



### **Shifts in Governance at the Physical and Legal Borders of Europe: In search of Accountability**

CHALLENGE Round Table Conference  
17 April 2009  
Utrecht University

The development of new measures dealing with the physical and legal borders of Europe result in various shifts of power. These shifts of powers may lead to changes in traditional forms of accountability and responsibility of the national Member State as concerns powers which are transferred to other levels: to EU institutions or other Member States, but even to third parties or private entities. These shifts in governance are closely related to five major trends in the underlying field:

- *Europeanization*: the development of EU policy and law, limiting and extending powers of Member States with regard to migration and border control: instruments adopted on the basis of Title IV EC Treaty, EU visa lists, the development of EU agencies such as FRONTEX, and the set up of EU databases such as Eurodac, SIS II and VIS;
- *Extraterritorialization*: the transfer of immigration control beyond the external borders of the EU, not only by the use of visa policies, but also by adopting readmission agreements with third states, the practices of FRONTEX or national or joined teams of EU Member States in third states or extraterritorial waters to fight against "illegal migration".
- *Privatisation*: the transfer of powers of border control to private entities, such as air carriers becoming responsible for the documentation of their passengers and the out-sourcing of data collection (including biometric identification) and visa applications.
- *Transnationalism*: various legal instruments adopted at the EU level prescribing the mutual recognition of national decisions, for example the registration of inadmissible third country nationals into the SIS. Another example is the Return Directive introducing EU wide re-entry bans for five years for persons who are to be removed from the EU.
- *Securitization*: EU and national policy makers focus increasingly on the possible risks and threats of migration for public and national security. By transferring migration control from administrative authorities to law enforcement authorities and internal security agencies, migration is criminalized and securitized

The shifts in governance following from these five trends raise the central question as to whether current forms of accountability, meaning both political and legal accountability, are sufficient to secure democratic decision making and to protect the rights and freedoms of the individual. Considering political accountability, are national parliaments and the EP in a position to scrutinize adequately current measures and proposals? If not, are alternative forms of political accountability called for? Trends of privatization, Europeanization, extraterritorialization and transnationalism do not only result in the question as to which authority or which individual Member State can be held accountable by the individual, but in addition they raise problems with regard to the very availability of venues for legal protection.

The Round Table is meant as an opportunity to investigate whether existing concepts of accountability are still valid in this field, and if not, whether new mechanisms of accountability should be developed.

For this purpose, we will consider three “case studies” including a specific mechanism of border control. These case studies have in common that they illustrate both shifts in governance at the physical and legal borders of Europe and the risk of “loss of accountability”.

### **Session I      The Returns Directive**

The recently adopted Returns Directive provides an apt case study for evaluating the impact in the field of human migration of the related trends of *Europeanization*, *trans-nationalism* and *securitization* on traditional processes of accountability. The Returns Directive presents a good example of the Europeanization of a policy area within which Member States have been extremely reluctant to transfer decision-making powers to the Community level, as this area has traditionally been regarded as belonging to the core of national sovereignty. The eventual Europeanization of high politics such as these may raise novel questions with regard to both democratic control of decision-making *and* processes of legal scrutiny by the judiciary of decisions that are based on the resulting instruments.

In the first place, attention can be paid to democratic control of *formal decision-making* in this area. The Returns Directive was subject to the co-decision procedure. Does the way in which the formal co-decision procedure has translated into political practice in this particular case – the approval of the Directive by the Parliament after first reading without a single amendment, after the text had been negotiated in so-called trilogues – do justice to the underlying aim of that procedure, which consists of fully securing democratic control of decision-making in this area? Would the involvement of national parliaments have resulted in a different outcome?

If we focus on the *content* of the Directive, other important issues of *political and legal accountability* surface. The Directive contains an important instance of *transnationalism*, in that EU-wide entry bans are introduced. Both traditional processes of political accountability, modelled upon the institutional organisation of the single nation state, and emerging processes of political accountability in the supranational context, seem by their very nature inadequate to control these transnational processes. What kinds of alternative accountability are conceivable and feasible in this respect?

Moreover, there is significant unclarity as regards the way in which national-decision making that is based upon the Directive can be effectively challenged by the individual. That does not only hold true for entry bans, but for numerous other aspects of the Directive, such as the provisions relating to detention, the mandatory issuing of a return decision, and the suspensive effect of appeal decisions. Are new venues of legal scrutiny of these measures called for? What is the role of national judges in this respect? Taking into account previous case law of the ECJ in the field of free movement of individuals – citizens *and* third-country nationals, is it conceivable that Europeanization can also offer more effective venues of legal scrutiny, and thus enhance the protection of individual rights?

### **Session II      Mechanisms of external border control**

The meaning of “border”, the place where authorities control the entry of persons to national territory of one of the EU Member States, has changed significantly in the last twenty-thirty years. In the first place, Member States transferred their controlling activities to places beyond their own territory. One of the most traditional extraterritorial controlling mechanisms is the visa regime. Complementary to the visa regime, but for the time being developed outside of the EU framework, is the introduction of integration and language tests that migrants applying for long term residence are required to pass before they are given leave to enter. Secondly, under the headings of “pre flight checks” or “entry clearance”, states post liaison officers in the airports of countries, which are (comparable to the states included in the visa lists) known as source of “unwanted” migrants.

Not only the territorial scope of border controls has changed, also the actors or the authorities or agencies performing border controls. Border control no longer is the exclusive sovereign competence of the national state desiring to control the movement of persons in and out its territory. An important development is the role of private actors in EU border policies, including the obligation of air carriers to transfer passenger data to the border control authorities of EU Member States and third countries, such as the United States of America. Other fields where private organizations are involved in border control measures are data processing, including the processing of biometric data, the outsourcing of visa applications, and security measures. Dealing with external border controls, the creation of FRONTEX, results in the Europeanization and externalization, but perhaps also contributes to the securitization of Member States policies.

From a perspective of *political accountability*, what are the most important changes deriving from the aforementioned externalization and privatization of border controls? What is the current role of national parliaments with regard to the EU policy on border management? How should national parliaments be involved in the decision making of their governments when outsourcing border controls or signing contracts with third parties? How can national governments be held politically accountable for actions of private organizations or with regard to the tasks and powers of FRONTEX? Should there be a (larger) role for General Audit Offices (Rekenkamer) or data protection authorities? Considering both externalization and privatization of border controls, questions also arise with regard to the *legal accountability*. For example, what are the human rights obligations for Member States when operating outside their own territories? Which rules apply to the liability of FRONTEX, or when Member States are contracting third parties for the performance of public tasks? What are the possibilities of legal redress for individuals?

### **Session III Public order and security**

Maintaining public order is a typical national competence exercised by national and even local authorities within the limitations of their territory and sovereignty. The present text of the EU-Treaty (Title VI) does not explicitly refer to the maintenance of public order as a goal of police cooperation within the area of freedom, security and justice. That maintaining public order is a 'sovereign preserve' is also suggested in the text of the EC Treaty (*Articles 33 and 35 (5) EU; 64 and 68 (2) EG*). Nevertheless, within the framework of the third pillar, various measures have been adopted with regard to the maintaining of public order, in particular triggered by concrete problems with football hooligans, and rioting surrounding European Council meetings.

Using mainly "soft law instruments", the EU Council adopted different resolutions and recommendations inviting the Member States to cooperate, to exchange information through 'national information points', and to take specific measures preventing potential violent demonstrators or football hooligans from leaving their country or entering other Member States. Some resolutions include in their *annexes* detailed cooperation-handbooks for national law enforcement authorities. However, these do not provide clear definitions of "potential demonstrators and other groupings". The central goal of this European cooperation is the exchange of information, concerning both individuals and groups, between law enforcement authorities.

Aside from this shift to *Europeanization*, there is also a development of *transnationalism* in the field of police cooperation as a result of increasing mutual recognition of national decisions. Examples are the development of a European Criminal Records Information System (ECRIS), the implementation of the European Arrest Warrant and the European Evidence Warrant, and the existing Schengen Information System.

Furthermore, taking into account possible threats of terrorism and serious crimes at major international events, the EU Member States tend to consider the management of demonstrations, football matches or other mass-events more as a matter of protecting 'European *security*' rather than one of maintaining public order. From the perspective of competences, however, public order is fundamentally different from the protection of the national security or prevention of crime. Participants of mass-events, individuals exercising their freedom of assembly or freedom of expression and their right of free movement, risk to be treated as mere security-threats.

Not in the least because fundamental rights are at stake, various questions arise with regard to *political and legal accountability* of the aforementioned measures and policies.

The choice of EU Member States to adopt mainly 'soft law instruments' in this field of police cooperation and public order largely excludes the European Parliament and national parliaments from involvement. How can parliaments be involved in the decision making process? Are there alternative ways of securing democratic control of decision-making within the Council, especially when this results in measures affecting the individual? Is the shift towards EU-decision making accompanied by a shift in structures towards EU mechanisms of political accountability, or is there an 'evaporation' of accountability?

Considering questions of *legal accountability*, what is the legal position of the individual confronted with measures deriving from this EU-wide transnational cooperation? Are there legal remedies for the individual (consider for example the question as to which legal remedies are available for individuals registered on the so-called 'black lists'). Is the exception of the competence of the ECJ in this field justified?