for the implementation of these measures and does not commit them firmly to any particular model of integrated border management in the future.

30. At its meeting on 21 and 22 June 2002 the plan was “applauded” by the Seville European Council, whose conclusions also referred to “the intention expressed by the Commission of continuing to examine the advisability of such a [European] police force.”<sup>32</sup> Thus it remained unclear whether the long-term aim was to establish an operational force or whether “integrated border management” would stop short of that.<sup>33</sup> The plan was also approved by the European Parliament in December 2002 on the basis of a report by the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs.<sup>34</sup>

#### RECENT DEVELOPMENTS

31. Ambiguity about the long-term aim continues in the draft Constitutional Treaty prepared by the Convention on the Future of Europe, which in proposing for the first time a specific Treaty base for the control of external borders provides for “the gradual introduction of an integrated management system for external borders.”<sup>35</sup>

32. The European Council returned to the issue at Thessaloniki in June 2003. It invited the Commission “to examine in due course, drawing on experience by the Common Unit activities, the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure, in order to enhance operational cooperation for the management of external borders.”<sup>36</sup> This appears to be a reference to the possibility of an operational European Border Guard without actually using the term.

### **Implementation of the Commission Communication and Council Action Plan**

#### THE EXTERNAL BORDER PRACTITIONERS COMMON UNIT

33. One of the recommendations in the Commission Communication was the establishment of a Common Unit of external borders practitioners, which was expected to develop from the Strategic

<sup>29</sup> Council document 10019/02, 14 June 2002.

<sup>30</sup> Paragraphs 118-120 of the Action Plan.

<sup>31</sup> Paragraphs 91-94 of the Action Plan.

<sup>32</sup> Paragraph 31.

<sup>33</sup> Mr Järviö told us that at Seville the Finnish and Swedish Prime Ministers had blocked an attempt to go further in the direction of a common border service (p 2, Q 14). Finland had also pressed for the conclusions to refer to a “European Border Police *system*”, but its view had not prevailed (p 3).

<sup>34</sup> A5-0449/2002, PE 319.234.

<sup>35</sup> See paragraph 8.

<sup>36</sup> Paragraph 14 of the Conclusions.

Committee for Immigration, Frontiers and Asylum (SCIFA).<sup>37</sup> This recommendation was taken up in the Council Action Plan<sup>38</sup> and endorsed by the Seville European Council, which urged Member States to “introduce without delay, within the framework of the Council, the common unit for external border practitioners, composed of Member States’ heads of border control, to coordinate the measures contained in the plan”.<sup>39</sup>

34. The Danish Presidency proceeded with the creation of the Common Unit under the existing formation of SCIFA+, with the remit of initiating operational forms of joint co-operation, approving a series of plans for joint operations and pilot projects submitted by the Member States, and monitoring them. According to a Progress Report prepared by the Greek Presidency, between July 2002 and March 2003 SCIFA+ approved the initiation of 17 projects and set up a network of national contact points for the management of external borders.<sup>40</sup>

#### JOINT OPERATIONS AT EXTERNAL BORDERS

35. The main joint operations approved under these arrangements are shown in the Box below, together with a description of their objectives and a list of the participants. A further report was prepared by the Presidency in June 2003 on the implementation of all these programmes, which indicated mixed results in achieving their objectives.<sup>41</sup>

Name of Operation	Description/Objective	Lead Member State	Other participants
<i>Ulysses</i> (January and May 2003)	Sea border controls off the coasts of the northern Mediterranean and the Canary islands	Spain	France, Italy, Portugal, United Kingdom <i>Observers:</i> Germany, Greece; Norway, Poland, Europol, the Commission
<i>Triton</i> (March 2003)	Joint sea border controls in the South-eastern Mediterranean	Greece	France, Italy, Spain. <i>Observers:</i> Finland, Germany, United Kingdom; Cyprus, Malta
<i>ORCA</i>	Prevention of illegal immigration, trans-border crime and illegal use of visas and documents issued to seamen by improving co-operation between border control authorities	Norway	<i>Observers:</i> Finland, Germany, Netherlands, Sweden; Estonia, Poland
<i>RIO IV</i> (May 2003)	Improving border control systems and practices in designated ports in candidate countries	Spain	Finland, France, Germany <i>Future participants:</i> Denmark, Portugal, United Kingdom; Norway,
<i>RIO III: Operation VISA</i>	Detecting the use of visas for illegal immigration at 22 designated airports	Denmark	All Member States; Iceland, Norway
<i>Operation at the Eastern external land borders</i>	Analysing the migratory pressure in the area and developing operational action	Greece	Finland, Germany, Italy; Norway and six candidate countries

<sup>37</sup> Paragraphs 28-30. SCIFA was set up following the Treaty of Amsterdam as a high-level expert group of immigration officials, reporting to COREPER (the Committee of Permanent Representatives), charged with taking a strategic view of immigration and asylum issues. “SCIFA+” is the same group meeting with the heads of Member States’ border guards (Home Office evidence, p 49).

<sup>38</sup> Point 45.

<sup>39</sup> Paragraph 32 of the Conclusions.

<sup>40</sup> Note from the Greek Presidency, *Progress Report for the implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive Plan for combating illegal immigration*, Council document 7504/03, 17 March 2003.

<sup>41</sup> Council document 10058/03, 3 June 2003.

Name of Operation	Description/Objective	Lead Member State	Other participants
<i>Project Deniz</i> (not yet in place)	Secondment of experts to Turkey to combat trafficking of illegal immigrants by sea	United Kingdom	Several Member States have indicated an interest

#### IMPLEMENTATION OF PILOT PROJECTS

36. The Progress Report also describes a number of pilot projects. One of these is a project for a *Common Integrated Risk Analysis Model (CIRAM)*, led by Finland with the aim of producing risk analyses used by the Practitioners Common Unit. The initial stage involved ten Member States (including the United Kingdom), Norway, the Commission and Europol. It has led to the establishment of a Risk Analysis Centre (RAC), which started work in Helsinki on 1 April 2003 to carry out common integrated risk assessments. The project is not currently open to candidate countries, whose participation will be considered after the first analyses have been completed. Another project with far-reaching implications is one designed to develop a *Common Core Curriculum for Border Guard Training*. It is led by Austria and Sweden, and all the Member States and the accession States take part, together with Iceland and Norway. Austria presented a report to SCIFA in April 2003 on this project.<sup>42 43</sup>

#### CREATION OF AD HOC CENTRES

37. The Presidency Report also refers to two major Centres. The *Centre for Land Borders* in Kehl (Germany) has a four-fold objective:

- to enhance the intensity of border controls and surveillance;
- to create a more effective, uniform border control standard;
- to prove the feasibility, effectiveness and added value of multinational teams on the spot; and
- to work out suggestions for the amendment of existing provisions aiming to reach a higher standard of border control and surveillance.

38. This will be achieved by conducting joint operations at the EU external borders, four of which have already been carried out, and organising the exchange of border guards at “focal point offices”. The Centre is led by Germany. Eleven other Member States (including the United Kingdom) and Norway take part. Since 3 April 2003 the ten accession countries have been participating as observers. However, it has been found that the Schengen legal basis for the deployment of guest officers is not appropriate for these joint operations, which has limited their usefulness.

39. The other Centre is the *Centre of Excellence—Dover*. This project was intended to focus on co-operation in the field of search and detection technology, particularly for detecting people hidden in vehicles. A possible development from this work might be the creation of joint mobile units that can be deployed at high-risk borders. It is led by the United Kingdom, with eight other Member States and Poland taking part in the initial phase. However, the project has not yet got off the ground, due partly to differences of view as to whether it should be limited to exchange of information or should organise joint projects and partly to lack of funding. The United Kingdom has amended the project profile and now plans the use of detection technology in support of other approved projects, such as the Centre for Land Borders.

#### RECENT DEVELOPMENTS: ORGANISATIONAL STRUCTURES FOR OPERATIONAL CO-OPERATION

40. The effectiveness of SCIFA+ has been questioned by the Commission on account of its large membership and wide agenda. In a recent Communication on the development of a common policy on illegal immigration and related matters,<sup>44</sup> the Commission called for “alternative institutional solutions” to the co-ordination and management of joint operations and pilot projects. It argued that a

<sup>42</sup> Council document 8285/1/03.

<sup>43</sup> Other projects include the *International Airports Plan*, setting up a standardised type of organisation for international airports, the *Rational Repatriation Procedures Plan*; a project on *Coordinated criminal investigation related to cross-border crime*; *IMMPACT*, a project providing specialist immigration training and advice to border guards in Serbia-Montenegro; and the *Immigration Liaison Officers Network* project.

<sup>44</sup> *On the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents*, COM(2003) 323 final, 3 June 2003.

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much more operational body should perform the daily operational management of these activities requiring a permanent and systematic activity.<sup>45</sup>

41. The Commission's recommendation was endorsed by the Justice and Home Affairs Council of 5-6 June, which adopted a number of conclusions on "a more effective management of the external borders".<sup>46</sup> It was agreed that:

- operational co-operation should be taken forward by the heads of border guards meeting as "the Practitioners' Common Unit" (PCU) and not as part of SCIFA+.
- the PCU would deal exclusively with operational issues and would hold separate sessions from SCIFA.
- SCIFA would continue to be responsible for preparing the common strategy for the gradual introduction of an integrated border management.
- the PCU, following a decision by SCIFA, would promote in due time the introduction of a common core curriculum for border guard training and would examine the possibilities for further developing common operational patterns in border management.

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<sup>45</sup> *Op cit*, page 7.

<sup>46</sup> Council document 10274/03, 6 June 2003.

## CHAPTER 4: ALTERNATIVE MODELS OF EUROPEAN BORDER CONTROLS

**A range of different models**

42. The political emphasis on the need to enhance the management of the EU external border has led to the plethora of activities described in the previous chapter, with the participation of not only most Member States but also EEA countries and future Member States. The activities range from the creation of more centralised forms of border management (in the form of SCIFA+ and now the PCU) to operational co-operation and joint projects. These forms of action cannot currently be translated into a coherent and clear model of border management in the EU. This may be the result of the different approaches by the Commission and various Member States (including some of the accession countries).

## CENTRALISED MODELS

43. The Commission has largely advocated *a centralised model*. Its 2002 Communication called for the establishment of a European Corps of Border Guards supporting the national services of Member States.<sup>47</sup> The term was dropped in the subsequent Council Action Plan, which referred to the creation of a “rapid response unit” which could be deployed at any time and place.<sup>48</sup> In his oral evidence to the Committee, Mr Faull, the Director General for Justice and Home Affairs at the Commission, referred to a European Border Guard as a unit in support of the national border guards and not as a supra-national body replacing them.<sup>49</sup> The wording in the recent Commission Communication on illegal immigration prepared for the Thessaloniki European Council is stronger: it calls for operational co-ordination “to be developed with the final aim of building up the common and integrated European policy for the management of the external borders *and creating the European border guard*” (emphasis added).<sup>50</sup> It also suggests that the creation of a Community operational structure resulting from the separation of the “operational” Common Unit from the “strategic” SCIFA “could also mark the first step on the road to the creation of a ‘European Corps of Border Guards’, which the Commission still firmly believes is necessary to support and complement the actions of Member States’ bodies in the management of their external borders”.<sup>51</sup>

44. A centralised model is also advocated by Germany. During our visit to the German Interior Ministry we were told that there should be a body in Brussels above national border authorities with the task of supervising, evaluating and co-ordinating their work. This body or steering committee would have a command and control centre responsible for finding out exactly where illegal migration or cross-border crime took place and to what extent. Our witnesses told us that there was a need for such a centre, which could deal with emergencies and develop prevention methods;<sup>52</sup> and that a European Border Police must be structured along operational lines, “that is every country can structure it along their own ideas but any body being placed above the individual structures of the Member States must have a certain influence” Indeed, Dr Frehse suggested that it should be able to “instruct” Member States.<sup>53</sup>

## OPERATIONAL CO-OPERATION

45. The United Kingdom Government emphasises *operational co-operation* rather than centralisation. In his evidence to the Committee, Lord Filkin, then Parliamentary Under-Secretary of State at the Home Office, emphasised more than once the importance of the co-operation mechanisms within SCIFA+.<sup>54</sup> The emphasis is on improving operational co-operation by using an intelligence-led approach rather than legal harmonisation. He emphasised that it was preferable to build on existing capacity “without having to think about constructing some almost monstrous legislative bureaucratic structure”.<sup>55</sup>

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<sup>47</sup> Pages 20-22.

<sup>48</sup> Paragraph 90.

<sup>49</sup> Q 197.

<sup>50</sup> COM(2003) 323 final, 3 June 2003, pages 8-9.

<sup>51</sup> *Op cit*, page 19.

<sup>52</sup> Q 40.

<sup>53</sup> Q 41.

<sup>54</sup> QQ 116, 126, 129.

<sup>55</sup> Q 129.



## TRUST WITH NEIGHBOURS

46. A different viewpoint on border controls in Europe came from the Finnish Government, whose representative highlighted the importance of *trust with neighbouring non-EU countries*. Mr Järviö, the Finnish Director General, used the example of the Finnish-Russian border. There, co-operation is based on a high level of trust between the Finnish and Russian guards, which is reinforced by close working together at the local level, where any incident would normally be resolved. Mr Järviö viewed the building of trust with the new EU neighbours as a major political task for the EU, emphasising that “a border cannot be controlled from one side only”.<sup>56</sup>

47. A similar view emphasising co-operation with neighbouring countries was advocated by the Polish Border Guards, who emphasised their own co-operation arrangements with the Lithuanian and Ukrainian authorities.<sup>57</sup> They were against common border patrols with guards from other Member States—as Colonel Kasiński noted, “I believe each one should try to protect their own borders”.<sup>58</sup>

**Assessment**

48. The idea of establishing a European Border Guard is one of the most ambitious which has so far appeared in the context of EU justice and home affairs, but, as the above analysis shows, there is little consensus about precisely what it means.<sup>59</sup> The natural meaning of the term is a corps or force of some kind. No one is proposing a multinational, uniformed force that would replace national border guards. But it is clear from its latest Communication (see paragraph 43 above) that the Commission does envisage in the longer term a force that would support the efforts of Member States; and this view is supported by some Member States, notably Germany. Such a force would meet some of the needs for burden-sharing among Member States and could help to ensure high standards of external border controls in the enlarged European Union. It could also provide a reserve “rapid reaction” force to assist national border guards under pressure as a result of an emergency of some kind. Yet there is clearly no consensus among the Member States on whether such a common force is actually needed, and even those supporting it have different ideas about its shape, task organisation and the time-frame for achieving it.

49. In the meantime under the term “integrated border management” other forms of progress on co-operation on external border security, as described in the previous chapter, are being given priority and may actually prepare the ground for a later implementation of the European Border Guard project.

50. **There is a clear need for effective co-operation between Member States to provide a more uniform level of security at external borders.** Effective controls at the EU’s external border protect all the Member States, including the United Kingdom and Ireland despite their non-participation in Schengen. For the Schengen States, which do not maintain controls at their internal borders, common standards are essential since, once a person is admitted to one of the Schengen countries, he or she is free to move on to any other Member State. The State carrying out controls at one particular point of its external borders therefore takes responsibility for the security of the Schengen area as a whole; and the security of the whole area is only as strong as the weakest link in the chain of external border controls. Consequently all the Schengen States have the strongest interest in co-operation and in meeting certain common standards and procedures. For the United Kingdom and Ireland the need is not so pressing, but more effective controls at the external border will benefit them by reducing the pressure on their borders. **We welcome the greatly increased level of practical co-operation between the Member States on external border issues and the United Kingdom’s active participation in them, although, as we argue in the next chapter, there is some inconsistency in the United Kingdom’s approach, given its non-participation in the main elements of Schengen.**

51. Enlargement will change the shape of the EU significantly, particularly at the much longer eastern border, and will require a major effort by the new Member States and continuing support from the existing Member States. It would be inequitable for the Member States that happen to have the longest sections of the EU’s external border to control to bear the disproportionate burden of protecting them. In our Report on Enlargement and EU External Frontier Controls in 2000 we said that that some existing Member States were “likely to resist any suggestion that there should be a common EU ‘pot’ to finance frontier controls”.<sup>60</sup> It is striking how opinion has shifted since then to the point where there is now a consensus in favour of burden-sharing in this area. **The case for financial**

<sup>56</sup> Q 1.

<sup>57</sup> Q 76.

<sup>58</sup> Q 79.

<sup>59</sup> As Lord Filkin observed in evidence, “It is a phrase that has been thrown about loosely and when you discuss it with people you find that they have varying views of what it means” (Q 127).

<sup>60</sup> *Op cit*, paragraph 88.

**burden-sharing is unarguable; we welcome the specific provision made for it in the draft Constitutional Treaty and the Government's acceptance of it in principle.**

52. At the same time the requirement on the new Member States to apply the full Schengen regime has implications for their political and economic relations with their neighbours, Belarus, Moldova, Russia and Ukraine. The imposition of a visa regime has had adverse effects on cross-border trade and other contacts with these countries. It is extremely important for relations with those countries and indeed for their stability that EU external border control requirements do not erect unnecessary barriers against them; and we welcome measures to ease visa restrictions for traders and others living near the border who need to cross it regularly.<sup>61</sup> **We strongly endorse the point made by many of our witnesses about the need for trust between authorities across a common border and we fully support the general thrust of the Commission's Communication on the "new neighbours".<sup>62</sup> It is important that preoccupation with EU integrated border management does not displace the equally important work of building up trust and effective working relationships with the new neighbours.**

**53. In our view the case for a fully fledged multi-national force has not been made:**

- It would have significant implications for national sovereignty, particularly if the force were to be responsible to the Commission, which has not previously been given responsibility for an operational service, and it would also raise problems of accountability (discussed further below).
- There is no reason to think that given the necessary financial and technical assistance the new Member States will be unable to operate an effective control at their external borders.
- Each Member State knows its own borders best and is best equipped to co-operate with its non-EU neighbours.
- As the law currently stands, there could be legal problems in border guards exercising powers outside their own jurisdiction, as already shown by the experience of recent projects. The Presidency's report referred to in paragraph 38 found that, "The absence of a proper legal framework for seconding staff to other Member States has proved itself a deficiency in all these cooperation projects and programmes. In some instances participating staff from Member States were limited to observer status".<sup>63</sup>
- It is unclear what a multinational force would add, and there would be a danger of misunderstanding as a result of language and other differences.

54. The last point is important and is relevant to joint operations as well as a possible European Border Guard. We were struck when we visited the German/Polish border by the fact that, despite the close co-operation between the German and Polish border guards, there were obvious difficulties in communication because of the apparent absence of a common language. There have also been reports that *Operation Ulysses* was hampered by language difficulties, although Lord Filkin told us that English was chosen as the operational language.<sup>64</sup> In this context we were interested to hear of the work done by Dr Edward Johnson of Wolfson College, Cambridge, who has undertaken pioneering work in developing specialised "languages" for specific operational situations, particularly in the policing field.<sup>65</sup> **Dr Johnson's work has great potential for facilitating communication in operational co-operation in the border control field, and we urge those concerned to examine further its possible application in such situations.**

55. Mr Faull, the Director General for Justice and Home Affairs at the Commission, drew an interesting comparison with customs controls in the EU, which he suggested provided a model for border controls on people.<sup>66</sup> The European Community was a customs union from the outset. It operates a unified customs code, under which the same customs duties, classification and valuation rules etc are applied wherever goods enter the Community. However, in our view it is significant that

<sup>61</sup> p 89.

<sup>62</sup> *Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, 11 March 2003.

<sup>63</sup> *Op cit*, page 33. In *Operation Ulysses* we understand that UK participation (in the form of a Customs cutter) was limited to maintaining a presence in the operational area and reporting sightings because of a lack of powers in international waters in relation to illegal immigration.

<sup>64</sup> Q 118. The Home Office regarded the operation as a success in terms of deterrence as no irregular migrants were detected (p 34), but Professor Guild told us "they had terrible problems about language and communications".

<sup>65</sup> p 91.

<sup>66</sup> Q 190.

this is achieved satisfactorily with each Member State retaining its own customs service and we see no reason why border controls on people should not operate in a similar way.<sup>67</sup>

56. We also have some reservations about the proposal that there should be some form of reserve force that could be deployed at short notice to immigration “hot spots”. Such a force would be likely to encounter the same difficulties referred to above in operating in unfamiliar territory. It is not clear what such a force would do when it was not required to assist in an emergency. The United Kingdom Immigration Service is not structured to contribute significantly to such a force.<sup>68</sup> If on occasion there is a need for a national border guard to seek temporary reinforcement from another Member State, what Mr Faull described as a system of “mutual assistance” between the national border guards,<sup>69</sup> we believe that it would be better for the arrangements to be made bilaterally.

57. The Council, most appropriately within the PCU, could, however, usefully provide a clearing house facility for such requests. Other Member States responding to a request for assistance would then temporarily delegate appropriately qualified units of their national border guard forces to the requesting Member State. As these requests are most likely to arise in relation to temporary shortages of specialised personnel and equipment, it would be useful if the Member States could agree on putting together a catalogue of capabilities similar to that existing in the anti-terrorism field, so that in case of need sources for temporary reinforcement could be more easily identified. The deployment of such temporary reinforcements could be an effective instrument of solidarity in responding to challenges at the external border, provided that appropriate funding arrangements were agreed.

### **Integrated border management: democratic and legal challenges**

58. Whether or not the case for some form of European Border Guard eventually prevails, the current operation of the integrated border management agenda already poses significant legal and democratic challenges. Operational decisions are taken by a unit situated within the Council consisting of national border guards, whose decisions—it appears—will not take the form of legislation, which would be subject to scrutiny by both national parliaments and the European Parliament. Numerous operations involving joint border controls have been taking place, but no rules have been adopted regulating the powers and accountability of the members of these teams. Co-operation is intelligence-led, based on risk analysis and the exchange of information, but no data protection rules have been adopted. The nature, powers and accountability of the current central structures are far from clear, and a number of our witnesses have argued that legality, human rights and accountability issues were not sufficiently dealt with in the Commission and Council proposals.<sup>70</sup>

59. Creating a centralised body might provide some safeguards, to the extent that such a body was visible and its functions subject to clear legal rules and mechanisms of democratic accountability. Eurojust, the EU’s judicial co-operation unit, provides a good parallel. Eurojust is composed of prosecutors and magistrates from each of the Member States, who help to co-ordinate the investigation and prosecution of cross-border crime. In this quasi-operational role supporting national police and judicial authorities in the execution of their tasks Eurojust performs activities largely equivalent to the Practitioners’ Common Unit. But unlike that Unit, Eurojust has been established by EU legislation prescribing in detail its competence, tasks and accountability; and a Joint Supervisory Body specifically established for this purpose exercises rigorous oversight of its data protection regime. Any change in Eurojust’s mandate is subject to parliamentary scrutiny at both the national and EU level.

60. Strikingly, the creation of a common unit as envisaged by the conclusions agreed at the Justice and Home Affairs Council in June 2002 does not provide any such safeguards. The Unit, which will have operational powers, will function on the basis of meetings of national border guards. It is not established by law and its tasks and powers are not defined—nor is it subject to any data protection safeguards. Its activities will not be subject to scrutiny by the European Parliament or national parliaments nor to judicial control. We believe that that is unsatisfactory. **It is essential that any EU body responsible for border controls should have a clear legal base and be subject to detailed accountability and data protection safeguards. The establishment of Eurojust provides a useful precedent.**

<sup>67</sup> The idea of a Community Customs Service was put forward by the Commission some years ago, but did not make progress.

<sup>68</sup> The situation in Germany is quite different. There, as our German witnesses explained to us, there is a standby force of 11,000 officers available for riots or other emergencies. If the Border Police need to deploy some of their officers to assist another Member State, they can draw replacements from the standby force (Q 47).

<sup>69</sup> Q 198.

<sup>70</sup> Professor Guild, QQ 143, 157; Mr Bort QQ 177, 178; Dr Guiraudon p 90; JUSTICE, pp 92-93; Statewatch pp 100-101.

61. Similar safeguards must apply to the operation of the Centres of Excellence being set up, if they are granted coercive powers and powers to receive, analyse and exchange data. **All common EU border control activities should be subject to effective data protection standards, particularly if they involve risk assessment and profiling and intelligence sharing.**

62. There is also a need for greater supervision of joint border operations. At present the rules on the powers and accountability of the officers taking part in these operations are unclear. Are they subject to the legislation of the country in whose territory they operate? What happens in cases where a boat is in international waters? **It is important that clear legal rules applying to joint operations are established, including rules on the powers of border guards and the remedies available to individuals when these powers are exceeded.** As one of our witnesses noted, this may present even greater problems than the legal difficulties arising from border guards operating in another Member State.<sup>71</sup>

63. One of the future priorities is the development of a common curriculum for border guards.<sup>72</sup> This can provide important safeguards, to the extent that it can offer specific guidance on the legal rules that border guards must follow when exercising their duties. **It is essential that guidelines for border guards take full account of international human rights principles and are drafted with the utmost care to combat racial discrimination in the application of controls on entry and to avoid racial stereotyping.**

### Current institutional structures

64. In his evidence to the Committee, Mr Faull referred to the problems of the division of EU action on border controls between the First and Third Pillars, admitting that “we have not yet achieved the right sort of institutional mechanisms ... which would bring with them the necessary democratic scrutiny”.<sup>73</sup> At present there is a legal basis for Community measures on external border controls in Title IV of the EC Treaty, while police operations (including activities by joint investigation teams) are a matter for the Third Pillar. This may lead to a fragmentation in the legal regulation and accountability of joint border operations in the EU and impede the development of a transparent and coherent framework of border management. This concern was shared by a number of witnesses.<sup>74</sup> **We welcome the proposals in the draft Constitutional Treaty, which should bring about considerable improvements by merging the First and Third Pillars and subjecting measures adopted in the area of freedom, security and justice to a high level of judicial control and parliamentary accountability.** The development of a coherent EU border management framework will, as we explained in paragraph 8, also be facilitated by the insertion in the Treaty of a specific legal base for “the gradual introduction of an integrated management system for external borders”.

### Inter-agency co-operation

65. As we explained in Chapter 2, a lot of official activity takes place at the border, and a range of agencies operate there. It is important that in looking at ways of enhancing EU co-operation at the border the need for close co-operation both with agencies on the other side of the border (see paragraphs 46-47) and between a Member State’s own border services (immigration, customs, police) within each country is not overlooked. We were impressed by the evidence we received of the close co-operation that exists between the Finnish border services, as a result of which people and vehicles have to stop only once when crossing the border and not for separate immigration and customs checks.<sup>75</sup> We welcome the measures taken within the United Kingdom to promote closer co-operation between border agencies following the report of the House of Commons Home Affairs Committee on Border Controls,<sup>76</sup> as described in the supplementary memorandum that Lord Filkin submitted, in particular the initiatives taken by the Border Agencies Working Group.<sup>77</sup> We were surprised and disappointed, however, that Customs and Excise declined to submit evidence to us of their role in operating border controls on the ground that their concern was only with the movement of goods. It is clear to us that controls on goods cannot operate in isolation from controls on people and *vice versa*. It is also likely that the establishment of a European Border Guard would have implications for Member States’ customs services.

<sup>71</sup> Professor Guild, Q 161.

<sup>72</sup> See paragraph 36.

<sup>73</sup> Q 202.

<sup>74</sup> Europol, p 86; Mr Järviö Q 22; Mr Bort Q 177; Professor Guild Q 148.

<sup>75</sup> Q 9.

<sup>76</sup> See footnote 8.

<sup>77</sup> pp 48-49.

## CHAPTER 5: THE UNITED KINGDOM'S POSITION

66. As we explained in Chapter 1, in 1997 the United Kingdom and Ireland secured an opt-out at Amsterdam from the requirement to remove frontier controls at their borders with other Member States. The rationale for this position, adopted by successive governments since 1986, and restated by Lord Filkin in his evidence to us,<sup>78</sup> is that the British Isles' island geography makes it much more effective to check passengers' admissibility at the limited number of ports of entry than to rely on controls at the more porous external borders of the Community; and that removal of these controls would make it necessary to rely on more intrusive internal controls supported by some form of identity card system, which has traditionally been resisted in this country.

67. In our report *Schengen and the United Kingdom's Border Controls* in 1999 we examined the Government's arguments for maintaining systematic frontier controls on all persons entering the United Kingdom.<sup>79</sup> We were unconvinced that such controls were the most effective use of resources to control illegal immigration. We said then:

“We question whether it will be practical to maintain the principle that passengers arriving in the United Kingdom are controlled by nationality rather than by point of departure for the foreseeable future. Closer co-operation with other European States in combating illegal immigration, coupled with selective checks on entry, appears to present the most effective way forward in managing cross-border flows which are increasing at a compound 8 per cent per year.”

68. In our view developments in the intervening period have demonstrated the increasing difficulty of maintaining the Government's position. Until recently they took the view that retention of the United Kingdom's frontier controls at its borders with other Member States made co-operation on external border security less of a priority. But a growing realisation that the United Kingdom and Ireland could not insulate themselves from the effects of an area without internal frontiers has led to a shift of emphasis, signalled most notably by the Prime Minister's initiative before the Seville European Council.<sup>80</sup>

69. With enlargement, the position of the United Kingdom and Ireland will no longer even be geographically unique, since as islands Cyprus and Malta will be in the same position. However, they, like the other accession countries, will be required to apply the full Schengen *acquis*.

70. The Government have made it clear on numerous occasions, however, that they intend to maintain controls at the United Kingdom's frontiers with other Member States, and to ensure that the opt-out secured at Amsterdam is retained in the new Treaty.

71. We received evidence that showed clearly that the United Kingdom has been to the fore in engaging in practical co-operation with other Member States on a bilateral and multilateral basis in many of the operations described in Chapter 3, and, as we have already said (paragraph 50), we welcome that. But the United Kingdom finds itself in an increasingly awkward position in seeking to reconcile its retention of internal frontier controls with more active participation in integrated border management at the EU's external border. As we have already explained, the rationale of integrated border management at the external border is to compensate for the removal of internal frontier controls. The Government's active participation in these measures makes it increasingly difficult to argue convincingly that the United Kingdom needs to retain its opt-out from Schengen.<sup>81 82</sup> These difficulties can only increase. Several witnesses referred to the importance of trust in operating external frontier controls across the enlarged EU.<sup>83</sup> However, we have no reason to doubt that the United Kingdom's contribution to operational co-operation is valued by its partners, even though it maintains a second line of defence at its internal borders.

72. The United Kingdom is likely to face other difficulties arising from an intensification of common border management. One relates to financial burden-sharing. We noted above (paragraph 51)

<sup>78</sup> Q 106.

<sup>79</sup> 1998-99 7th report, HL Paper 37.

<sup>80</sup> See paragraph 27.

<sup>81</sup> As Professor Guild put it in evidence, “This is a contradiction in terms of the Community legislation in the field, in that the whole idea of these increased controls is about compensating for the abolition of controls elsewhere” (Q 162).

<sup>82</sup> We have criticised in other contexts the Government's “pick and mix” approach to participation in Title IV measures, which derives from a separate protocol agreed at Amsterdam: see, for example, our report, *A Common Policy on Illegal Immigration* (37th Report 2001-02, HL Paper 187), paragraph 54.

<sup>83</sup> Dr Guiraudon put it as follows: “Trust, which lies at the basis of interstate cooperation can only be developed if all parties feel they are treated equally and enjoy the same rights and obligations. The fact that new member states cannot “opt-out” or selectively “opt-in” as the UK does can only be detrimental to trust-building” (p 90).

that there is general agreement within the EU that the burden of controlling the external borders of the EU should not fall disproportionately on those Member States responsible for the longest sections of them. Despite having in the past been resistant to proposals for burden-sharing, the Government now accept the case for it, although they still seem to have an unrealistically narrow expectation of what is likely to be involved. Mr Hain said that burden-sharing “could include, for example, intelligence-led joint operations and the provision of some experts and some training”,<sup>84</sup> and Lord Filkin similarly suggested that burden-sharing “may be in kind rather than in cash, rather than there being a pooled budget”.<sup>85</sup>

73. At the time of writing the Commission had not brought forward detailed proposals for a financial burden-sharing mechanism, but in its June 2003 Communication it outlined the general principles that it proposed should apply.<sup>86</sup> It confirmed as the four main criteria to be taken into account in evaluating the burden of each Member State:

- the geographical situation of a Member State and the nature of the borders;
- the migratory pressure at the different types of border (land, sea and airport);
- the number of checks carried out on persons entering and leaving the Schengen area; and
- the quality standard of controls and surveillance at external borders, as measured by the common risk analysis method applied at each type of border.<sup>87</sup>

74. In his evidence to us Mr Faull explained, as does the Communication, that the Community contribution would always be supplementary to the effort being made by the country concerned.<sup>88</sup> Nevertheless it is clear that in the longer term substantial expenditure is envisaged: the Communication concludes (page 17) that the principle of solidarity is “of major financial importance” and “should be reflected in budgets within the new post-2007 financial perspective”.<sup>89</sup> Moreover, the draft Constitutional Treaty includes specific provision in the Title dealing with an Area of Freedom, Security and Justice for the “principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”.<sup>90</sup> Although the precise long-term financial implications are unclear, there is no doubt that burden-sharing will go far beyond operational co-operation, and the United Kingdom will have no choice but to pay its full contribution to the external frontier regime through its contribution to the Community budget, while at the same time meeting the cost of retaining its internal frontier controls.

75. Another potential problem for the United Kingdom presented by the establishment of a European Border Guard arises from the fact that most other Member States’ border guards operate as a uniformed police force and typically possess police powers. The United Kingdom’s Immigration Service is a civilian body that is an integral part of the Immigration and Nationality Directorate of the Home Office and directly responsible to the Home Secretary. It may be difficult for the United Kingdom to participate fully in joint operations with other Member States’ border guards without the powers and a structure akin to theirs. Lord Filkin acknowledged this in telling us that in joint operations United Kingdom immigration officers have a “secondary role” because of their civilian status.<sup>91</sup> This may be unavoidable. We have received no representations in favour of a reorganisation of the Immigration Service on a continental model, nor do we recommend one.

76. Short of becoming a full Schengen member, the Government could demonstrate their commitment to the development of common standards at the external border by adopting the common manual on checks at external borders. This is one of the key means of promoting common standards and procedures, and its application by the United Kingdom would ensure that our procedures were closely aligned with those of the Schengen States without requiring full participation in Schengen. In oral evidence the Home Office said that the differences between the common manual and UK procedures were “reasonably slight” and it was something they could look at, but that in practice it would be “extremely complicated” to apply the common manual.<sup>92</sup> We do not understand why this

<sup>84</sup> Q 100.

<sup>85</sup> Q 131; see also Home Office evidence, p 38.

<sup>86</sup> *On the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents* COM(2003) 323 final, 3 June 2003.

<sup>87</sup> Page 15 of the Communication.

<sup>88</sup> Q 208.

<sup>89</sup> The Commission estimates that for the period 2004-2006 €140 million will be required to meet additional needs in the immigration field, including protection of external borders (page 18 of the Communication).

<sup>90</sup> Article III-164 (CONV 725/03).

<sup>91</sup> Q 121.

<sup>92</sup> Q 107.

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should be if the differences are slight and we urge the Home Office to review its position. The Commission is currently revising the manual,<sup>93</sup> and it would be an opportune time for the United Kingdom to reconsider adopting the manual. **If the Government continue to maintain controls at the United Kingdom's borders with other Member States, they should consider the possibility of adopting the common manual on checks at external borders.**

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<sup>93</sup> Q 194.

## CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

77. Border controls cannot bear the full weight of ensuring security in the EU, but relaxed or inefficient controls will clearly tend to increase the risks of illegal immigration and cross-border crime (paragraph 16).

78. There is a clear need for effective co-operation between Member States to provide a more uniform level of security at external borders (paragraph 50).

79. We welcome the greatly increased level of practical co-operation between the Member States on external border issues and the United Kingdom's active participation in them, although there is some inconsistency in the United Kingdom's approach, given its non-participation in the main elements of Schengen (paragraph 50).

80. The case for financial burden-sharing is unarguable; we welcome the specific provision made for it in the draft Constitutional Treaty and the Government's acceptance of it in principle (paragraph 51).

81. We strongly endorse the point made by many of our witnesses about the need for trust between authorities across a common border and we fully support the general thrust of the Commission's Communication on the "new neighbours". It is important that preoccupation with EU integrated border management does not displace the equally important work of building up trust and effective working relationships with the new neighbours (paragraph 51).

82. The case for a fully fledged multi-national force has not been made (paragraph 53).

83. Dr Edward Johnson's work in developing specialised operational "languages" has great potential for facilitating communication in operational co-operation in the border control field, and we urge those concerned to examine further its possible application in such situations (paragraph 54).

84. It is essential that any EU body responsible for border controls should have a clear legal base and be subject to detailed accountability and data protection safeguards. The establishment of Eurojust provides a useful precedent (paragraph 60).

85. All common EU border control activities should be subject to effective data protection standards, particularly if they involve risk assessment and profiling and intelligence sharing (paragraph 61).

86. It is important that clear legal rules applying to joint operations are established, including rules on the powers of border guards and the remedies available to individuals when these powers are exceeded (paragraph 62).

87. It is essential that guidelines for border guards take full account of international human rights principles and are drafted with the utmost care to combat racial discrimination in the application of controls on entry and to avoid racial stereotyping (paragraph 63).

88. We welcome the proposals in the draft Constitutional Treaty, which should bring about considerable improvements by merging the First and Third Pillars and subjecting measures adopted in the area of freedom, security and justice to a high level of judicial control and parliamentary accountability (paragraph 64).

89. If the Government continue to maintain controls at the United Kingdom's borders with other Member States, they should consider the possibility of adopting the common manual for checks at external borders (paragraph 76).

*Recommendation to the House*

90. The Commission Communication on integrated management of the external borders of the Member States of the European Union issues raises important issues of policy to which the attention of the House should be drawn, and we therefore recommend this report for debate.



## APPENDIX 1

**Sub-Committee F (Social Affairs, Education and Home Affairs)**

Members:

- \* Lord Avebury
- Lord Corbett of Castle Vale
- Lord Dubs
- Baroness Gibson of Market Rasen
- † Lord Greaves
- Baroness Greengross
- Lord Griffiths of Fforestfach
- Baroness Harris of Richmond (Chairman)
- Lord King of West Bromwich
- Baroness Knight of Collingtree
- Baroness Stern
- Lord Wright of Richmond

\* since 21 May 2003

† until 21 May 2003

Professor Jörg Monar, Co-Director of the Sussex European Institute, University of Sussex, was appointed as Specialist Adviser for the inquiry

**Interests declared by Members in connection with the Inquiry:*****Baroness Greengross***

Consultant/Adviser, European Movement

Vice-Chair, Britain in Europe

***Baroness Harris of Richmond***

Former Member, NCS Service Authority

Former Member, Police Negotiating Board

***Lord King of West Bromwich***

Alternate Member, Committee of the Regions and its external relations commission

Member, Sandwell Metropolitan Borough Council

## APPENDIX 2

**Call for evidence**

Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union is conducting an inquiry into integrated management of the European Union's external borders and proposals to establish a European Border Guard. The starting point of the inquiry is a Communication of 7 May 2002 from the European Commission to the Council and the European Parliament *Towards integrated management of the external borders of the Member States of the European Union*.<sup>94</sup> This led in June 2002 to agreement by the Council of an action plan on external border management.<sup>95</sup> The inquiry will also examine the issues raised by an Italian-led feasibility study into the establishment of a European Police Border force.<sup>96</sup>

The Communication's premise is that there is a need for a more homogeneous level of security at the EU's external borders to ensure mutual confidence between the Member States. The issue gains added importance from the forthcoming enlargement of the EU, which will greatly extend the EU's Eastern border and put it under the control of new Member States. The eventual aim is the establishment of a European Corps of Border Guards. The Communication also examines the problems faced by existing Member States in policing long maritime borders.

The Communication identifies a number of issues that need to be addressed in the shorter term, including:

- a common body of legislation
- a mechanism for ensuring operational co-operation
- common integrated risk analysis (including acting with third countries)
- a harmonised curriculum and joint training for border guards
- financial burden-sharing between Member States

The Italian-led feasibility study looked in more detail at the steps necessary for the gradual establishment of a European Border Guard. At Seville in June 2002 the European Council gave a general welcome to these initiatives and called for the work to be taken forward as a matter of urgency.

This inquiry is a follow-up to the Sub-Committee's recent inquiry into *A Common Policy on Illegal Immigration*.<sup>97</sup> Evidence is invited on all aspects of the subject. Questions on which the Sub-Committee would particularly welcome comments include the following:

- (i) What forms of co-operation between EU Member States on external border controls already exist, and what are their strengths and weaknesses?
- (ii) Is the Commission's premise that a more homogeneous level of security is needed at the EU's external borders justified?
- (iii) What are the implications of enlargement for external border security?
- (iv) Are the measures to enhance operational and training co-operation proposed by the Commission sufficient or is there a need for a degree of legal, financial and organisational harmonisation?
- (v) Should financial burden-sharing between the Member States take place?

<sup>94</sup> Document COM (2002) 233 final, available on the Commission's web-site: [www.europa.eu.int](http://www.europa.eu.int).

<sup>95</sup> *Proposal of a plan for the management of the external borders of the Member States of the European Union*, document 9834/02.

<sup>96</sup> *Feasibility study for the setting up of a "European Border Police"*, Final Report, Rome, May 2002.

<sup>97</sup> HL Paper 187.

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- (vi) If so, how and to what extent?
  - (vii) Has the case been made for a European Corps of Border Guards? If it has, what would be its main benefits and problems? What should be the nature, composition, powers and objectives of such a body? Should it operate only at land or also at sea borders?
  - (viii) What should its legal basis be?
  - (ix) How should it be organised, financed and trained?
  - (x) Should the UK participate in it? How would participation square with the UK's opt-out from the Schengen border control system?

7 January 2003

## APPENDIX 3

**List of witnesses**

The following witnesses gave evidence. Those marked\* gave oral evidence.

Association of Chief Police Officers (ACPO)

Association of Chief Police Officers of Scotland (ACPOS)

\* Border Police, Ministry of the Interior, Federal Republic of Germany

\* Mr Eberhard Bort, Institute of Governance, University of Edinburgh

\* Department for European Integration and International Co-operation,  
Ministry of the Interior, Poland

\* European Commission, Justice and Home Affairs Directorate-General  
Europol

Foreign & Commonwealth Office

Dr Virginie Guiraudon, Research Fellow, National Center for Scientific Research, Lille

\* Home Office

\* The Rt Hon Peter Hain MP, British Government Representative  
on the Convention on the Future of Europe

\* Immigration Law Practitioners' Association

\* Mr Pekka Järviö, Director General, International Security Affairs, Ministry of the Interior, Finland  
Dr Edward Johnson, Wolfson College, Cambridge

JUSTICE

National Criminal Intelligence Service (NCIS)

\* Polish Border Guard

Rail Freight Group

Road Haulage Association

Dr Janos Sallai, Hungarian Government

Statewatch