THE SCHENGEN AREA A DREAM OR REALITY?

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Abstract

The purpose of this article is to analyze the history and evolution of the Schengen Area. This analysis is based on the chronological and comparative aspect of the changes and alterations that followed the Schengen code. At the same time it represents a case study of Article 8 of the Schengen Regulation. This article aims to analyze the rights and obligations of Albanian citizens in the Schengen Area as well as the rights that take place in the framework of signing the European Stabilization and Association Process.

**Keywords:** schengen area, external borders, free movement, regulations, Albania

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Introduction. The free movement of people is one of the main characteristics of the European area and of Europe without frontiers. The history of the Schengen area begins on June 14, 1985, when between five states: France, Germany, Luxembourg, Belgium, the Netherlands, in the Schengen region located in Luxembourg, the decision regarding the gradual abolition of controls at the common borders was adopted. The agreement aimed at creating an area where citizens would move freely without checks [10]. In 1990, the Convention Implementing the Schengen Agreement was signed, setting out the modalities by which Member States would cooperate to compensate the abolition of inter-
n border controls and ensure better securing of external borders. The Convention entered into force in 1995.

The Convention abolished controls at the internal borders of the signatory states and created a single external border where controls are carried out according to a clear set of rules. Moreover, common rules on visas, migration, asylum and measures on police, judicial or customs cooperation have been established [30]. Key rules adopted within the Schengen framework include:

- removal of checks on persons at the internal borders;
- a common set of rules applying to people crossing the external borders of the EU Member States;
- harmonisation of the conditions of entry and of the rules on visas for short stays;
- enhanced police cooperation (including rights of cross-border surveillance and hot pursuit);
- stronger judicial cooperation through a faster extradition system and transfer of enforcement of criminal judgments;
- establishment and development of the Schengen Information System (SIS) [22].

The Schengen Convention structure is divided into the following titles:

I. Definitions;
II. The abolition of checks at internal borders and movement of persons

Title III, policy and security are defined in the following chapters:

- Police cooperation;
- Mutual assistance in criminal matters;
- Application of the NON BIS IN IDEM principle;
- Extradition;
- Transfer of the enforcement of criminal judgments;
- Narcotic drugs;
- Firearms and ammunitions.

Title IV, The Schengen Information System

Establishment of the Schengen Information System

Operation and use of the Schengen Information System

Protection of personal data and security of data in the Schengen Information System

Apportionment of the costs of the Schengen Information System
Title V, transport and movement of goods
Title VI, protection of personal data
Title VII, Executive Committee which ensures the correct implementation of the Convention
Title VIII, final provisions [8].

With the signing of the Treaty of Amsterdam on October 2, 1997, which entered into force on May 1, 1999, a protocol attached to the Treaty incorporates the Schengen acquis into the legal and institutional framework of the European Union [19]. From this moment, the Schengen acquis is part of the Community law and it is transferred to the new Title IV - Visas, asylum, immigration and other policies related to the free movement of persons of the TEU. Later, the Schengen legislation has been included in the Regulation no. 562/2006 which established a Community Code on the rules governing the movement of persons across borders. This is the Schengen Borders Code [11]. Articles 2 to 8 of the Schengen Convention have been replaced by Regulation No. 562/2006 (Schengen Borders Code) which defines common rules on the movement of persons across national borders and contains the provisions on the crossing of external borders of the European Union. The Code also sets out the entry conditions for third-country nationals, the procedures applicable to refusal of entry, the need to stamp travel documents and specific rules for checks on certain categories of persons [16]. We note that it is about a market without internal borders, a space in which European citizens can move freely, without customs and controls. All the changes have simplified the movement rules, regardless the purpose of traveling. They support the European Union’s objective of creating an area of freedom, security and justice, respecting the fundamental rights and the different legal systems and traditions of the Member States [3, Art.67.2 TBUE].

The actual situation will be illustrated by the results of the following case study: Spain’s accession to the Schengen area in 1991. The case concerns two elected citizens who have been refused a visa on the grounds that Germany had issued an alert under the Schengen Convention, referring to article 5 and 15 of the Schengen Regulation [16, KE]. Consequently, the Court clarified the correlation between the Schengen CISA and the Community law, and found that Spain violated the Com-
munity law on the refusal of a person to enter the country only if it represents a serious threat to the public policy requirements of the State of destination. This leads to the conclusion that a Contracting Party may issue an alert only after it has been established that the presence of the foreign constitutes a serious threat and affects one of the fundamental interests of society [6].

We can also mention the case of Mr Melki and Abdeli, Algerian nationals unlawfully present in France, that subject to a police control, in accordance with the French Code of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. On 23 March 2010, they were each made the subject of a deportation order from the Prefect and a decision for continued detention. Mr Melki and Mr Abdeli disputed the lawfulness of the check made on them and raised the issue of the constitutionality of the Code of Criminal Procedure provision, on the ground that that provision prejudices the rights and freedoms guaranteed by the Constitution, contrary to the principle of the free movement of persons and, especially to EU rules which provide for the absence of internal border controls for persons [7]. Referring to the Article 67 of the TFEU [3, art. 67.2 TBUE], and the Regulation No 562/2006, that EU law preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the CISA, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

The Treaty of Lisbon has strengthened the notions of freedom, security and justice in order to provide citizens with an area without internal borders, thus laying the foundations for the architecture of Europe. The desire to strengthen the Schengen acquis has been incorporated into the TFEU and TEU. At the same time, Article 7 of this Protocol and the countries negotiating the accession to the European Union have to respect the Schengen acquis and the other measures taken by the institutions within its scope [15].
At present, 26 European states are full members of the Schengen Agreement, 4 Schengen signatory countries that are not EU Member States, namely Iceland, Norway, Switzerland and Liechtenstein. And two states of the European Union have decided not to fully apply the Schengen acquis, but they work with the Schengen Member States in some areas. This is about Ireland and the United Kingdom [17]. The Schengen area is also based on the Schengen regulation of 2016 and 2017, which brought some changes, correlating them with the European Union Code on the regime for the crossing of external borders by persons.

Content analysis of the regulations.

a) The Schengen Regulation of 2016

The Schengen Code has been amended several times. For reasons of clarity and rationalization, it was codified and another regulation came into force in 2016, which repealed the 2006 regulation. The 2016 Regulation was adopted in Sarsburg on March 9, 2016 and came into force on the twentieth day following that of its publication in the Official Journal of the European Union. This regulation consists of 45 articles and it is divided into 4 titles, also divided into chapters and contains ten annexes:

Title I: General provisions;

Title II: External borders, divided into: Chapter I - Crossing of external borders and conditions for entry; Chapter II - Control of external borders and refusal of entry; Chapter III - Staff and resources for border control and cooperation between Member States; Chapter IV - Specific rules for border checks; Chapter V - Specific measures in the case of serious deficiencies relating to external border control.

Title III: Internal borders: divided into: Chapter I - Absence of border control at internal borders; Chapter II - Temporary reintroduction of border control at internal borders.

Title IV: Final provisions [13].

b) The Schengen Regulation of 2017 [31]

This regulation has not repealed the 2016 regulation, but it has made some changes regarding the strengthening of checks by consulting relevant databases at the external borders. The practice of external border controls is a guarantee for the Schengen area, an area without internal controls, an important contribution to guaranteeing the long-term security of the European Union and of its citizens. In this context, an important objective is to
strengthen controls to combat terrorist threats in the European Union and to ensure the security of EU citizens. Systematic controls must be carried out in accordance with the relevant Union law, with the Charter of Fundamental Rights of the European Union, and must fully respect human dignity in accordance with articles 4 and 7 of the 2016 Regulation [18].

In April 2017, the European Parliament approved with 469 votes in favor, 120 against and 42 abstentions, a new regulation modifying the Schengen Borders Code. It entered into force in April 2017 [28]. Regulation 2017/458 and BE has made some amendments and replaced Article 8 [17], paragraphs 2 and 3 of the 2016 Regulation. Systematic checks at external borders are linked not only to third-country nationals as well as to persons enjoying the right to free movement. At the same time, the amendment is also linked to the use of the SIS databases, Interpol on lost and/or stolen travel documents and national databases to improve the security of the EU and its citizens [29]. The migration crisis and the security situation, constantly changing in recent years, have shown that the Schengen area needs strong external borders. In 2017, new rules have been adopted for the external borders of the Schengen area, with the confrontation of relevant baseline data, in order to ensure that these people do not represent a threat to public policy or internal security. In addition, 1,700 officers from the new European Border and Coast Guard Agency support the national border guards of the Member States in patrolling the external borders in Bulgaria, Greece, Italy and Spain. The European Union is working to create a Security Union, so that Europe becomes safer by combating terrorism and serious crime, and by strengthening Europe’s external borders [31].

Analysis of article no. 8 of the Schengen regulation. In order to ensure the security of citizens within the EU, the security of the Union’s borders must be strengthened. The amendment to the Schengen regulation, which is a joint regulation between the European Commission and the European Parliament, furnishes measures to strengthen the external borders of the European Union, not the Schengen borders [26]. The Schengen regulation provides some changes to Article 8 (2) and (3), which refers to systematic verification at external borders, arguing that control is being done not only for citizens of third countries but also for European citizens; control is not only a minimal one, but systematic checking is also made at the entrance and exit for each person, verifica-
tion of databases etc. It is important to show the difference between the name of the internal border and the external border:

- **“internal borders”** means: (a) the common land borders, including river and lake borders, of the Member States;[18](b) the airports of the Member States for internal flights; (c) sea, river and lake ports of the Member States for regular internal ferry connections; **Internal borders means that the border is situated between two Schengen States [23].**

- **“external borders”** means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders [18]. The external borders are located between a State which is part of the Schengen Area and a State not party to that area.

Article 8/2 of the Schengen regulation of 2016 is amended by the Schengen regulation of 2017. Schengen countries want a real and effective Security Union, capable of combating crime, terrorism, and strengthening the means of defense at the external borders.

This also applies to Article 1, which replaces Article 8/2 [18, p.2], where we observe, compared to the 2016 regulation, that every person is subject to stricter control at the entrance and exit of all frontiers, air, land and sea, irrespective of the fact that these persons enjoy the right to free movement under EU law. Whenever a person enters or leaves the EU, the date, the place, the reason for crossing the border shall be recorded. The amendments to the Schengen Code provide for systematic checks in databases which improves the exchange of information and strengthen Europe, ensuring the defense of this space and its citizens [18].

Referring to paragraph 3 of the Schengen regulation, we see that in article 8/3 [17, paragraph 3] there are some changes regarding the third-country nationals, which refers to systematic checks on entry and exit at the EU borders in order to identify travelers who represent a threat to security or who are subject to an arrest warrant. Checks also allow Member States to ensure that those persons do not pose a threat to public order, internal security or public health [17, paragraph 3]. These new systematic reviews should be carried out in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union (“the Charter”) and Article 4 of Regulation 2016/399 of the European Parliament and of the Council (1) and should fully respect human dignity in accordance with Article 7 of the respective regulation [13].
In addition to these changes certified in the Schengen area, if we refer to third-country nationals, they must also fulfill other conditions when traveling to the Schengen area.

- They must not exceed the period of stay (maximum 90 days in any 180-day period), must justify the purpose and conditions of the intended stay;
- They must have sufficient means of subsistence, both for the duration of the intended stay and for the return to the country of origin or for transit to a third country where the admission is guaranteed, or to be able to legally acquire such means;
- The means of subsistence shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the member states concerned for board and lodging in budget accommodation, multiplied by the number of days stayed [18, art.6].

The European Union and the requirements for deepening integration - its fundamental objective, have a single internal market that could not be conceived without the right of movement of persons, integration meaning explicitly and organically the existence of freedom of movement, as the restriction of this exercise equals to the fragility and blockage of the EU [2].

The Schengen States have a common external border for which, in the absence of internal border controls, they are jointly responsible to ensure security in the Schengen area. However, effective control of the external border does not mean that Europe has become a “fortress”. On the contrary, it is essential for European economies to encourage business travel and tourism. It is also necessary for the external frontier to remain open to those who come to work or to flee wars and persecutions. [23]

**Free movement of Albanian citizens in the Schengen area.** Albania is a post-communist country that sees its future only as part of the European Union. The Selanic Summit is a model for the Eastern Balkan countries because it has opened the prospect of EU membership, giving priority to reforms for each country individually. Thus, the Stabilization and Association Agreement (SAA) was signed between Albania and the European Community in 2006 [12] and entered into force in 2009. This agreement was ratified by law and after being published in the Official Journal of the Republic of Albania is part of its internal legal system.
The agreement takes priority over Albanian legislation [21]. Article 216 [20] of the TFEU stipulates the conclusion of agreements between third countries and the EU, and Article 217 [3, Article 217] specifies association agreements. Citizens of some countries with which the EU has concluded association, stabilization, cooperation, partnership and/or other types of agreements, such as the Republic of Moldova, enjoy equal treatment in many respects, but have no right to the full equality of treatment which is enjoyed by EU citizens [14].

The Demirel case [1] solved the uncertainties of the “association” concept, defining it as a way of creating special and privileged ties between third countries and the Community, which participate in the realization of the functions of the community system. On the other hand, the community, under Article 238, must ensure that the necessary measures are taken for all the areas covered by the treaty. Judges must adopt the SAA articles as part of an international agreement, adopting, interpreting Albanian law and bringing it closer to the European law.

The Title V, articles 46/48 of SAA refers to the movement of workers. Albanian legally working in the territory of a Member State of the European Union shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to its own nationals [5, art. 46/1]. Under the Association Agreement, it must be understood that the legally resident spouse and children of a worker legally employed in the territory of a Member State shall also have access to the same benefits [5, art. 46/2]. Article 80 of the Stabilization and Association Agreement between the EU Member States and Albania states that “In relation to migration, the Parties agree to the fair treatment of nationals of other countries who reside legally on their territories and to promote an integration policy aiming at making their rights and obligations comparable to those of their citizens” [3].

The Council, created by the Stabilization and Association Agreement, focuses its work on improving working conditions, finding solutions to guarantee the rights of individuals employed as legal workers in a European Union state, to gain access to the market and benefit from professional courses, etc. [5, art. 47].

Citizens of Albania can travel without visa in the EU, but visa-issuing is subject to conditions and it means to have a biometric passport to enter the EU territory for a period of 90 days, and if they exceed
the legal staying deadline, they pay a fine or are denied the entry into the Schengen Member States. If Albanian citizens stay in a Schengen country for more than 90 days, they need a visa to work or study in that country. [27] They are obliged to justify the planned purpose and conditions of their stay and to have sufficient means of subsistence, both for the duration of the intended stay and for the return to the country of origin or for transit to a third country where the admission is guaranteed, or to be able to acquire the necessary means legally, not be the subject of an alert in the Schengen SIS for the purpose of refusing entry etc. [18, art. 6]

**Directive 2009/52/EC** lays down minimum standards on sanctions and measures on the address of employers of third-country nationals who are illegally staying. Employers of people who are staying illegally or who are not qualified to be employed in the EU countries are subject to sanctions. This is a justified need to strengthen cooperation between Member States in the fight against illegal immigration and, in particular, on the need to step up measures to combat illegal employment at Member State and EU level [9]. Employers must not hire third-country nationals who are illegally staying [9, art. 9], and if they are in breach of this, reduced financial sanctions will be applied [9, art.5], the overdue payments, which employers [9, art.6] are to be carried out by other measures, such as: reimbursement of overdue salaries, taxes, as well as social security contributions [9, art.7], and, in the cases more serious, criminal sanctions are reached [9, art.10]. The directive protects migrants by giving them the right to outstanding remuneration from their employer and access to the support of third parties, such as trade unions or NGOs [14].

**Conclusion**

The European Union’s regional integration model is viable, dynamic, features ensured by the fact that the integration process of other states is oriented and guarantees, promotes the free movement of citizens, building a Europe without frontiers. The analysis of the history and evolution of the Schengen area, of the TFEU articles, or of the regulations and amendments to the Schengen legislation, will be useful to students, master students and other social groups, made up of the citizens of the Republic of Albania, Republic of Moldova, Ukraine,
Romania etc. planning to travel to the Member States of the European Union or having relatives there and being often asked to provide details on the legal rules of the Schengen area.

The signing of the SAA, the visa liberalization for the citizens of Albania, the Republic of Moldova, Ukraine, offers new opportunities for them, creating favorable conditions for their work, visits, studies in the EU Member States, reminding them that any agreement comes with rights but also reciprocal obligations. The history of Albania and other states in Central and Eastern Europe has shown that no single country can develop alone. By working together, we ensure the viability and dynamism of the model created by the European Union.

A Europe without frontiers also brings important economic benefits, which shows that the Schengen area is a palpable, appreciated and successful reality, demonstrating its importance in our everyday life and for the society we live in. We need to maintain and consolidate this common achievement. After the two devastating world wars, it took many years to eliminate borders, ensure security and build confidence. The creation of the Schengen area is one of the most important achievements of the EU, and its results have produced irreversible changes.

**Bibliographical references**

3. Acordul de Stabilizare şi Asociere între Statele Membre ale UE şi Albania, Articolul 80.
5. ASA, Art 46/1
6. Case C-503/03 Commission v Spain,
7. Case Aziz Melki (C-188/10), and Sélim Abdeli (C-189/10).
12. Ligjin nr 95 9 0, dt 27. 7. 2006, që ratifikoi MSA ndëmjet Republikës së Shqipërisë dhe Komuniteteve Europiane të shteteve të tyre anëtare.
15. Protocolul nr. 19 din TFUE, Privind Acquis-Ul Schengen Integrat în Cadrul Uniunii Europene.
16. Regulamentul 562/2006 i CE.
19. Traktati i Amsterdamit, Titlul IV, Viza, azil, emigracion dhe politika të tjera që lidhen me lëvizjen e personave në Be.
27. www.punetejashtme.gov.al
28. www.caleaeuropeana.ro
29. www.press.office@consilium.europa.eu