



Study on

# Conferring executive powers on Border Officers

Operating at the

# External borders of the EU

*Final report of the Study to examine the possibility of preparing a legal instrument in order to confer executive powers on Member States' officers participating in operations at the external borders of another Member State or in the context of return enforcement*

This document presents the results of the Study on the powers of border officers carried out by Unisys for the Directorate General Justice, Freedom and Security of the European Commission. This study has for objective to assess the situation in the 25 EU Member States, Norway, Iceland and Switzerland with respect to the possibility of conferring executive powers on border officers invited to operate at the external EU borders of another state or in the context of joint return enforcement. From there it draws suggestions for possible actions to increase the level of involvement of guest officers to contribute to an integrated management of the external borders.

Basic information for this study has been collected through desktop research, face to face interviews with the competent authorities of the 28 involved States and contributions from experts involved in the project, as well as representatives from the European Agency for the management of the external borders (FRONTEX). It was conducted under the supervision of and in coordination with DG JLS.

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# Study

to examine the possibility of preparing a legal instrument in order to confer executive powers on officers operating at the external borders of one of the countries under consideration or in the context of return enforcement

## Final Report

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# 1 Management Summary

## 1.1 Study Objectives

To the frequently asked question “Do we need to set-up a corps of European Border Guards?” we could object that the question is finally not so relevant: the Member States of the European Union have border control activities all along their external borders and, in order to ensure this service, the current operational instrument is mostly composed of all officers put in charge of border control by the competent authorities of their Member State. Officers in charge of this mission are the European Corps of Border Guard. In addition, joint operations combining activities of officers from different Member States are already conducted in a number of areas, involving officers from their respective States, based on a general set of common rules and on a large number of bilateral or multilateral agreements.

The pertinent questions are therefore:

- How far can the legal framework of agreements allow border guards to operate with their colleagues from other Member States if this is necessary to address with full efficiency the issues they are facing?
- What are the obstacles restricting the achievement of this requested efficiency level when executing their missions?
- To what extent does the practice require more operational interoperability, by conferring (mutually or through a common body?) more powers (and which powers?) to officers from another Member State when exercising common tasks?
- To what extent could more power provide more efficiency, reduce or share costs, provide more visibility and clarity to citizens?
- To what extent should this be obtained by making the existing practices consistent, by adopting common rules, rather than by developing a network of bilateral agreements between neighbour countries in a nearly 30-States Community?

## 1.2 Border Management

Regarding persons, border management implies more than just checks and surveillance as often perceived from the traveller’s point of view. It also covers the whole range of preparatory tasks for border control, the risk analysis, intelligence and investigation missions. It covers administrative processes (organisation, management, travel document evaluation, maintaining documentation and databases) from the first line check to a “final”

administrative decision, possibly transmitting the case to Justice. With time, missions have become more complex and intensive: the Union and all its Member States are confronted with a series of serious common issues. This includes in particular the necessity to increase protection against severe or organised forms of criminality, with a strong focus on providing a global response to address terrorism, and the need for a balanced and common approach for managing the growing pressure of economic migration, dealing with the situation of legal migrants, while further strengthening the fight against illegal migration, migrant smuggling and trafficking in human beings, notably women and children, together with the application of asylum policies.

### 1.3 Common EU legal basis and strategy

A coherent and harmonised border management activity is possible thanks to a common legal basis for controlling external borders. Following the treaties of Maastricht (1992) and Amsterdam (1999), the Union's Member States have constantly reinforced their cooperation in Justice and Home Affairs, moving, in particular, asylum, Visa, migration and border control policies to their common "first pillar" and opening the way to common operational practices as a Community Code on the rules governing the movement of persons across the borders<sup>1</sup>. Previously intergovernmental but now partially included in Community Law, the Schengen Convention and "acquis", even if not implemented with respect to all their provisions in some of the Member States, have completed our common legal framework with a full set of general and operational/practical provisions.

The European Union has also developed a common strategy and a political commitment: after the Tampere Programme, which was adopted in 1999, the European Council endorsed in November 2004 the The Hague Multiannual Programme (THP) for strengthening the area of freedom, security and justice, and was provided with a Plan in which the aims and priorities of the Programme are to be translated into concrete actions.

The European Council has stressed on improving border checks and the fight against illegal immigration: "*the importance of further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. In this respect the need for solidarity and fair sharing of responsibility including its*

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<sup>1</sup> Regulation of the Parliament and Council establishing a Community Code on the rules governing the movement of persons across borders, adopted by the European Parliament, 25 June 2005.

*financial implications between the Member States is underlined*<sup>2</sup>. While maintaining the control and surveillance of external borders under the authority of national competent bodies, mutual support is acknowledged and welcomed, especially where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on their borders.

## 1.4 Common instruments

The existing Schengen Information System (SIS 1+ and soon SIS-II) is already the cornerstone for exchanging information related to persons. In the short term, it will be completed with the Visa Information System (VIS) where all visa requests will be documented and shared. The border control risk analysis is done today by a new Community Border Management Agency (“FRONTEX”), which will also organise joint operations and will be responsible for coordinating and assisting Member States’ action in surveillance and controlling of external borders.

## 1.5 Approved Action plan, still to apply

The Hague Programme calls for a plan in which the aims and priorities of the Programme are to be translated into concrete actions, including a timetable for their adoption and implementation. After the initial and important step of creating the FRONTEX agency, point 6 of the THP action plan develops an integrated management of external borders for a safer Union, and foresees (among other points<sup>3</sup>):

- The establishment of an integrated management system for external borders (supported, in the field of asylum, migration and border policy, by an External Borders Fund and by a Return fund, which will be established in 2007);
- The proposal on teams of national experts to support Member States in the control and surveillance of external borders within the framework of the Border Management Agency;
- The “Handbook for Border Guards” ( after adoption of the Community Code on the rules governing the movement of persons across borders );
- A proposal on the executive powers conferred to Member States’ officials operating at the external borders of another Member State (for which the present Study provides preparatory analysis);

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<sup>2</sup> Bulletin EU 11-2004 - Annexes to the Presidency conclusions (15/39).

<sup>3</sup> See: Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years. COM/2005/0184.

In 2007, an evaluation report on the Border Management Agency will be carried out, including a review of the Agency tasks and an assessment of whether it should concern itself with other aspects of border management (including the evaluation of the functioning of the teams of national experts and the feasibility of a system of European border guards).

## 1.6 Study Findings

After introducing the study and its methodology (an exhaustive investigation processed in 28 States - the 25 current EU members and 3 other Schengen States involved: Norway, Iceland and Switzerland) in greater detail, the study analysed the following points:

### **- The Powers of Border Guards**

The analysis of the powers of execution of all officers who as their principal or subsidiary activity perform checks on persons at borders has:

- Produced a list of 70 border management tasks that could be divided into three categories: Preparation, Surveillance, and Checks. The “Checks” category was divided in 1st line (general, traveller facing checks), 2nd line (in-depth technical and administrative investigation, if needed) and 3rd line actions (procedures leading to an administrative action, decision or transmission outside border guard control – e.g. to judiciary authorities);
- Detailed the aspects of return enforcement (preparation, escort for removal, transport, arrival);
- Identified the competent services for each country;
- Identified and analysed border guard laws in each visited country.

It was demonstrated that in most countries, border guarding is more than just an administrative activity carried out by dedicated officers: Police officers in charge of border management have, in general, much broader prerogatives related to the exercise of public authority as police officers are responsible for preserving public order, promoting public safety and preventing and detecting crime. This makes it more difficult to accomplish a complete integration of “guest officers” with “similar” powers...

A first finding of the study was therefore the selection of tasks involving limited degrees of public authority, which are needed for border control missions and can be acceptable – according to interviewees - for most participating States. This selection was made with respect to the delegation of certain tasks to guest officers



on the one hand, and the identification of tasks that clearly fall under the State monopoly of exercising public authority (command and control activities, use of force and coercion, criminal investigation) on the other hand.

#### **- International agreements**

Complementing the Schengen convention, limited delegations of executive powers are today regulated by bi- or multilateral agreements, or even by simple memorandums (letters) between competent ministries. No less than 92 main agreements have been enlisted during the interviews, most of them signed during the recent years. The real number is much higher as a number of provisions are included in Memorandums of Understanding, Circular Letters or other local protocols which are not always published in official journals or available to the public<sup>4</sup>. Hungary itself has reported no less than 49 agreements or conventions that were relevant in the domain of border control. Frequently, several agreements have been concluded between the same countries, each of them related to a specific control point or to a specific common structure<sup>5</sup>, or dedicated more specifically to land, air and sea borders as well as to return enforcement.

We reach here a second finding: even if we limit investigations to external EU borders (that most EU countries have, plus at least one international airport) the recent “multiplication” of bilateral and multilateral agreements has brought us to a point where no one can reasonably know each of them in detail. The number and variety in content and language of these agreements (even when they are quite similar) are a major obstacle to interoperability. Their enforcement will be equally challenging from the point of view of citizens and their possible (legal) representatives in case of border guard action leading to the use of force and to a deprivation of liberty.

#### **- Operation in “other” participating countries**

The Union and its Member States have explored and removed obstacles related to the common exercise of power in several domains other than border control, starting with military, peace

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<sup>4</sup> This even applies to certain national provisions. For example, France provided its main legislation “Code on Entry and Stay of Aliens” but could not provide the study team with its Decision of the *Council for Interior Security of 06/11/1995 on complementarity between PAF and Customs (main border control actors)*.

<sup>5</sup> For example, France has concluded several trans-border agreements with other countries, implementing common “Commissariats” in a first stage and “Centres for Police and Custom Collaboration” in a second stage (CCPD - centres de coopérations policière et douanière). See French Senate – 9 November session : « Actuellement, la France dispose de dix CCPD : quatre avec l'Espagne, deux avec l'Italie, un avec l'Allemagne, un avec la Suisse, un avec la Belgique et un avec le Luxembourg. Ce dernier, qui est situé à Metz, regroupe ainsi des policiers et des douaniers luxembourgeois, belges, allemands et français. »

keeping and crisis management missions: the Eurocorps<sup>6</sup>, Eurofor<sup>7</sup> and specific police forces grouped in EuroGendFor<sup>8</sup>. Other representative examples are available with the European Anti-Fraud Office (OLAF) where inspectors (EU civil servants) initiate and participate in investigations and operations on the territory of all Member States. External to Europe, the integrated border enforcement teams at the US-Canada border is another example of cooperation between national services at their external borders. The exercising of the powers of police forces has been extended considerably following the 2004 update of the Senningen Agreement between the Netherlands, Belgium and Luxembourg. Equally, the provisions on police cooperation, hot pursuit and customs cooperation in the Schengen Implementation Convention are concrete examples of joint efforts at the common borders of the States involved.

Regarding external border management, competent services currently carry out two types of operations:

- Joint operations, based on the Schengen convention and on bilateral agreements, where guest officers participate wearing their uniform (in some cases wearing service weapons) and exercise limited executive powers. These were organised under the supervision of Community bodies (the previous ad hoc centres and now the FRONTEX Agency) and funded by the ARGO Community programme, or based on intergovernmental agreements;
- Joint removal actions, mainly by air, where a number of Member States currently participate<sup>9</sup>.

In future, these operations are expected to grow considerably in importance, especially with the new FRONTEX agency coordinating them. However, the executive powers recognised by regulations to guest officers are very limited. Exceptionally, States allow guest officers to perform official acts (e.g. Germany). In the “real world”, the set of national rules and practices providing foreign officers with the competence to exercise de facto powers when participating in joint operations – based on mutual trust and

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<sup>6</sup> Based in Strasbourg, Eurocorps operates within and outside the territory of the Union and operational powers are executed by officers from France, Belgium, Germany, Luxembourg and Spain.

<sup>7</sup> Based in Florence, the European Operational Rapid Force (EUROFOR) has been created between France, Spain, Italy and Portugal. It covers also the project of an European Maritime Force (EUROMARFOR).

<sup>8</sup> Based in Vincenza (Italy) Eurogendfor is an inter-governmental cooperation initiative formed by 5 nations having police force with a “Military character” France, Spain, The Netherlands, Italy and Portugal, with the purpose to stay at the disposal of the Union and other international organisations (UNO, NATO, OSCE) to maintain order in time of crisis.

<sup>9</sup> According to interviews carried out in the framework of the Study, 10 countries have already participated in joint removal actions (Germany, Malta, Belgium, Luxembourg, Netherlands, France, Spain, Italy, United Kingdom, Ireland).

good relations but without any legal basis – are a source of specific difficulties.

### **- Joint operations practice**

There are several types of joint operations. On the one hand there are operations that are taking place daily within the framework of bilateral or multilateral agreements. This first set allows checks to be done in foreign territory (e.g. the “Channel treaty” both sides of Eurostar terminals), mixed patrols, joint offices, and provisions related to hot pursuit and surveillance. This group also includes regional agreements (Nordic States, Baltic Sea, Prüm). On the other hand there are the “EU” joint operations that were coordinated under the auspices of the ad hoc centres<sup>10</sup> and are coordinated by the FRONTEX agency. These were launched during the Spanish presidency in 2002 and from 1 December 2002 until 1 November 2005, 30 important joint operations involving an average of 6 guest officers each (in addition to home officers) already took place, mainly in central Europe. As it is reported in detail in section 4 analysing the practice, guest officers’ assistance has been especially useful in sharing knowledge on other ways to operate, in bringing knowledge from other State’s intelligence and experience on suspicious cars and lorries (certain companies for example) and in the area of document checks, in particular when the travellers’ final destination is the country of origin of the guest officer (recognizing forged/falsified travelling documents, contacting destination authorities to verify the real travel intentions of the person being checked, discovering that the claimed “visited family” has no existence in the country of destination etc.).

### **- Comparative analysis of legal rules**

Tasks related to border control activities (which are assigned in some countries to dedicated immigration officers) are often combined with other activities linked with exercising public authority in other areas (e.g.: police missions). Therefore, the approach of assimilating guest officers to their host counterparts is sensitive and limited. The German Police Act of 1994 provides the only example of normative framework for conferring the powers of a police officer to a guest officer, acting however under control of a German supervisor.

Other States (Slovakia, Czech Republic, Hungary and Slovenia) generally admit the principle of allowing foreign authorities for activities, provided it is determined in detail by an international agreement.

A detailed analysis shows very different answers from concerned States to each practical question regarding the right to wear a

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<sup>10</sup> Prior to the creation of FRONTEX, several coordination centres were created for risk assessment, for air, “blue” (maritime) and “green” (land) borders.

uniform (3 countries ignore or limit this right, on the contrary 9 consider that it is an obligation), to wear a service weapon, to access private property, request ID or travel documents, access to information systems, interview persons, check for the correctness of information, reporting, using force etc. Analysing the 70 possible tasks related to EU border control, the number of tasks that may be conferred to guest officers varies - depending on which country is analysed- between 2 and 60 (!).

These different answers (even when facing identical situations) demonstrate the current lack of a consistent legal framework in Europe in order to regulate the conferment of powers during EU joint operations. It is also the evidence that our common legal basis (the Schengen “acquis”, our common strategy – even coordinated by a common agency) is too general to be translated into operational realities just based on bilateral agreements, and without making a minimal effort to agree on common basic rules. The elaboration effort will be facilitated by commonalities in many existing agreements, regarding cases of self defence, emergency situations, hot pursuit etc.

### **- Legal Barriers**

Are there serious legal barriers that could prevent officers from a Member (or Participating) State to exercise the prerogatives that are requested for border control, when they are invited to operate in another State? At first sight, the most visible obstacle looks to be the requirement of nationality, which is present in most country regulations and authorised by Community law<sup>11</sup>. However, nationality and language requirements restrict accession to home forces and their impact on conferring occasional powers to guest officers is limited. Legally speaking, sovereignty issues are more important: even when not stipulating formally such a requirement, the national Constitutions and constitutional Courts limit delegation of public authority to specific “non-discretionary” cases and to international institutions, as this is done regarding Community policies to the Commission (competition, protection of the Community’s financial interests,...).

When exercising missions related to these Community policies, national constitutions do not forbid conferring specific powers to foreign officers acting as Community officials.

Mutual recognition of the conferment of powers to persons who are not Community officials (or – generally speaking - are not acting for any multilateral - international organisation) but are acting on

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<sup>11</sup> Article 39 TEC provide an exception to the free movement of workers for employment in public service.

behalf of their State of origin is also accepted by national authorities, for example when applying Schengen provisions on police cooperation (hot pursuits, done without a prior agreement of the Host State) provided the powers are defined and limited (non discretionary).

The domain of Border Control combines these two situations: guest border guards are not “Community officials” (they are appointed by their Home State, which is a subject of international law, and not by the Community or by another intergovernmental body), but their mission is to apply a Community policy (immigration / asylum). In their missions (joint operations), which may be initiated by the Inviting State or by the FRONTEX Agency (with the agreement of all concerned States) the powers conferred should be well defined and depending on the invitation of the Host State.

When operating according to an EC instrument defining the roles and powers necessary for border control tasks, the mutual trust and recognition regarding acts of these officers will be reinforced by the promotion of the common knowledge base (e.g. specific training related to matters related to border control). Without creating a new dedicated corps of border guards, and without making any modification to the national status of the concerned officers in their State of origin, the new EC instrument will have to define minimal powers, rights and obligations (e.g. related to data protection) allowing Member States to approximate their legislation in the field. This could be done in due respect of National Constitutions, with the specific purpose of improving the efficiency of joint operations decided by concerned States, coordinated by the FRONTEX Agency.

The knowledge or the use of national language(s), especially when facing nationals from the inviting State, is a significant requirement. This implies that the concerned missions could be limited to specific situations (traveller facing or not) and/or to certain countries depending on the linguistic capabilities of the officer.

Other “Obstacles” mentioned in interviews (specific criminal law provisions, human rights principles, data protection) will be addressed with much more efficiency and transparency both for citizens (travellers) and officers involved if rules were commonly organised and translated.

## 1.7 Need for improvement

The need for a clear legal framework, a growing expectation for joint operations and mutual support in specific geographic areas in the case of sudden crises, threats or migration pressures has been highlighted by interviewees. The current practices, where collaborations are organised, based on a growing number of

fragmented bilateral agreement, have revealed a lack of consistent legal basis and a wide variety of answers to the same simple set of questions regarding the powers, obligations and issues related to the liability of “guest officers” and the involved States (home or guest). The potential offered by articles 7 and 47 of the Schengen Convention is not used except by Germany, making the carrying out of joint operations legally un-secure when foreign officers are physically present and participate by little more than mere observation. Trust and good personal relations are important, but are insufficient to build legal certainty.

Joint operations are not and will not become “daily business” for everyone. In most cases external borders will remain controlled efficiently at the local level, and therefore most interviewees did not consider the presence of guest officers on their territory an unambiguous added value for daily operations. However, exchanges of knowledge, best practices and temporary solidarity support in case of a crisis or a special event may be valuable for improving methods, for solving emergency situations or fighting against trans-border criminals. The appreciation of the added value, and therefore the initiative of such operations must stay “in the hands” of the inviting country or of the FRONTEX agency which operates (with the agreement of the States involved) in the framework of its mission.

As a first step, the definition and adoption of a minimal set of rights and obligations seems to be proportional to the need, together with a “Common Core Curriculum” training ensuring that officers will share the same level of basic knowledge to participate with success in border control joint operations.

## 1.8 Recommendations

From doing little more than providing and sharing information, providing expert advice and coordination, to the approximation of national legislations conferring specific powers to guest border guards based on the knowledge acquired through the Common Core Curriculum taught in national border guard academies, three scenarios are proposed. These scenarios are not exclusive, but are to be understood as three degrees of the same question (mutual information is necessary in all cases).

To pave the way for such an approximation of Members States’ legislations, we have proposed the main provisions of a Community instrument. It covers the specific minimum powers that will be recognised for invited border guards, for the limited period of time of joint operations, and provided these operations have been planned and accepted by the guest Member State – possibly under coordination of the FRONTEX agency.

During such well defined (and therefore non-discretionary) operations and tasks, the necessary corresponding public authority could be conferred to guest officials acting under the supervision of their host counterparts.

To reinforce the confidence and recognition by a Host State relative to the operational efficiency and experience of guest border guard officers, an appropriate training would improve mutual trust and acceptance. It would facilitate the mutual recognition of specific authority powers to other Member States' border guard officers.

Without creating any specific permanent status, the conferment of specific powers to guest border guards during the accomplishment of the concerned operations and tasks could be considered as a modest step in the direction of a further development of a common corps of border guards.

# 2 Introduction to the study

## 2.1 Description of the study and main objectives

This report includes the main findings of the Study initiated by the European Commission concerning all the Member States of the European Union, as well as the Schengen Participating States. It addresses the powers of “border officers” when they are invited to operate in another Member State, in the framework of joint operations or for removal operations of third country nationals found in an illegal situation.

The primary objective of this study is to collect legal and practical information on the different activities and functions usually carried out by border guards, and the relevant powers they have been granted. Its second objective is to examine legal requirements in every Member State (and Schengen Participating State) to granting powers of execution, on their territory, on border guards from other States when they participate in joint border control operations and/or removal actions of foreigners in an illegal situation.

Finally, the study formulates recommendations in order to allow the European Commission to prepare and propose a legal instrument aiming at reducing potential barriers to cooperation, progressing towards an approximation of practices and enhancing the creation of specialised expert teams prefiguring what could possibly become in the long run a more dedicated European corps of border guards.

## 2.2 Context of the study

### 2.2.1 Justice and Home Affairs

In the mid 1970s the EC Member States began to exchange information and cooperate with one another on matters related to the monitoring and control of terrorism, drugs, and organised crime. A series of mechanisms, outside the framework of the Community Treaties and which came to be known as the Trevi process, were developed. Year after year, the European Union demonstrated the will to offer its citizens an area of freedom, security and justice without internal borders based on a main objective of “liberty, democracy, respect of human rights and fundamental freedom, and the rule of law”<sup>12</sup>. This is a reason why there is a constant development of policy areas over the years in the field of Justice

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<sup>12</sup> Art.6, Amsterdam Treaty.



and Home Affairs. This policy area is still very much in the course of development, but it nonetheless has advanced considerably in both institutional and policy terms. Moreover, recent events such as the extension of the EU borders following the 1 May 2004 enlargement, international terrorism gave much more importance to this field and revealed the necessity of a good coordination at a European level<sup>13</sup>.

Therefore, this area of policies has been significantly strengthened since the Treaty of Maastricht (1992) established the Justice and Home Affairs (JHA) domains: crossing by persons of external borders of Member States, asylum policy, struggle against drugs and drug addiction, fight against international fraud, judicial cooperation in civil and criminal matters, customs cooperation, police cooperation, immigration policy and residence rights of third country nationals. Still, because the JHA issues are of a highly sensitive nature, raising deep cultural issues and touching directly on national sovereignty concerns, the third pillar was established on an intergovernmental basis, requiring unanimity for council decision-making while leaving room for initiatives taken by a group of Member States.

The Treaty of Amsterdam (1999) widened and strengthened this field through the integration in the EC Treaty of asylum, immigration and judicial cooperation in civil matters. It also implemented the aspects of judicial cooperation. The JHA policy areas of asylum, migration and judicial cooperation in civil matters were transferred to the first pillar. Decisions were still taken by unanimity in the Council but provisions were made for the use of qualified majority voting for the future. Title VI of the EU Treaty was then refocused and re-titled "Provisions on Police and Judicial Cooperation in Criminal matters". Five months later, the Tampere Council marked a key moment where the major aims of the area of Freedom, Security and Justice have been defined. In Tampere the national governmental leaders gave further impetus to common policies by, amongst other things, reaching an agreement on the introduction of a common asylum system, measures to improve progress in access to justice and in the mutual recognition of judicial decisions, and the creation of two new agencies: Eurojust and a European Police College.

In December 2001, the Laeken Council concluded a compromise on cooperation on external border issues, creating the foundations of a plan to combat illegal immigration.

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<sup>13</sup> DEN BOER Monica, Transnational law enforcement: crossing the borders of statehood, Conference, The Hague, 9-11 September 2004.

The June 2002 Seville summit is the stage where a political agreement was reached on a series of measures including closer cooperation of Member States on border controls, including the creation of a network of immigration control officers. The Seville Action Plan urged Member States to “introduce without delay (...) the common unit for external border practitioners, composed of Member States’ heads of border control, to coordinate the measures contained in the plan”.

4 November 2004 is the starting date of the so called “The Hague Programme” which settled a five-year plan for closer co-operation in justice and home affairs in the EU to be implemented in the period of 2005-2010. EU leaders agreed to use qualified majority decision-making and co-decision in the fields of asylum, immigration and border control issues by April 2005. Legal immigration will remain subject to unanimity. The external dimension of asylum and migration is one of the main innovations introduced by the Dutch Presidency, with the purpose of developing asylum and migration policies outside the Union. On the other hand, The Hague Programme also focuses on the management of migration flows and mainly on border control. The Hague Programme foresees that the Schengen Information System (SIS II) will be operational in 2007; it also calls for harmonised solutions at the EU level on biometric identifiers and asks for establishment of common visa rules as a way to facilitate legitimate travel and tackle illegal immigration.

## 2.2.2 Schengen

In parallel and complementary to the development of the Justice and Home Affairs legal and institutional background, some States developed since 1985 the “Schengen area”, where persons can circulate freely across internal borders and where travellers’ movements are controlled at external borders.

In 1984, at the Fontainebleau Council, the Heads of State and government decided to bring Europe closer to its citizens. Therefore a number of them concluded on the 14 June 1985 the Schengen Agreement whose goal was the end of border checks within the area (countries of Benelux, France and Germany). This agreement was not part of the Community framework and was made on an intergovernmental basis. Still, it would take five more years to sign the Schengen Convention (1990) whose goal was the implementation of the Schengen Agreement. The Convention specified that on the one hand the internal frontiers would disappear and on the other hand the external borders would be reinforced in order to protect the citizens. As compensatory measure for the removal of the internal borders, the police and judicial cooperation would be strengthened. In order to help this collaboration, the SIS (Schengen Information System) is an information network and

database based in Strasbourg that allows the competent national authorities to access information on certain categories of persons and property.

It is only in 1995, ten years after the first agreement, that the five founding countries, joined by Portugal and Spain started to operate the system allowing free circulation inside internal borders. Italy, Austria, Greece, Denmark, Finland, Iceland, Norway<sup>14</sup> and Sweden joined the group during these last years. The ten new Member States adopted the Schengen *acquis* when joining the EU in May 2004 and are preparing themselves for its implementation in the near future. More recently Switzerland also decided by public referendum to join the Schengen area<sup>15</sup>.

During this long process, the Treaty of Amsterdam (1999) integrated the Schengen Convention in the Community law. Consequently, Schengen joins the legal and institutional framework of the EU and can be further developed within its structure. Decisions related to the Schengen “acquis” are therefore taken by the European Council and the European Parliament. Regarding border control, United Kingdom and Ireland are the exceptions to the rule because of their particular status which allows them to continue to control people at their borders. The position of Denmark is also an exception as it can choose within the EU framework whether or not to apply any new decision taken under the agreement.

### 2.2.3 Border management

Managing the external borders of the Schengen area was found to be a priority in every Participating State. Still, border management is a broader concept than just exercising border checks at the external borders. A wider approach had to be adopted in order to ensure an efficient overall management of the borders. This is the reason why a mechanism of filters has been developed through the “Integrated Border Security Model”. This model presents four complementary tiers giving a general strategy for border management, asking cooperation and coordination at different levels.

The first step is to regulate the activities in third countries, especially in countries of origin and transit. This includes the issuing and control of visas, and thus asks the officials working abroad for the Schengen States’ consular posts to be trained by specialists. False and falsified documents will also have to be detected through a thorough inspection of documents and use of

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<sup>14</sup> The main reason for why the non-EU States of Iceland and Norway joined Schengen was to preserve the open borders agreement between the Nordic countries that has been in effect since 1952.

<sup>15</sup> Agreement of 16 October 2004, ratified by referendum on June 5, 2005.

databases. Moreover, carriers are responsible for returning those aliens who are refused entry on the basis of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, and are obliged to take all necessary measures to ensure that an alien is in possession of valid travel documents<sup>16</sup>.

Secondly, bilateral and international cooperation will help to provide appropriate mechanisms in order to exchange information, organise emergency procedures or develop local contact points.

Thirdly, the above Integrated Border Security model focuses its attention on the border management as such. It will consist in border checks and border surveillance, both based on risk analysis. This risk analysis, with its tactical, operational and strategic approach will contribute to diminish the threats. This is where the present Study fits in, adopting a definition of border control in line with the one used in the Community Code, Art 2(9): “*the activity carried out at a border (...) in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks<sup>17</sup> and border surveillance<sup>18</sup>*”.

Finally, the fourth filter is a series of activities inside of the territory of the Schengen States. Measures have to be taken to prevent illegal immigration and cross-border crime by police forces and this, mainly on the international traffic routes.

## 2.2.4 Burden sharing

The new threats and new challenges at the borders ask of the EU authorities to ensure controls on the external borders to be as effective as possible. The Schengen Convention stipulated that every single person who enters this area is allowed to travel from one country to another without any control. There are no restrictions anymore and as a consequence, each Member State has to carefully pay attention that no irregular border crossing happens in the different external borders of the Schengen region. Since it has shifted and concentrated at the external borders, the mission of

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<sup>16</sup> The Council adopted in June 2001 a Directive supplementing the provisions of Article 26 CIS, which contains three optional models of penalties for carriers who do not fulfil their obligations. – See Council Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union – 27 Feb 2002 - 6621/1/02.

<sup>17</sup> Defined in Art 2(10) of the same Regulation as “*checks carried out at border crossing points, to ensure that persons, their means of transport and the objects in their possession may be authorised to enter the territory of the Member States or authorised to leave it.*”

<sup>18</sup> Defined in Art 2(11) of the same Regulation as “*the surveillance of borders outside border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks*”.

border control has to be efficiently performed for the welfare of all the other members.

Therefore, a strong argument can be made for the adoption of common provisions at EC level and for establishing minimum standards in external border control activities. By proposing a common policy, the European Commission planned to include different components: a common corpus of legislation; a common co-ordination and operational co-operation mechanism; a common integrated risk analysis; a staff trained in the European dimension and inter-operational equipment. Accordingly, Member States with external borders have to adapt their border checks and surveillance to the standards and procedures decided at EU level.

The burden of managing critical sections of land and/or sea borders is not equally distributed between all Member States. The situation has changed with recent EU enlargement and occasional crises occur. It is opportune to avoid that some States should bear a disproportionate share of the costs involved by external border control management. The goal is then clearly to share the burden of managing external border, according to the principle of solidarity.

## 2.2.5 FRONTEX

Following all these developments, the Thessaloniki Council (2003) agreed to create a common body of border experts. In a second stage, FRONTEX, a European Agency for the Management of Operational Cooperation at the External Borders of the Member States, officially started its activities in 2005. This recent body of the Community, located in Warsaw, has an autonomous budget and can have specialised branches in the Member States. Its Management Board is composed of one representative of each Member State plus two representatives of the European Commission<sup>19</sup>.

“The Agency will coordinate/assist the competent services of Member States responsible for implementing the Schengen “acquis” on control of persons at the external borders”. This agency strives to improve the integrated management of the external borders while providing also technical support and expertise. This objective leads the Agency to coordinate operational cooperation through information exchange systems, cooperation with Europol and international organisations and, finally, the development of partnerships and gradual development with third countries. Moreover, the agency evaluated different tasks such as risk analysis, training, follow-up to research, management of technical

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<sup>19</sup> See: European Parliament and Council Regulation (EC) No 2007/2004<sup>19</sup> providing the legal basis for the establishment of the Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

equipment, support to Member States in circumstances requiring increased cooperation. Cooperation with Europol is also provided.

In order to fulfil its mission, FRONTEX was conferred with different tasks such as the possibility to evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States. It can also launch initiatives for joint operations, put its technical equipment at the disposal, and make a comprehensive comparative analysis of the results. Future challenges for the Agency could be (this is under evaluation) the responsibility of coordination of the cooperation with customs and other authorities at the external borders responsible for goods-related security matters<sup>20</sup>.

## 2.3 Study methodology

The Study on the Powers of Border Officers was carried out over a period of just over 7 months. The official kick-off meeting took place on June 3, 2005 and the Final Report was delivered on January 10, 2006.

The core team in charge of this Study was composed of seven consultants<sup>21</sup> and a Project Manager<sup>22</sup> from Unisys, assisted by two experts: Prof. Dr. Gert Vermeulen, professor of criminal law at the University of Ghent and director of the Institute for International Research on Criminal Policy (IRCP) and Mr. Patrick Zanders, chief superintendent and director for international police policy within the Belgian Federal Police. The core team was furthermore supported by other experts from the IRCP<sup>23</sup> and in regular contact with DG JLS from the European Commission<sup>24</sup>.

The methodology applied, described in detail in Annex 10.2, allowed for the collection and analysis of information taking into consideration both the views of practitioners as well as the legal aspects of cross border cooperation.

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<sup>20</sup> In : Europa website;  
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/230&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>21</sup> Kamini Aisola, Rebecca Vanhecke, Nicolas Dufour, Wilfried De Wever, Sébastien Baqué, Marc Flammang and Thomas Van Cangh.

<sup>22</sup> Patrice-Emmanuel Schmitz, Manager EU consulting.

<sup>23</sup> Prof. Dr. Tom Vander Beken, professor of Criminal Law and director of the IRCP and Els De Busser, academic assistant and member of the IRCP.

<sup>24</sup> The project officer in the Commission was Mrs. Agnès Pinault during the first four months of the study. After her departure, she was followed by Mr. Durante Rapacciuolo from October onwards.

# 3 Powers of border guards

## 3.1 Section summary

This section is divided into three main parts.

The first one addresses the chain of prerogatives for border control activities and removal actions. It distinguishes and details four border control phases: the preparation of operations, surveillance and checks; whereas removal actions are presented according to the major steps involved: the preparation phase, the escort towards the removal vehicle, the removal/transport phase and the arrival.

In a second stage, the section gives an overview of the services involved in border control in the Member States (18 of them being police authorities) and the main acts regulating their activities.

Combining both actors and a list of 70 border control tasks, established on the basis of the chain of prerogatives, the last part focuses on specific executive powers conferred on border guards. When they operate on their home territory, border guards have relatively similar powers from country to country. However, when they are invited to operate abroad, the extent of their prerogatives varies considerably, ranging from 2 in Malta up to 60 in Germany where the national normative framework foresees such a bestowment of powers.

Several factors explain this variety:

- The existence of bi- and multilateral agreements between Member States is obviously the main element influencing the powers that officers have on the territory of the signatories. The number of such agreements creates an asymmetric picture where, typically, even though most agreements imply reciprocity between their signatories, officers from some States do not have the same powers as their counterparts from other Member States on the territory of a third Member State.
- Within such agreements, several elements have themselves an impact on the degree of powers conferred: the fact that guest officers work under the supervision of host border guards or special circumstances like emergency situations are commonly encountered elements that clearly increase the scope of the powers that are bestowed to the guest officers; whereas elements like the ranks of such officers or the type of borders involved seem to be of limited importance.

Ultimately, by applying objective criteria characterising public authority, this section tries to distinguish within border control activities according to the degree of exercise of public authority they imply:

- the tasks that do not imply or entail interactions with travellers, do not impact the fundamental freedom of citizens

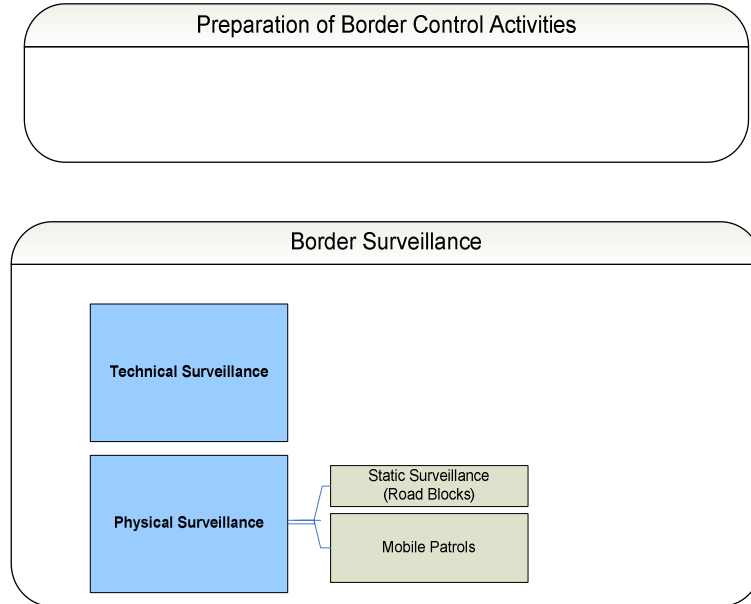
nor involve the use of discretionary powers and that do not bind the State legally (several surveillance activities),

- the tasks representing a limited use of the above-mentioned criteria (specific first line and second line activities, without decision-making or discretionary powers and limited interactions with travellers), and
- Sensitive activities matching most of these criteria and therefore strictly falling under the States’ monopoly on the exercise of public powers (typically the use of force and coercion, and command and control activities)

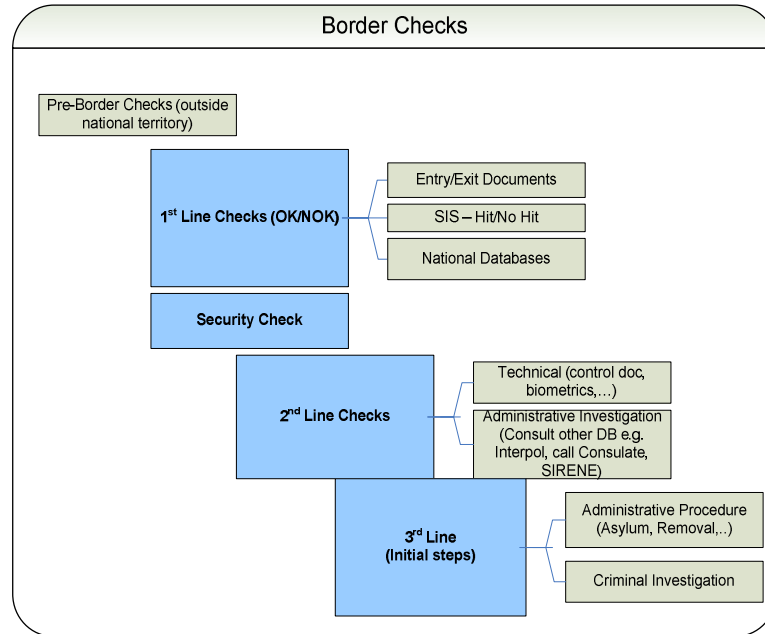
## 3.2 Chain of prerogatives

### 3.2.1 Border control tasks

Through analysis and interviews with practitioners, a standard list of activities performed in the framework of border control (including joint operations) was developed. This list covers the standard steps involved in border control on all types of borders (land, air and sea). This list of more than 70 tasks, rights and obligations was clustered in three major categories, as can be seen in Figure 1:







**Figure 1: Standard Border Control Activities**

### 3.2.1.1 Preparation of border control

The preparation of border control activities mainly covers threat analysis and risk assessment activities. Other related activities are administration and activities related to the exchange of information between the Host States. For joint operations as well, the organisation of an activity is more and more based on a preliminary assessment of the situation. Before the creation of the FRONTEX agency, joint operations were mainly organised based on a proposition from a Member State to one of the ad-hoc centres, or suggested directly by the centres themselves.

The functioning of FRONTEX and its role both in threat assessment and in the coordination of EU joint operations is most likely to reinforce that trend. Based on Chapter 2, art 8 of the Regulation 2007/2004, FRONTEX is entitled to provide operational assistance to Member State requesting it, including by detaching FRONTEX officials in these Member States (art 8(2)) possibly using FRONTEX equipment in the framework of such missions (art 8(3)).

### 3.2.1.2 Border surveillance

#### 3.2.1.2.1 Technical control and surveillance

Technical control and surveillance consists of the use of instruments (radars, heat detectors, breathing detectors,...) and is usually carried out to prevent persons from circumventing the official border crossing points in order to evade checks and illegally enter the common area of freedom of movement. In the context of joint operations, guest officers sometimes provide support to the host authorities by handling such instruments due to their technical expertise.

#### 3.2.1.2.2 Physical control and surveillance

Physical surveillance can be either static (commonly called road blocks) or mobile. In the case of static physical surveillance, border officers are physically present along the border line and are ready to intervene if someone attempts to cross the border illegally. During joint operations, guest officers can be present at such road blocks to support their colleagues from the Member State where the operation takes place.

Mobile surveillance implies patrolling between border crossing points, possibly leading to a pursuit and apprehension of a person in the act of committing an offence or participating in an offence. Such patrols are never done by only one host officer, placing guest border guards officers (if any) under permanent supervision of host officers.

### 3.2.1.3 Border checks

#### 3.2.1.3.1 Pre-border checks

Pre-border checks are border checks carried out in third countries (before entering a Member State). They are mainly done to control air borders and consist of officers from the Host States that are detached abroad screening the passengers of flights with their Home State as destination and assisting airline staff members in charge of the pre-checks<sup>25</sup> under the Warsaw Convention. These officers have no executive authority and the airline remains competent to authorise access to its aircraft, the officer performing only an advisory role. In this field, exchange of officers is not a common feature, even though several countries have officers carrying out

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<sup>25</sup> Such pre-checks are also performed by non-law enforcement services, i.e. by the airlines themselves.

such controls on behalf of a group of countries<sup>26</sup>. Such activities do not constitute border control activities in the strict sense and fall therefore outside the scope of this Study. However, since practitioners repeatedly reported this activity as a possibility for a common use of resources, this activity is discussed again in chapter 7 on recommendations.

#### 3.2.1.3.2 First line checks

This activity is clearly the most visible border control task for the public. It involves two major steps: controlling/stamping the travel documents (and other information) and accessing hit/no hit<sup>27</sup> databases (SIS or national databases, and in the future VIS).

These activities involving important actions and responsibilities on behalf of the officers performing them are currently not carried out by guest officers in the context of joint operations where they operate as advisors under Art 7 and 47 of the Schengen Implementation Convention.

#### 3.2.1.3.3 Security checks

These controls are performed in order to guarantee the safety of both travellers and border guards themselves. As such, they are not strictly border control-related and are often delegated to private companies under the supervision of the competent law enforcement service.

#### 3.2.1.3.4 Second line checks

Whenever the officer in charge of the first line check notices a possible irregularity when controlling the travel documents or the hit/no hit databases, the person wishing to cross the border is subjected to a more thorough second line check. These checks can be purely technical, possibly using specialised detection devices to verify the authenticity of the documents. In parallel, an administrative investigation can be carried out by interviewing the person wishing to cross the border on their ID, their financial situation, their travel route, etc, by contacting other authorities (SIRENE, Consulates ...) or by accessing specialised databases for investigation purposes.

As expressed by practitioners experienced with joint operations, second line checks are an area where guest officers can genuinely

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<sup>26</sup> E.g.: Norwegian officers posted in Dubai execute such checks on behalf of the Nordic Countries.

<sup>27</sup> Hit/no hit databases are systems that provide instant information on the person checked (e.g. persons who are suspected of having committed an offence) and allow to make an appropriate decision on whether or not certain action needs to be taken.

carry out their advisory role, under the supervision of their host counterparts.

### 3.2.1.3.5 Third line activities

- **Administrative procedure**

Border control activities only cover initial phases of third line administrative procedures and criminal investigation. Administrative procedures can be related to the initiation of an asylum procedure and the possible placement in a detention centre.

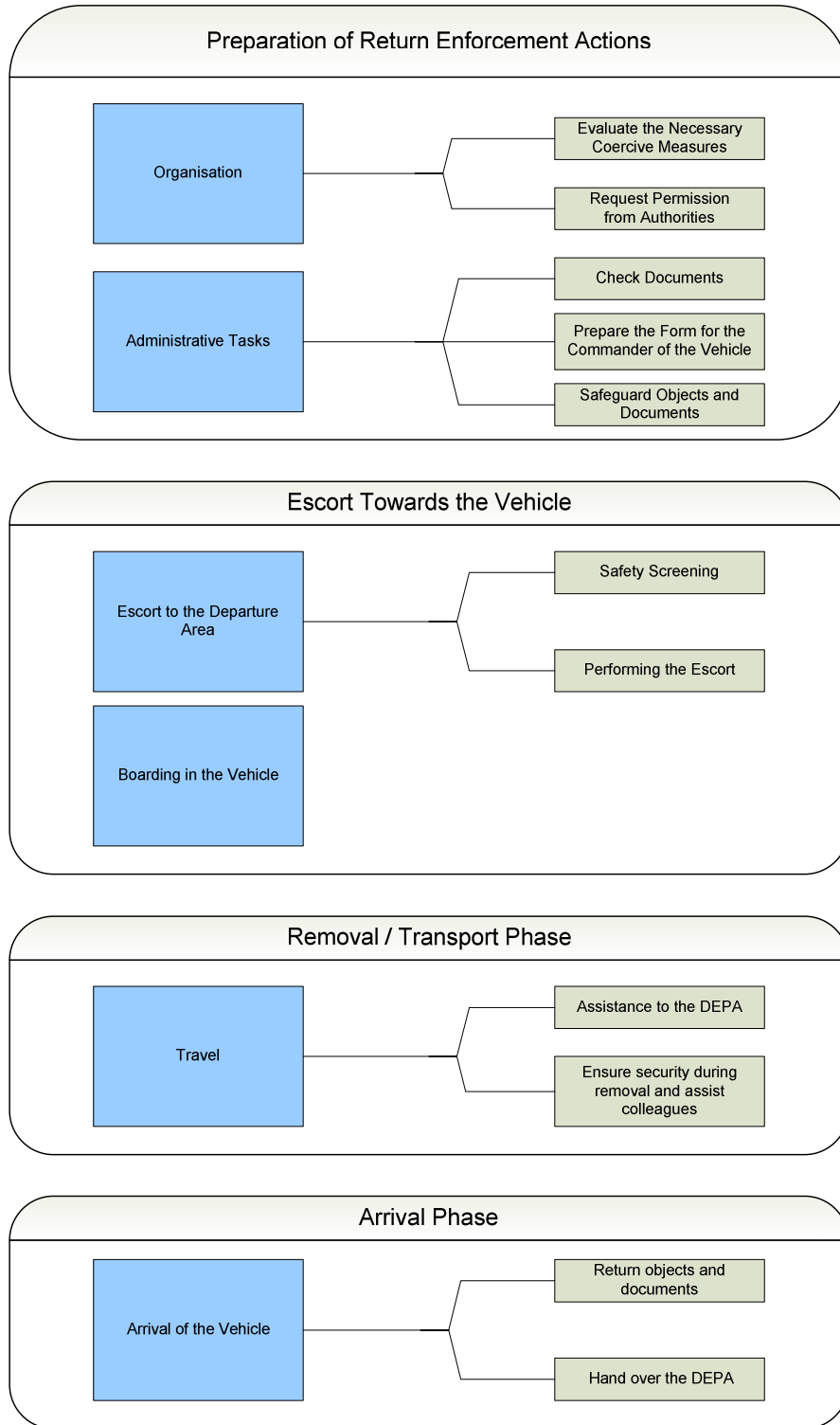
- **Criminal investigation**

The start of a criminal investigation is related to the initial pre-trial collection of evidence, and the possible transfer of a case to a prosecutor or a judge. Even though the degree of competences in this area for the law enforcement services varies between countries (e.g. in Denmark and Norway where prosecutors are members of the police force or in Poland where the border guard has extensive criminal investigation prerogatives), these activities mark a clear transition to police cooperation activities. In the context of joint operations, such prerogatives are always carried out by host officers.

These activities being deeply enrooted in strictly national procedures (described mainly in the criminal code), cooperation at European level is subsequently regulated by other instruments (e.g. Framework decision 2002/465/JHA on Joint Investigation Teams).

## 3.2.2 Removal tasks

Removal operations are closely linked to the enforcement of the regulation regarding the borders. In the framework of these operations a standard list of all performed activities was developed. This list of approximately 25 tasks covers the standard steps of removal operations and was clustered in four main phases. The results can be seen in Figure 2:



**Figure 2: Standard Removal Activities**

The four main phases of removal operations are:  
1. The preparation of return enforcement actions

2. The escort of the DEPA (Deported Person Accompanied) towards the vehicle
3. The removal/transport phase
4. The arrival phase

The following titles provide a short description of these phases. For the sake of conciseness, the reader is referred to the information contained in the interview guides<sup>28</sup> for a detailed description of the activities involved in the organisation and implementation of a (joint) removal action.

### 3.2.2.1 Preparation of return enforcement actions

The preparation phase of return enforcement actions involves various tasks that are related to the organisational process on the one hand, and tasks that are administrative in nature. On an organisational level, officers involved have to evaluate the necessity of coercive measures and request permission from authorities of the country of destination. On a more administrative level, the documents of the DEPAs have to be checked and the form for the commander of the vehicle needs to be prepared. Moreover, certain objects or documents of the DEPA have to be safeguarded.

### 3.2.2.2 Escort of the DEPA towards the vehicle

During the phase of the escort towards the vehicle several interrelated activities have to be performed by the officers. A distinction can be made between activities related to the escort to the departure or transit area on the one hand and actually boarding the removal vehicle on the other hand. Important tasks in this phase are the performance of necessary safety screenings and the possible use of various forms of persuasion including coercive force.

### 3.2.2.3 Removal/transport phase

During the phase of actual removal and transport of the DEPA various types of actions that are related to the health of the DEPA and the security during transport are possible. Here, providing assistance to the DEPA and/or colleagues and the use of force or coercion as it may be are essential executive powers. It goes without saying that executive powers related to controlling the situation during transport and communication, are also important.

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<sup>28</sup> See interview guides (documents IG\_IGJRA on the Cd-Rom containing the study background documentation – Annex 10.1).

### 3.2.2.4 Arrival phase

When the removal vehicle arrives, it is possible that a contact with local authorities is necessary (handing over the DEPA or providing them with additional information). Moreover, certain objects and documents have to be returned to the DEPAs.

## 3.3 Border control services

This part of the report compares the 28 relevant States with respect to the services involved in border control. Summaries are provided in annex **10.3** on the situation of border officers in their home country. For an exhaustive view of the prerogatives of all services involved, the reader is referred to the Country Information available on the Annexed CD-ROM.

Border guards are mainly police officers. In 18<sup>29</sup> out of the 28 relevant countries, the police (law enforcement service) are the main actor in charge of border control activities, whereas 6<sup>30</sup> Member States have an independent dedicated border guard and 4 fall under special categories<sup>31</sup>.

Country	Service / Unit	Surveillance	Checks	Land	Air	Sea
Austria	Border Service of the Federal Police	Yes	Yes	Yes	Yes	No
Belgium	Federal Police	Yes	Yes	Yes	Yes	Yes
Cyprus	Aliens and Immigration Unit	No	Yes	No	Yes	Yes
Czech Republic	Alien and Border Police Service	Yes	Yes	Yes	Yes	No
Denmark	Aliens Department of the Police	Yes	Yes	No	Yes	Yes
France	Border Police (Police Aux Frontières – PAF)	Yes	Yes	Yes	Yes	Yes
Germany	Bundespolizei	Yes	Yes	Yes	Yes	Yes
Greece	Hellenic Police	Yes	Yes	Yes	Yes	Yes
Iceland	Police Force	Yes	Yes	No	Yes	Yes
Ireland	Garda Síochána	Yes	Yes	No	Yes	Yes
Italy	Border and Foreign Police Service	Yes	Yes	Yes	Yes	Yes
Luxembourg	Airport Control Service (SCA)	Yes	Yes	No	Yes	No
Malta	Special Branch of the Malta Police Force	Yes	Yes	No	Yes	Yes
Norway	Police	Yes	Yes	Yes	Yes	Yes
Slovakia	Border Police Department	Yes	Yes	Yes	Yes	Yes
Slovenia	Border Police	Yes	Yes	Yes	Yes	Yes

<sup>29</sup> The Cypriot Aliens and Immigration Unit, regulated by the Police Act and Police orders, is counted in this category. The same holds for the Irish Garda Síochána.

<sup>30</sup> Estonia, Finland, Hungary, Latvia, Lithuania, Poland.

<sup>31</sup> In Portugal and the Netherlands, a military law enforcement service has the main responsibility in border control, the UK Immigration Service is a specific service and the Swiss Border Guard Service belongs to the federal customs administration, under the Ministry of Finance.

Spain	National Police Corps	No	Yes	Yes	Yes	Yes
Sweden	Police	Yes	Yes	No	Yes	Yes

**Table 1: Main border control service per country (Police)**

Country	Service / Unit	Checks	Surveillance	Land	Air	Sea
Estonia	Border Guard	Yes	Yes	Yes	Yes	Yes
Finland	Border Guard	Yes	Yes	Yes	Yes	Yes
Hungary	Border Guard	Yes	Yes	Yes	Yes	Yes
Latvia	State Border guard	Yes	Yes	Yes	Yes	Yes
Lithuania	State border guard service	Yes	Yes	Yes	Yes	Yes
Poland	Border Guard	Yes	Yes	Yes	Yes	Yes

**Table 2: Main border control service per country (independent border guard)**

Country	Service	Checks	Surveillance	Land	Air	Sea
Portugal	Serviço de Estrangeiros e Fronteiras	Yes	Yes	Yes	Yes	Yes
Switzerland	Border Guard Service	Yes	Yes	Yes	Yes	No
The Netherlands	Royal Marechaussee	Yes	Yes	No	Yes	Yes
United Kingdom	Immigration Service	Yes	Yes	Yes	Yes	Yes

**Table 3: Main border control service per country (other services)**

Border checks are typically carried out by one to three services (according to a repartition mostly based on the importance of the border crossing points). With respect to surveillance, military presence is stronger. The repartition between services is based on the geographical type of border (land, sea, air).

As far as removals of third-country nationals in an illegal situation are concerned, these same services are generally the ones in charge of executing the decisions usually taken by an immigration office, even though they are sometimes done by other services. Only in two countries the main service in charge of border control is not involved in removal operations, namely Switzerland, where the Cantonal Offices for Migration work in close collaboration with the cantonal police. In this country, like in the UK, private-sector escorts are sometimes used, but, in the case of Switzerland, only to escort the DEPAs until the place of departure of the removal. In Finland, it is the police who handle such removals.



Country	Service	Category
Switzerland	Cantonal offices for Migration	Immigration Department
Finland	Police	Civil LES

**Table 4: Competent services for removal operations distinct from the ones in charge of border control**

## 3.4 Executive powers per country

### 3.4.1 Executive powers in home country

In most countries, border guarding is far from being a strictly administrative activity. Police officers in charge of this activity exercise many prerogatives of a police nature that are intertwined in their everyday activity. Moreover, border control activities as a whole imply the exercise of public authority. In the opinion expressed by practitioners<sup>32</sup> this implies that every component of border control activities (every individual task by a public authority potentially leading to an act disposing a good or imposing a burden on a citizen) holds in itself an element of public authority.

When looking at dedicated border guards (e.g. immigration officers where it exist), their prerogatives go far beyond mere passport checks. The current trend of widening the scope of activities or territorial competences of the border guards (as can be seen in Finland or Poland<sup>33</sup>) tends to confer even more importance to these services, which might make it harder to approximate these activities among Member States.

The case of the UK immigration service is specific since the use of coercion is very limited for dedicated Immigration Officers. This implies that, as such, their powers provide an interesting example of a possible common denominator approach.

When analysing the normative framework regulating the activities of these UK services, their core prerogatives are defined in two main acts: a Police/Border Guard Act and an Immigration/Aliens Act<sup>34,35</sup>. None of them however describes the powers of border

<sup>32</sup> See e.g. interview of Swedish authorities.

<sup>33</sup> See Annex 10.3.

<sup>34</sup> Available on the CD-ROM provided as Annex 10.1 of this report.

guards in as much detail as the detail of the list of border control tasks drawn up in the context of this Study. Below is a generic table illustrating the tasks carried out by border control services in the 28 relevant States, consequently combining explicit legal provisions from the above-mentioned acts and prerogatives implied in the generic competence of controlling borders.

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<sup>35</sup> When assessing the requirements to either join such services or simply exercise such prerogatives, the situation becomes more complex as national regulations on public service or data protection regulations come into play.

ID	Description	Countries	#
4.01	Perform threat analyses and risk assessment (Provide data input and intelligence information, support with analytical tools)	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	28
5.01.a	Make use of surveillance instruments	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	28
5.02	Observe the area close to the border (without specific instruments)	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
5.03.a	Stop a person trying to cross the border - Ask him/her to stop on a voluntary basis	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
5.03.b	Stop a person trying to cross the border - Force him/her to stop	AT,CH,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	23
5.04	Interview persons on their reasons for crossing external borders outside the authorised crossing points	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IS,IT,LT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
5.05	Forbid access to an area close to the border	CZ,DE,DK,EL,EE,ES,FI,FR,HU,IS,LU,LV,MT,NL,PL,SE,SI,SK	18
5.06	Patrol the area between border crossing points	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
5.07	Engage in pursuit of and stop persons trying to cross the border	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	25
5.08	Intercept or monitor telecommunications	CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NO,PL,SE,SI,SK	21
5.09.a	Access to property (without searching it in detail) - Enter private premises	AT,CH,CY,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	23
5.09.b	Access to property (without searching it in detail) - Enter public premises	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	24
5.10.a	Access to property and search it in detail - Enter private premises	AT,CH,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	22
5.10.b	Access to property and search it in detail - Enter public premises	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.01	Carry out pre-border checks in third countries (at gates, before entry in plane/boat...)	AT,CY,DK,EL,EE,ES,UK,IE,IS,NL,NO,PT,SI	13
6.02	Screen the persons crossing the border	AT,BE,CH,CY,CZ,DK,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	25
6.03	Support control activities by physical presence during the control procedures	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.04	Ask for ID, VISA, travel documents	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.05	Give indications to persons (pedestrian, drivers, pilots, skippers) crossing the border	BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.06	Stop a vehicle entering or leaving the free movement area	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	24
6.07	Stamp entry/exit document	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,SE,SI,SK	27
6.08	Decide whether to authorise entry/exit	BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.09	Consult the Schengen Information System	AT,BE,DE,DK,EL,ES,FI,FR,IS,IT,LU,NL,NO,PT,SE	15
6.12	Notify the person willing to cross the border of admission or refusal of admission/exit	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.13	Make the decision to proceed to second line check activities	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
6.14.a	Perform a security check - Check security of persons	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
6.14.b	Perform a security check - Check security of objects that they carry	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	28
6.15.a	Establish identity of persons - Search a person for additional ID information	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,SE,SI,SK	27
6.15.b	Take biometric data of persons	AT,BE,CH,CY,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,MT,NL,NO,PL,SI	21
6.16.a	Perform an extensive check of persons and objects - Search persons extensively	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
6.16.b	Perform an extensive check of persons and objects - Examine objects	AT,CH,CY,CZ,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NO,PL,SE,SI,SK	23

6.16.c	Perform an extensive check of persons and objects - Refer the matter to Customs authorities	AT,CH,CY,CZ,DE,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,PL,SE,SI,SK	24
6.17.a	Make use of detection devices – Detection devices to establish authenticity of documentation	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.17.b	Make use of detection devices – Detection devices to detect dangerous or illegal goods and objects	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IS,IT,LU,LV,MT,NO,PL,SE,SI,SK	23
6.17.c	Make use of detection devices - Make use of devices used by the host officers	AT,BE,DE,DK,EL,EE,ES,FI,FR,UK,IE,LT,LV,MT,NL,NO,PL,PT,SK	19
6.18	Check correctness of provided documentation	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.19.a	Apprehend a person to be handed to national administration, police, customs or judicial authorities - Who refuses to provide identity information	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.19.b	Apprehend a person to be handed to national administration, police, customs or judicial authorities - In possession of illegal goods	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NO,PL,SE,SI,SK	23
6.19.c	Apprehend a person to be handed to national administration, police, customs or judicial authorities - For preventive measures	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.19.d	Apprehend a person to be handed to national administration, police, customs or judicial authorities - A wanted person for enforcement measures	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	25
6.20	Temporarily take possession of vehicles / dangerous objects and substances	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.21	Contact other authorities to control authenticity of documents (Consulate, SIRENE,...)	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
6.22	Access to property (without searching it in detail) during border control activities (enter vehicles entering or leaving the Schengen area)	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
6.23	Access to property and search it in detail during border control activities (Enter vehicles entering or leaving the free movement area)	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
6.24.a	Interviewing persons - About their ID	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.24.b	Interviewing persons - About their financial situation (return ticket, income)	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.24.c	Interviewing persons - About goods they carry	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NO,PL,SE,SI,SK	25
6.24.d	Interviewing persons - About their itinerary and the purpose of their visit	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	26
6.25	Consult additional databases for investigation purpose (not simple hit/no hit)	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	28
6.26	Initiate Asylum procedure	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
6.27	Refer the matter to an Immigration Officer (who assumes responsibility)	BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SK	25
6.28	Accompany inadmissible person (to detention centre or for removal when necessary)	AT,BE,CH,CY,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
6.29	Specify a fixed fine	AT,BE,CH,CY,CZ,DK,EL,EE,ES,FI,FR,UK,HU,IE,IT,LT,LV,MT,NL,NO,PL,PT,SE,SI,SK	25
6.30	Initiate pre-trial investigation of criminal cases	AT,CY,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	23
6.31	Initiate procedure for judicial seizure of objects/ vehicles	AT,BE,CY,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NO,PL,PT,SE,SI,SK	24
7.32	Question suspects	AT,CY,DE,DK,EL,EE,ES,FI,FR,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	21
7.33	Transfer the pre-trial investigation to the pre-trial investigation authority	AT,CY,DE,DK,EL,EE,ES,FI,FR,HU,IS,IT,LU,LV,MT,PL,SE,SI,SK	19
7.34	Take the decision on whether or not to place the matter before a prosecutor or a judge	CY,DK,EL,EE,ES,FI,FR,IE,IS,IT,LT,LU,LV,MT,PL,SE,SI,SK	18

7.35	Refer the matter to and contact a prosecutor or a judge (who then assumes responsibility)	AT,CY,DE,DK,EL,EE,ES,FI,FR,IS,IT,LU,LV,MT,NL,PL,SE,SI,SK	19
8.01.b	Service weapons - Right to carry a service weapon	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
8.01.c	Service weapons - Right to make use of an individual service weapon	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
8.01.d	Service weapons - Right to make use of a collective service weapon	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,SE,SI,SK	25
8.02.a	Right to write official reports - On interviews performed	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
8.02.b	Right to write official reports - On searches performed	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
8.02.c	Right to write official reports - On information gathered	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
8.02.d	Right to write official reports - On evaluation of operations	AT,BE,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
8.03.a	Right to issue – VISAs	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	25
8.03.b	Right to issue – Residence Permits	CY,DK,NO,SE	4
8.03.c	Right to issue - Work Permits	DK,LU,NO	3
8.03.d	Right to issue - EU Laissez Passer	DE,DK,ES,HU,IE,IT,LU,NL,NO,SE	10
8.05.b	access to data bases – SIS	AT,BE,DE,DK,EL,EE,ES,FI,FR,IS,IT,LU,NL,NO,PT,SE	16
8.05.c	access to data bases – Data base of home country	EL,EE,ES,UK,HU,IE,IT,LT,LU,LV,NL,NO,PL,PT,SI,SK	16
8.05.d	access to data bases – EURODAC	AT,BE,CY,DE,EL,ES,FI,FR,UK,HU,IE,IS,LT,LU,MT,NL,NO,PT,SI,SK	20
8.05.e	access to data bases – Other International data bases	AT,BE,CH,CY,DK,EL,EE,ES,FR,UK,HU,IE,IS,LT,LU,LV,MT,NO,PT,SE,SI,SK	22
8.05.f	Free access to data bases - Provide input to these databases	AT,CY,DK,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NO,PL,PT,SE,SI,SK	21
8.06.a	Use of force - In self-defence	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	27
8.06.b	Use of force – coercion	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	24
8.07.a	Wearing their own uniform – Right	AT,BE,CH,CZ,DE,DK,UK,HU,LT,LU,MT,NL,PT,SE,SI	15
8.07.b	Wearing their own uniform – Obligation	BE,CH,CY,CZ,DE,EL,EE,ES,FI,FR,HU,IS,IT,LU,LV,MT,NO,PL,PT,SI,SK	21
8.08.a	Wearing an authentication sign – Right	BE,CH,CZ,DE,UK,HU,LT,LU,LV,NL,NO,PT,SI,SK	14
8.08.b	Wearing an authentication sign – Obligation	BE,CH,CY,CZ,DK,EL,EE,ES,FI,FR,HU,IS,IT,LT,LU,MT,NO,PL,PT,SE,SI	21
8.09	Obligation to possess a police ID card	AT,BE,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SK	27
8.10	Obligation to be able to prove their public authority	AT,BE,CH,CY,CZ,DK,EL,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,MT,NL,NO,PL,PT,SE,SI,SK	26
8.13	Perform Command and Control activities (make decisions, give orders)	AT,CH,CY,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,IT,LU,LV,MT,NL,NO,PL,SE,SI,SK	24

Regarding executive powers in the home country, the situation is clearly similar in all relevant States (with the obvious exception of access to the SIS for Member States having joined the EU on the 1<sup>st</sup> of May 2004). Another interesting insight when comparing the powers of border officers in the 28 relevant States is the limited right to issue certain documents (such as residence permits or Laissez passer<sup>36</sup>).

### 3.4.2 Executive powers in host country

#### 3.4.2.1 General overview of powers in host country

Countries have different approaches with respect to conferring powers to guest officers. Various factors explain the different degrees of delegation of powers between the 28 analysed States. They are detailed in section 0. The number of tasks conferred to guest officers indicates the degree of preparedness of the national normative frameworks to receive guest officers.

Therefore, the following table provides a general overview for the number of executive powers (out of the approximately 70 tasks) that have been conferred to guest officers in the domain of border control<sup>37</sup> per country, together with the major legal bases on which these prerogatives are being conferred:

Name	Number of tasks conferred	Major legal bases
Germany	60	§64 Police Act (BPolG), Germany-Poland Agreement On the cooperation between police and border control Officers (2002), German-Swiss trans-border police cooperation agreement (1999), Prüm Convention (2005), Slovenia-Germany Police cooperation agreement (2004)
Switzerland	58	German-Swiss trans-border police cooperation agreement (1999), Italy-Switzerland agreement on trans-border cooperation in police and customs matters (2000)

<sup>36</sup> The European Union provides certain officials and their dependants with a EU laissez-passer, which is accepted in lieu of a passport or national identity card for entry to any of the Member States. It has a dark blue cover, contains 18 pages and has a statement of nationality on page 2. Besides EU authorities, some Host States also issue a document that allows for the entry on their territory and the passing through towards another EU state. This document can then also be referred to as a laissez-passer document.

<sup>37</sup> Since, as explained above, police services are often in charge of border control, police cooperation agreements have been taken into consideration in so far as they address at least partially the powers to be conferred to guest border guards (e.g. Prüm Convention, or Senningen agreement). Such agreements, even though they are not directly related to border control, clearly establish a precedent with respect to conferring certain prerogatives to guest officers.

Name	Number of tasks conferred	Major legal bases
Luxembourg	58	Benelux Treaty on cross-border interventions (2004), Prüm Convention (2005)
Belgium	50	Benelux Treaty on cross-border interventions (2004), UK-Belgium-France Channel Treaty (1993), Prüm Convention (2005)
Austria	46	Austrian-German agreement on the facilitation of railroad, road and ship traffic, Hungary-Austria police cooperation agreement on prevention and the fight against cross-border criminality (2004), Prüm Convention (2005), Czech Republic-Austria police cooperation agreement (2005)
Slovakia	45	Slovakia-Czech Republic agreement on police cooperation and border protection (2005), Slovakia-Austria agreement on police cooperation and border protection (2005)
Finland	42	Police cooperation agreement with Sweden and Norway (2003), Baltic Sea Border Control Cooperation (1996)
Latvia	41	Latvia-Lithuania agreement on joint border controls (1995), Latvia-Estonia Agreement on work of plenipotentiary border representatives (1994), Baltic Sea Border Control Cooperation (1996)
Spain	40	Portugal-Spain agreement on mixed border posts (1997), Schengen hot pursuit agreements with France and Portugal, Prüm Convention (2005)
Portugal	40	Portugal-Spain agreement on mixed patrols, Portugal-Spain agreement on mixed border posts (1997)
Norway	36	Police cooperation agreement with Sweden and Finland (2003)
Slovenia	36	Slovenia-Croatia Agreement on cross-border police cooperation (2003), Slovenia-Croatia Protocol on mixed patrolling (2004), Slovenia-Germany Police cooperation agreement (2004)
Iceland	35	Possible use of Art 20 Police Act, Iceland-Faeroe Islands regarding the border control of the scheduled ferry Norraena (2003)
Sweden	33	Police cooperation agreement with Finland and Norway (2003), Sweden-Denmark Police cooperation in the Orensund region (2000)
Greece	30	Based on interviews. Interviewees stated that relevant police cooperation agreements exist.
Czech Republic	30	Czech Republic-Germany agreement on cooperation between police authorities and border control authorities (2000), Slovakia-Czech Republic agreement on police cooperation and border protection (2005), Czech Republic-Austria police cooperation agreement (2005)
Ireland	29	Mostly taking place at operational level according to interviews. Reference to the Garda Siochana Act, Schedule 3: Agreement with the Police Service of Northern Ireland (2002). Could not be expanded as such to officers from any EU Member State. Agreement with US immigration officers allowing them to carry out pre-checks in Dublin and Shannon for flights to the US
Italy	25	Italy-Switzerland agreement on trans-border cooperation in police and customs matters (2000), Italy-France agreement on trans-border cooperation in police and customs matters (1997)
Lithuania	24	Latvia-Lithuania agreement on joint border controls (1995), Lithuania-Poland agreement on joint border checks
Denmark	20	Sweden-Denmark agreement on police cooperation in the Orensund region (2000), Germany-Denmark agreement on police cooperation (2001)
France	19	UK-France Touquet Agreement (2003) and Sangatte Protocol (1991), UK-Belgium-France Channel Treaty (1993), Prüm Convention (2005)

Name	Number of tasks conferred	Major legal bases
The Netherlands	19	Benelux Treaty on cross-border interventions (2004), Prüm Convention (2005)
United Kingdom	18	UK-France Touquet Agreement (2003) and Sangatte Protocol (1991), UK-Belgium-France Channel Treaty (1993)
Estonia	15	Latvia-Estonia Agreement on work of plenipotentiary border representatives (1994)
Hungary	11	Hungary-Austria police cooperation agreement on prevention and the fight against cross-border criminality (2004)
Poland	9	Poland-Germany Agreement on the cooperation between police and border control Officers (2002)
Malta	2	No formal (bilateral) agreement exists. Limited cooperation reported in interviews: presence and the use of technical surveillance instruments.
Cyprus	0	No formal (bilateral) agreements exists.

**Table 5: Number of powers and rights conferred per country**

The following preliminary observations can be made:

- Most legal bases for the conferment of executive powers to guest officers are found in bi- or multi-lateral agreements rather than in national legislation
- There is a large variety in the various legal systems with respect to the number of tasks that are conferred to guest border guards
- States with Germanic cultures allow for a relatively high number of tasks to be performed by guest border guards.
- The normative framework of Malta currently provides for the conferment of a very limited amount of executive powers to guest border guards.<sup>38</sup>

When analysing the situation in detail, one notices that no agreement clearly details all the specific powers conferred to guest officers as it was done in the list developed in the context of the Study.

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<sup>38</sup> These tasks are: “Make use of surveillance instruments from the host and the home country” (5.1a and b).

Malta does not have any bilateral agreements in the domain of border control. It is therefore logical that their normative framework does not provide for it since there is no legal basis in their national legislation either. The Polish normative framework also allows for a relatively limited conferment of powers but Poland has just recently finalized several negotiations for new agreements with neighbouring States (Czech Republic, Lithuania and Slovakia) that will allow more executive powers to guest officers from those States in the future.



Considering now the reality, as it results from practitioner's interview processed during the study, the following table (next page) shows the powers that have been conferred to guest officers in practice.

Due to the inexistence of explicit legal bases for all of these powers, the most sensitive conferments are analysed in detail in chapter 4.

The number in the right column indicates the number of States for which the normative framework<sup>39</sup> contains a legal basis, either in a national law or in a bi- or multilateral agreement for the conferment of that particular executive power to guest border guards from another State.

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<sup>39</sup> This means that it might concern e.g. only one specific bilateral agreement with another relevant state.

ID	Description	Countries	N° Countries
8.11.b	Give advice or support to other officers - Technical advice	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,NL,NO,PL,PT,SE,SI,SK	25
8.11.a	Give advice or support to other officers - Operational advice	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,NL,NO,PL,PT,SE,SI,SK	25
8.06.a	Use of force - In self-defence	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LT,LU,LV,NO,PL,PT,SE,SI,SK	25
8.11.e	Give advice or support to other officers - Exchange of information	AT,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,HU,IE,IS,IT,LU,LV,NL,NO,PL,SE,SI,SK	23
8.11.c	Give advice or support to other officers - Technical support	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,UK,IE,IS,IT,LU,LV,NL,NO,PT,SE,SI,SK	23
6.11	Consult an Information System from home country (when abroad)	AT,BE,CH,CZ,DE,DK,EL,EE,ES,FI,FR,HU,IE,IS,LV,NL,NO,PT,SE,SI,SK	21
6.03	Support control activities by physical presence during the control procedures	AT,BE,CH,CZ,DE,EL,ES,FI,UK,HU,IE,IS,IT,LT,NL,NO,PL,PT,SE,SI,SK	21
5.02	Observe the area close to the border (without specific instruments)	AT,CH,CZ,DE,EL,ES,FI,FR,IE,IS,IT,LU,LV,NL,NO,PL,PT,SE,SI,SK	20
8.07.a	Wearing their own uniform – Right	AT,BE,CH,CZ,DE,EL,ES,FR,UK,IE,IT,LU,LV,NL,NO,PT,SE,SI,SK	19
8.11.d	Give advice or support to other officers - Logistical support	AT,CH,CZ,DK,EE,ES,FI,FR,UK,IS,IT,LU,LV,NO,SE,SI,SK	17
8.05.c	Free access to data bases - Data base of home country	AT,BE,CH,CZ,DE,DK,EL,ES,FI,FR,HU,IS,LV,NO,SE,SI,SK	17
5.01.b	Make use of surveillance instruments (instruments of the home country)	AT,BE,CH,CZ,DE,EL,ES,FI,UK,IE,IS,LV,MT,NO,PT,SI,SK	17
8.10	Obligation to be able to prove their public authority	AT,BE,CH,CZ,EL,ES,FI,FR,HU,IE,IS,IT,LU,LV,NO,SI,SK	17
8.09	Obligation to possess a police ID card	AT,CH,CZ,EL,EE,ES,FI,FR,IE,IS,IT,LU,LV,NL,NO,PT,SK	17
8.04	Right to make use of their own equipments (vehicles, etc.)	AT,CH,DE,EL,EE,ES,FI,UK,IE,IS,IT,LV,NO,PT,SE,SI,SK	17
6.17.a	Make use of detection devices - Detection devices to establish authenticity of documentation	AT,BE,DE,EL,ES,FI,IE,IS,IT,LU,LV,NL,PT,SE,SI,SK	16
6.17.d	Make use of detection devices - Make use of devices of home country even if they are not used by the host officers	AT,BE,CZ,DE,EL,ES,FI,UK,IE,IS,LU,LV,PT,SI,SK	15
5.01.a	Make use of surveillance instruments (instruments of the host country)	AT,CH,DE,EL,ES,FI,UK,IE,IS,LV,MT,NO,PT,SI,SK	15
6.21	Contact other authorities to control authenticity of documents (Consulate, SIRENE,...)	BE,DE,EL,ES,FI,IE,IS,IT,LT,LU,LV,NL,PT,SE,SK	15
5.06	Patrol the area between border crossing points	AT,CH,CZ,DE,EL,ES,FI,LU,LV,NO,PL,PT,SE,SI,SK	15
8.01.b	Service weapons - Right to carry a service weapon	AT,BE,CH,DE,DK,EE,ES,FR,IT,NL,NO,PT,SE,SI	14
6.18	Check correctness of provided documentation	AT,BE,DE,ES,FI,IS,IT,LU,LV,NL,NO,SE,SI,SK	14
6.02	Screen the persons crossing the border	AT,BE,CH,CZ,EL,ES,HU,IS,IT,LU,NO,PT,SI,SK	14
4.01	Perform threat analyses and risk assessment	CH,DE,DK,EL,ES,FI,FR,IE,IS,LV,NO,PT,SE,SK	14
8.08.a	Wearing an authentication sign – Right	BE,CH,CZ,DE,EL,UK,IT,LU,LV,NO,PT,SI,SK	13
8.01.a	Service weapons - Right to import a service weapon from the home country	AT,BE,CH,DE,DK,EE,ES,FR,IT,NO,PT,SE,SI	13
6.17.c	Make use of detection devices - Make use of devices used by the host officers	CZ,DE,EL,ES,FI,IE,IS,IT,LU,LV,PT,SI,SK	13
8.12	Report to authorities of the host country	CH,DK,EL,EE,ES,FI,FR,IS,LV,NO,SE,SI,SK	13
5.07	Engage in pursuit of and stop persons trying to cross the border	AT,BE,CH,CZ,DE,ES,FI,IS,LT,LU,PT,SI,SK	13

5.03.a	Stop a person trying to cross the border - Ask him/her to stop on a voluntary basis	AT,CH,CZ,DE,ES,FI,IS,IT,LU,LV,SI,SK	12
6.05	Give indications to persons (pedestrian, drivers, pilots, skippers) crossing the border	AT,CH,CZ,DE,EE,ES,FR,IT,NO,PT,SI,SK	12
8.08.b	Wearing an authentication sign – Obligation	BE,CH,CZ,EE,ES,FI,IS,IT,LU,NO,PT	11
8.02.d	Right to write official reports - On evaluation of operations	CH,DE,DK,EL,UK,IS,LT,LV,NL,NO,SE	11
8.02.c	Right to write official reports - On information gathered	CH,DE,DK,EL,UK,IS,LT,LV,NL,NO,SE	11
8.01.c	Service weapons - Right to make use of an individual service weapon	AT,BE,CH,DE,DK,ES,FR,NO,PT,SE,SI	11
6.24.d	Interviewing persons - About their itinerary and the purpose of their visit	AT,BE,CH,DE,FI,LT,LU,LV,NL,PT,SE	11
6.24.a	Interviewing persons - About their ID	AT,BE,CH,DE,FI,LT,LU,LV,NL,PT,SE	11
6.01	Carry out pre-border checks in third countries (at gates, before entry in plane/boat...)	BE,DK,FI,IE,IS,LU,NL,NO,PL,PT,SI	11
6.24.b	Interviewing persons - About their financial situation (return ticket, income)	AT,BE,CH,DE,FI,LT,LU,LV,PT,SE	10
6.17.b	Make use of detection devices - Detection devices to detect dangerous or illegal goods and objects	AT,DE,EL,ES,FI,IS,LU,LV,SI,SK	10
8.07.b	Wearing their own uniform – Obligation	BE,CH,CZ,DE,EE,FI,IS,IT,PT	9
6.24.c	Interviewing persons - About goods they carry	AT,BE,DE,FI,LT,LU,LV,PT,SE	9
5.04	Interview persons on their reasons for crossing external borders outside the authorised crossing points	AT,DE,ES,FI,LU,LV,NL,PT,SK	9
8.05.d	Free access to data bases – EURODAC	DK,EL,ES,FI,HU,IE,NO,SE	8
8.02.b	Right to write official reports - On searches performed	CH,DE,DK,UK,LT,LV,NO,SE	8
8.02.a	Right to write official reports - On interviews performed	CH,DE,DK,UK,LT,LV,NO,SE	8
6.14.a	Perform a security check - Check security of persons	BE,CH,DE,LT,LU,NO,PT,SK	8
5.03.b	Stop a person trying to cross the border - Force him/her to stop	AT,BE,CZ,DE,ES,LT,LU,SK	8
6.2	Temporarily take possession of vehicles / dangerous objects and substances	BE,CH,DE,ES,LU,PT,SE,SK	8
6.06	Stop a vehicle entering or leaving the free movement area	AT,BE,CH,CZ,DE,LT,PT,SI	8
8.06.b	Use of force - Coercive force	BE,CH,DE,LT,LU,PT,SE	7
5.09.b	Access to property (without searching it in detail) – Enter public premises	AT,CH,CZ,DE,IE,LU,SI	7
6.04	Ask for ID, VISA, travel documents	AT,BE,CH,CZ,DE,SI,SK	7
8.01.d	Right to make use of a collective service weapon	AT,DK,ES,FR,NO,SE	6
6.19.d	Apprehend a person to be handed to national administration, police, customs or judicial authorities - A wanted person for enforcement measures	AT,BE,CH,LT,LU,SK	6
6.15.a	Establish identity of persons - Search a person for additional ID information	AT,BE,IS,LU,LV,SK	6

5.10.b	Access to property and search it in detail - Enter public premises	AT,CH,CZ,IE,LU,SI	6
5.09.a	Access to property (without searching it in detail) – Enter private premises	BE,DE,IE,LT,LU,SI	6
6.25	Consult additional databases for investigation purpose (not simple hit/no hit)	CH,DE,EL,ES,IE,LU	6
6.12	Notify the person willing to cross the border of admission or refusal of admission/exit	AT,BE,CZ,DE,FI,LU	6
6.19.b	Apprehend a person to be handed to national administration, police, customs or judicial authorities - In possession of illegal goods	AT,BE,LT,LU,SK	5
6.16.a	Perform an extensive check of persons and objects - Search persons extensively	BE,DE,LT,LU,SK	5
6.14.b	Perform a security check - Check security of objects that they carry	CH,DE,LU,NO,SK	5
8.13	Perform Command and Control activities (make decisions, give orders)	BE,CH,LT,LU,PT	5
7.35	Refer the matter to and contact a prosecutor or a judge (who then assumes responsibility)	BE,CH,LT,LU,PT	5
6.22	Access to property (without searching it in detail) during border control activities (enter vehicles entering or leaving the Schengen area)	BE,DE,LU,LV,PT	5
6.09	Consult the Schengen Information System	DE,FI,IE,LU,PL	5
5.05	Forbid access to an area close to the border	BE,EL,DE,LT,PT	5
8.05.e	Free access to data bases - Other International data bases	ES,FI,IE,LV	4
8.05.b	Free access to data bases – SIS	DE,FI,HU,LV	4
6.19.c	Apprehend a person to be handed to national administration, police, customs or judicial authorities - For preventive measures	AT,CH,LU,SK	4
6.19.a	Apprehend a person to be handed to national administration, police, customs or judicial authorities - Who refuses to provide identity information	AT,CH,LU,SK	4
6.16.c	Perform an extensive check of persons and objects - Refer the matter to Customs authorities	BE,IS,LU,SK	4
6.16.b	Perform an extensive check of persons and objects - Examine objects	BE,LT,LU,SK	4
6.3	Initiate pre-trial investigation of criminal cases	BE,FI,LT,PT	4
6.28	Accompany inadmissible person (to detention centre or for removal when necessary)	AT,CH,IS,LU	4
6.27	Refer the matter to an Immigration Officer (who assumes responsibility)	CH,FI,IT,LU	4
6.13	Make the decision to proceed to second line check activities	BE,DE,LU,LV	4
8.03.d	Right to issue - EU Laissez Passer	BE,CH,PT	3
7.32	Question suspects	BE,LT,PT	3
6.07	Stamp entry/exit document	CH,DE,FI	3
5.08	Intercept or monitor telecommunications	LU,LV,SK	3

6.15.b	Take biometric data of persons	IS,LU	2
7.34	Take the decision on whether or not to place the matter before a prosecutor or a judge	CH,LU	2
7.33	Transfer the pre-trial investigation to the pre-trial investigation authority	BE,LT	2
6.23	Access to property and search it in detail during border control activities (Enter vehicles entering or leaving the free movement area)	DE,LU	2
6.10	Consult a national (host country) Information System	DE,IE	2
8.05.f	Free access to data bases - Provide input to these databases	UK	1
8.05.a	Free access to data bases - Data base of host country	DE	1
8.03.c	Right to issue - Work Permits	PT	1
8.03.a	Right to issue – VISAs	CH	1
5.10.a	Access to property and search it in detail - Enter private premises	IE	1
6.31	Initiate procedure for judicial seizure of objects/ vehicles	LU	1
6.29	Specify a fixed fine	CH	1
6.26	Initiate Asylum procedure	CH	1
6.08	Decide whether to authorise entry/exit	DE	1

**Table 6: Overview conferment of executive powers to guest officers**

The raw data expressed in the above table needs to be complemented with a more detailed analysis. This will be done in chapter 5. However, the following general observations can be made:

- Tasks that are linked more closely with exercising public authority and the State monopoly on the legal use of force within its own territory are conferred by a smaller number of States
- Guest border guards are very rarely involved in tasks in the sphere of criminal investigation (like initiating procedures or decide on the transfer of a case to a prosecutor or a pre-investigation authority),
- Tasks that involve direct contact with persons trying to enter or exit the territory are conferred less frequently (e.g. checks on persons, use of force or coercion)

### 3.4.2.2 Overview of executive powers per selected country

In addition to information per executive power provided in the table of the previous section, we depict below the general overview per country, as it results from bi- or multilateral agreements that have been analysed. The overview starts with a short description of the executive powers that can be conferred on the basis of the Prüm Convention.

#### 3.4.2.2.1 The Prüm Convention

Executive power:

- Carry arms, ammunition and equipment
- Make use of the arms, ammunition and equipment in legitimate defence of officers themselves or others
- Participation in joint operations
  - The host State can confer sovereign powers on other Contracting Parties' officers under certain conditions
  - The host State can allow other Contracting Parties' officers to exercise their sovereign powers under certain conditions

Relevant provisions:

- Joint operations: Art. 24 of the Prüm Convention of 27 May 2005.
- General provisions (e.g. use of arms): art. 28 Prüm Convention

Practical aspects shall be governed by the implementing agreements as referred to in article 44 of the Prüm Convention.

### 3.4.2.2.2 Austria

#### Executive power:

- Wear uniform
- Carry service weapon
- Make use of service weapon for legitimate defence
- Carry coercive instruments
- Exercising police powers implying the exercise of public powers<sup>40</sup>
- Use of service weapons in framework of legitimate defence or after order of the team leader
- Establish the identity of a person
- Arrest a person
- Exercise coercive measures<sup>41</sup>
- Use of vehicles (including for air and water)

#### Legal basis:

Agreement between Switzerland, the Republic of Austria and the Kingdom Liechtenstein on the trans-border cooperation between security- and customs authorities of 27 April 1999:

- Sending of officers who have the right to exercise public powers: art. 15
- Mixed patrol (border area = 10 km from border): art. 16
- General rights and obligations: art. 27

#### Executive power:

- Wearing uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for reasons of legitimate defence
- Arrest and detain person caught in the act or trying to escape

#### Legal basis:

- Agreement between the Republic of Austria and the Republic of Hungary on the cooperation on the prevention of and the fight against cross-border criminality of 2004
  - Art. 18: mixed patrol

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<sup>40</sup> If the success of a necessary police measure, without such power, would be defeated or seriously endangered or the actions would otherwise offer no prospects or would be seriously more difficult (free translation of art. 15 (1) of the Agreement of 27 April 1999, last section.

<sup>41</sup> If the success of the action would be endangered or would be seriously more difficult without the involvement of the guest officer (free translation of art. 16 (3) of the Agreement of 27 April 1999, last section.

- Art. 27: general rights and obligations

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for legitimate defence
- Make use of coercive instruments
- Use of vehicles (for land, air and water)
- Make use of radio communications
- In the framework of mixed patrol:
  - Establish the identity
  - Halt a person trying to escape
  - Take other measures if they are necessary<sup>42</sup>
- In the framework of hot pursuit:
  - Detain a person until a host officer can come to establish the identity of a person

Legal basis:

Agreement of 14 July 2005 between the Republic of Austria and the Czech Republic on the cooperation of police authorities and border control officers in the border areas

- Art. 11: hot pursuit
- Art 14: mixed patrol
- Art. 17: general rights and obligations

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of coercive instruments in cases defined by Host State
- Make use of service weapon for legitimate defence
- Make use of land, air and water vehicles
- Make use of technical instruments under certain conditions
- Mixed patrol (border area = 10 km from border)
  - Establish identity of persons
  - Halt them if they attempt to escape
  - Exercise coercive measures if the success of the operation without an action by the guest officer would otherwise be endangered

Legal basis:

- Agreement between the Republic of Austria and the Republic of Slovenia of 21 April 2004 on police cooperation
  - Art. 29: general rights and competences

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<sup>42</sup> If the success of the measures would be endangered or made seriously more difficult without an action by the guest officer (free translation: art. 14, 2 of the Agreement of 14 July 2005).



- Art. 16: mixed patrol
- Art. 18: use of air and water vehicles

### 3.4.2.2.3 Belgium

Executive power:

- Exercising border control activities (in general)

Art. 4 of the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Belgium and the Government of the French Republic concerning rail traffic between Belgium and the United Kingdom using the Channel fixed link of 15 December 1993 allows for UK officers to exercise frontier controls in all trains in Belgian territory.

Executive power:

- Detaining persons
- Arresting persons
- Conduct persons to the territory of their own State

Legal basis:

The first paragraph of article 3 of the Protocol concerning non-stop rail traffic between Belgium and the United Kingdom using the Channel fixed link specifies that: *“The officers of the other States shall, in exercise of their national powers, be permitted in the control zone situated in the host State to detain or arrest persons in accordance with the laws and regulations relating to frontier controls of their own State or persons sought by the authorities of their own State. These officers shall also be permitted to conduct such persons to the territory of their own State.”*

Executive power:

- Checking possession of necessary travel documents
- Checking fulfilment of the other conditions for entry to the territory

Legal basis:

The Administrative Arrangement concerning the exercise of immigration controls by British officials at the “Gare du Midi” in Brussels and by Belgian officials at Waterloo International station in London and Ashford international of 1 October 2004.

Exceptional powers:

Art. 21 of the fore mentioned Channel treaty allows for the contracting parties to take measures derogating from its obligations under the Channel Treaty or any supplementary arrangement, in the

event of any exceptional circumstances, such as natural disasters, acts of terrorism or armed conflict, or the threat thereof.

#### 3.4.2.2.4 Cyprus

No bilateral agreements containing provisions conferring executive powers to guest border control officers were identified.

#### 3.4.2.2.5 Czech Republic

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for legitimate defence
- Use of vehicles (for land and water)
- Provide support during mixed patrol activities
- In the framework of hot pursuit:
  - Detain a person
  - Establish the identity of a person

Legal basis:

Agreement of 19 September 2000 between the Republic of Germany and the Czech Republic on the cooperation of police authorities and border control officers in the border areas

- Art. 11: general rights and obligations
- Art 6: mixed patrol
- Art. 8: hot pursuit

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for legitimate defence
- Make use of coercive instruments
- Use of vehicles (for land, air and water)
- Make use of radio communications
- In the framework of mixed patrol:
  - Establish the identity
  - Halt a person trying to escape

- Take other measures if they are necessary<sup>43</sup>
- In the framework of hot pursuit:
  - Detain a person until a host officer can come to establish the identity of a person

Legal basis:

Agreement of 14 July 2005 between the Republic of Austria and the Czech Republic on the cooperation of police authorities and border control officers in the border areas

- Art. 11: hot pursuit
- Art 14: mixed patrol
- Art. 17: general rights and obligations

### 3.4.2.2.6 Denmark

Executive powers: (in the framework of art. 40,41 of the Schengen Implementing Convention)

- Wear uniform
- Carry service weapons
- Make use of service weapons for reasons of legitimate defence

Legal basis:

- Art. 13 of the Police cooperation agreement between the Republic of Germany and the kingdom of Denmark on police cooperation in the border areas of 21 March 2001

Executive power:

- Cooperate on issues related to control of entry into and departure from the country

Legal basis:

- Sweden-Denmark agreement on police cooperation in the Oresund region (2000)

Executive power:

- Conduct local measures to deepen cross-border police cooperation
- Perform a police interrogation

Legal basis:

- Art. 5 and art. 7 of the agreement between the police authorities of the Nordic countries on police cooperation of 2 September 2002

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<sup>43</sup> If the success of the measures would be endangered or made seriously more difficult without an action by the guest officer (free translation: art. 14, 2 of the Agreement of 14 July 2005).

### 3.4.2.2.7 Estonia

Executive power:

- Performing border check
  - Checking possession of necessary travel documents
  - Checking fulfilment of the other conditions for entry to the territory
  - Access database of host country (wanted persons)

Legal basis:

Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on Organising Joint Border Control of 31 August 31 1994.

### 3.4.2.2.8 Finland

Executive power:

- Perform duties in another country's territory in the framework of article 40, 41 of the Schengen Implementing Convention

Legal basis:

- Section 4 of the Police cooperation agreement with Sweden and Norway between the competent authorities/ministries/departments in Finland, Norway and Sweden on the detailed application of articles 40-41 in the Convention implementing the Schengen Agreement on the abolition of checks at common borders (this agreement came into effect on 1 January 2003)

Executive power:

- Cooperate on issues related to control of entry into and departure from the country

Legal basis:

- Baltic Sea Border Control cooperation agreements
- Cooperation protocol of the frontier guard of the Republic of Finland and the border guard service of Estonia (2002)
- Cooperation protocol of the frontier guard of the Republic of Finland and the State border guard service under the Ministry of the Interior of the Republic of Lithuania (29 November 2002)

Executive power:

- Conduct local measures to deepen cross-border police cooperation
- Perform a police interrogation

Legal basis:

- Art. 5 and art. 7 of the agreement between the police authorities of the Nordic countries on police cooperation of 2 September 2002

### 3.4.2.2.9 France

Executive power:

- Exercising border control activities (in general)

Legal basis:

Art. 4 of the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Belgium and the Government of the French Republic concerning rail traffic between Belgium and the United Kingdom using the Channel fixed link of 15 December 1993 allows for Belgian officers to exercise frontier controls in all trains in French territory.

Art. 3 of the Touquet Treaty (for the “Control Zone”)

Executive power:

- Arresting persons
- Question persons
- Conduct persons to the territory of their own State

Art. 5 of the Touquet Treaty foresees that *“The responsible Officers of the State of Arrival may arrest and hold for questioning in the Control Zone those who are being examined for the purposes of immigration control or those who, there are reasonable grounds to suspect, have committed an act that infringes the laws and regulations relating to Frontier Controls...Officers shall also be permitted to conduct such persons to the territory of the State of Arrival”*

Executive power:

- Wearing uniform (or a visible distinctive symbol)
- Carry service weapon
- Make use of service weapon for reasons of legitimate defence

Legal basis:

- Art. 13 of the Touquet Treaty (within the “control zone”)
- Art. 23 (5) of the agreement between the Swiss Confederation and the French Republic related to trans-border cooperation in judiciary, police and customs matter of 11 May 1998

- Art 9, 6 of the Agreement of the Republic of Italy and the Government of the Republic of France on trans-border cooperation in police and customs matters of 1997

Executive power:

- Wearing uniform (or a visible distinctive symbol)
- Carry service weapon
- Make use of service weapon for reasons of legitimate defence
- Guest officers can be entrusted to participate in joint investigative activities

Legal basis:

- Art. 11, 7 and art. 12, 2 of the Agreement on trans-border Cooperation in police and customs matters between the Kingdom of Spain and the Republic of France of 7 July 1998

#### 3.4.2.2.10 Germany

Executive power:

- Wearing uniform
- Carry service weapon
- Carry coercive instruments
- Make use of the service weapon in case of legitimate defence
- Make use of coercive instruments within the framework of the laws and the modalities of the host country
- Import and carry technical instruments that are necessary for the tasks
- Make use of the technical instruments
- Make use of vehicles of home country
  - Land
  - Water
  - After approval: air

Legal basis (for the border area):

- Art. 18, 3 of the Agreement of 18 February 2002 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the cooperation between police officers and border control authorities in the border areas

Executive power:

- Exercising police tasks including the exercise of public powers
- Wearing uniform

- Carry service weapon
- Make use of the service weapon in case of legitimate defence (except when host authority decides differently in a particular case)
- Make use of vehicles of home country
  - Land
  - Water
  - Air
- Hot pursuit:
  - Establish identity
  - Arrest person

Legal basis:

Agreement between the Swiss Confederation and the Federal Republic of Germany on the trans-border police and judiciary cooperation of 27 April 1999

- Art. 22: exchange of officers including the right to exercise public powers
- Art. 30: Uniforms and service weapons
- Art. 25: Use of air and water vehicles of home country
- Art. 20: participation in mixed patrol activities
- Art. 16 (2): hot pursuit

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for legitimate defence
- Use of vehicles (for land and water)
- Provide support during mixed patrol activities
- In the framework of hot pursuit:
  - Detain a person
  - Establish the identity of a person

Legal basis:

Agreement of 19 September 2000 between the Republic of Germany and the Czech Republic on the cooperation of police authorities and border control officers in the border areas

- Art. 11: general rights and obligations
- Art 6: mixed patrol
- Art. 8: hot pursuit

### 3.4.2.2.11 Greece

Executive power:

- Make use of surveillance instruments
- Observe the area close to the border

Legal basis:

- Police cooperation agreements with the following countries: Italy, Cyprus, Hungary, Lithuania, Latvia, Poland and Slovenia.

#### 3.4.2.2.12 Hungary

Executive power:

- Wearing uniform
- Carry service weapon
- Carry coercive instruments
- Make use of service weapon for reasons of legitimate defence
- Arrest and detain person caught in the act or trying to escape

Legal basis:

- Agreement between the Republic of Austria and the Republic of Hungary on the cooperation on the prevention of and the fight against cross-border criminality of 2004
  - Art. 18: mixed patrol
  - Art. 27: general rights and obligations

Executive power:

- Performing border checks

Legal basis:

- One-stop border control agreements with neighbouring countries
- Facilitation of border control agreements with neighbouring countries

#### 3.4.2.2.13 Iceland

Executive power:

- Conduct local measures to deepen cross-border police cooperation
- Perform a police interrogation

Legal basis:

- Art. 5 and art. 7 of the agreement between the police authorities of the Nordic countries on police cooperation of 2 September 2002

Other relevant bilateral agreement:

- Iceland-Faeroe Islands agreement regarding the border control of the scheduled ferry Norraena (2003)



### 3.4.2.2.14 Ireland

There are no executive powers conferred to guest officers on the basis of bilateral agreements.<sup>44</sup> Cooperation can take place on the basis of working arrangements of more operational level, or on the basis of national legislation allowing for the assistance by other persons. E.g. for executive powers 5.9 and 5.10 searching private property the Criminal Justice Act 1994 and the Immigration Act 2004 - section 15 (2) allow for searches to be conducted with a warrant. It also allows for a named member of the Garda to be accompanied by “such other persons as may be necessary” to carry out the search.

### 3.4.2.2.15 Italy

Executive power:

- Wearing the uniform (or a distinctive sign)

Legal basis:

- Art. 10, (6) of the Agreement between the Swiss Confederation and the Italian Republic on the cooperation between the police authorities and customs authorities of 10 September 1998

Executive power:

- Wearing the uniform (or a distinctive sign)
- Carry service weapon
- Make use of service weapon for reasons of legitimate defence

Legal basis:

- Art 9, 6 of the Agreement between the Republic of Italy and the Government of the Republic of France on trans-border cooperation in police and customs matters of 1997
- Art. 10, 6 of the Agreement between the Republic of Italy and the Government of the Republic of France on police and customs cooperation of 12 September 1998

### 3.4.2.2.16 Latvia

Executive power:

- Performing joint border checks

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<sup>44</sup> With the exception of an agreement allowing US Immigration Officers to conduct immigration checks at Dublin and Shannon airports for all flights to the US. This is a case of officers from a third country exercising executive powers on the territory of Ireland.

Legal basis:

- Agreement between the Governments of the Republic of Lithuania and the Republic of Latvia on border checks at Joint border crossing points

### 3.4.2.2.17 Lithuania

Executive power:

- Performing joint border checks
  - Checking possession of necessary travel documents
  - Checking fulfilment of the other conditions for entry to the territory
- Performing joint patrolling activities

Legal basis:

- Agreement between Chief of the Lazdijai Frontier District of the SBGS and Commandant of the Podlaski Border Guard District Unit of the Border Guard of Poland on Cooperation on exchange of experts (joint patrolling)
- Agreement between Chief of the Lazdijai Frontier District of the SBGS and Commandant of the Podlaski Border Guard District Unit of the Border Guard of Poland on joint actions when organising and performing joint border checks at Kalvarijos- Budzusko Border Crossing Point (joint border checks)
- Agreement between Chief of the Lazdijai Frontier District of the SBGS and Commandant of the Podlaski Border Guard District Unit of the Border Guard of Poland on joint actions when organising and performing joint border checks at Akmeniu and Ogrodniki Border Crossing Point (joint border checks)
- Agreement between the Governments of the Republic of Lithuania and the Republic of Latvia on border checks at Joint border crossing points (joint border checks)
- Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on Organising Joint Border Control, signed in Palanga on August 31, in 1994.

### 3.4.2.2.18 Luxembourg

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Perform identity controls

- Perform observation, perform surveillance of the terrain and screen persons
- Escort groups of persons and engage in coercive measures if necessary
- Give traffic directions

Legal basis:

- The agreement between Belgium, the Netherlands and Luxembourg in matters of cross-border police intervention of 8 June 2004 (in particular article 4)

#### 3.4.2.2.19 Malta

No international agreements containing provisions conferring executive powers to guest border control officers were identified.

#### 3.4.2.2.20 The Netherlands

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Perform identity controls
- Perform observation, perform surveillance of the terrain and screen persons
- Escort groups of persons and engage in coercive measures if necessary
- Give traffic directions

Legal basis:

- The agreement between Belgium, the Netherlands and Luxembourg in matters of cross-border police intervention of 8 June 2004 (in particular article 4)

#### 3.4.2.2.21 Norway

Executive power:

- Perform duties in another country's territory in the framework of article 40, 41 of the Schengen Implementing Convention

Legal basis:

- Section 4 of the Police cooperation agreement with Sweden and Norway between the competent authorities/ministries/departments in Finland, Norway and Sweden on the detailed application of articles 40-41 in the Convention implementing the Schengen Agreement on the

abolition of checks at common borders (came into effect on 1 January 2003)

Executive power:

- Conduct local measures to deepen cross-border police cooperation
- Perform a police interrogation

Legal basis:

- Art. 5 and art. 7 of the agreement between the police authorities of the Nordic countries on police cooperation of 2 September 2002

#### 3.4.2.2.22 Poland:

Executive power:

- Wearing uniform
- Carry service weapon
- Carry coercive instruments
- Make use of the service weapon in case of legitimate defence
- Make use of coercive instruments within the framework of the laws and the modalities of the host country
- Import and carry technical instruments that are necessary for the tasks
- Make use of the technical instruments
- Make use of vehicles of home country
  - Land
  - Water
  - After approval: air

Legal basis:

- Art. 18, 3 of the Agreement of 18 February 2002 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the cooperation between police officers and border control authorities in the border areas

Executive power:

- Performing joint border checks
- Performing joint patrolling activities

Legal basis (among others)

- Agreement between Chief of the Łazdijai Frontier District of the SBGS and Commandant of the Podlaski Border Guard District Unit of the Border Guard of Poland on Cooperation on exchange of experts (joint patrolling)
- Agreement between Chief of the Łazdijai Frontier District of the SBGS and Commandant of the Podlaski Border

Guard District Unit of the Border Guard of Poland on joint actions when organising and performing joint border checks at Kalvarijos- Budzusko Border Crossing Point (joint border checks)

- Agreement between Chief of the Lazdijai Frontier District of the SBGS and Commandant of the Podlaski Border Guard District Unit of the Border Guard of Poland on joint actions when organising and performing joint border checks at Akmenių and Ogrodniki Border Crossing Point(joint border checks

#### 3.4.2.2.23 Portugal:

Executive power:

- Participation to joint operations

Legal basis:

- Art. 3, 2 of the Agreement between the Kingdom of Spain and the Republic of Portugal on the creation of joint border control offices of 19 November 1997

Executive power:

- Performing border control activities

Legal basis:

- Agreement between the Kingdom of Spain and the Republic of Portugal related to juxtaposed control and border traffic of 7 May 1981
- Agreement between Spain and Portugal on mobile controls of 17 January 1994

#### 3.4.2.2.24 Spain

Executive power:

- Participation to joint border control operations of various natures

Legal basis:

- Art. 3, 2 of the Agreement between the Kingdom of Spain and the Republic of Portugal on the creation of joint border control offices of 19 November 1997

Executive power:

- Performing border control activities

Legal basis:

- Agreement between the Kingdom of Spain and the Republic of Portugal related to juxtaposed control and border traffic of 7 May 1981

- Agreement between Spain and Portugal on mobile controls of 17 January 1994

Executive power:

- Wearing uniform (or a visible distinctive symbol)
- Carry service weapon
- Make use of service weapon for reasons of legitimate defence
- They can be entrusted to participate in joint investigative activities

Legal basis:

- Art. 11, 7 and art. 12, 2 of the Agreement on trans-border Cooperation in police and customs matters between the Kingdom of Spain and the Republic of France of 7 July 1998

#### 3.4.2.2.25 Slovakia

Executive power:

- Participate in joint patrol activities

Legal basis:

- Agreement on police cooperation and border control between Austria and Slovakia
- Agreement on police cooperation and border control between the Czech Republic and Slovakia

#### 3.4.2.2.26 Slovenia

Executive power:

- Wear uniform
- Carry service weapon
- Carry coercive instruments
- Make use of coercive instruments in cases defined by Host State
- Make use of service weapon for legitimate defence
- Make use of land, air and water vehicles
- Make use of technical instruments under certain conditions
- Mixed patrol (border area = 10 km from border)
  - Establish identity of persons
  - Halt them if they attempt to escape
  - Exercise coercive measures if the success of the operation without an action by the guest officer would otherwise be endangered

Legal basis:

- Agreement between the Republic of Austria and the Republic of Slovenia of 21 April 2004 on police cooperation
  - Art. 29: general rights and competences
  - Art. 16: mixed patrol
  - Art. 18: use of air and water vehicles

#### 3.4.2.2.27 Sweden

Executive power:

- Perform duties in another country's territory in the framework of article 40, 41 of the Schengen Implementing Convention

Legal basis:

- Section 4 of the Police cooperation agreement with Sweden and Norway between the competent authorities/ministries/departments in Finland, Norway and Sweden on the detailed application of articles 40-41 in the Convention implementing the Schengen Agreement on the abolition of checks at common borders (came into effect on 1 January 2003)

Executive power:

- Cooperate on issues related to control of entry into and departure from the country

Legal basis:

- Baltic Sea Border Control cooperation agreements
- Agreement between the
- Sweden-Denmark agreement on police cooperation in the Öresund region (2000)

Executive power:

- Conduct local measures to deepen cross-border police cooperation
- Perform a police interrogation

Legal basis:

- Art. 5 and art. 7 of the agreement between the police authorities of the Nordic countries on police cooperation of 2 September 2002

#### 3.4.2.2.28 Switzerland:

Executive power:

- Exercising police tasks including the exercise of public powers
- Wearing uniform
- Carry service weapon

- Make use of the service weapon in case of legitimate defence (except when host authority decides differently in a particular case)
- Make use of vehicles of home country
  - Land
  - Water
  - Air
- Hot pursuit:
  - Establish identity
  - Arrest person

Legal basis:

Agreement between the Swiss Confederation and the Federal Republic of Germany on the trans-border police and judiciary cooperation of 27 April 1999

- Art. 22: exchange of officers including the right to exercise public powers
- Art. 30: Uniforms and service weapons
- Art. 25: Use of air and water vehicles of home country
- Art. 20: participation in mixed patrol activities
- Art. 16 (2): hot pursuit

Executive power:

- Wear uniform
- Carry service weapon
- Make use of service weapon for legitimate defence
- Carry coercive instruments
- Exercising police powers implying the exercise of public powers<sup>45</sup>
- Use of service weapons in framework of legitimate defence or after order of the team leader
- Establish the identity of a person
- Arrest a person
- Exercise coercive measures<sup>46</sup>
- Use of vehicles (including for air and water)

Legal basis:

Agreement between the Swiss Confederation, the Republic of Austria and the Kingdom Liechtenstein on the trans-border cooperation between security- and customs authorities of 27 April 1999:

- Sending of officers who have the right to exercise public powers: art. 15

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<sup>45</sup> If the success of a necessary police measure, without such power, would be defeated or seriously endangered or the actions would otherwise offer no prospects or would be seriously more difficult (free translation of art. 15 (1) of the Agreement of 27 April 1999, last section.

<sup>46</sup> If the success of the action would be endangered or would be seriously more difficult without the involvement of the guest officer (free translation of art. 16 (3) of the Agreement of 27 April 1999, last section.



- Mixed patrol (border area = 10 km from border): art. 16
- General rights and obligations: art. 27

Executive power:

- Wear uniform
- Carry service weapon
- Make use of service weapon for legitimate defence

Legal basis:

- Art. 23 (5) of the agreement between the Swiss Confederation and the French Republic related to trans-border cooperation in judiciary, police and customs matters of 11 May 1998
- Art. 10, 6 of the Agreement between the Republic of Italy and the Government of the Republic of France on police and customs cooperation of 12 September 1998

### 3.4.2.2.29 United Kingdom

Executive power:

- Exercising border control activities (in general)

Legal basis:

- Art. 4 of the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Belgium and the Government of the French Republic concerning rail traffic between Belgium and the United Kingdom using the Channel fixed link of 15 December 1993 (from here on referred to as the Chunnel Treaty) allows for Belgian officers to exercise frontier controls in all trains in UK territory.

Executive power:

- Checking possession of necessary travel documents
- Checking fulfilment of the other conditions for entry to the territory

Legal basis:

- The Administrative Arrangement concerning the exercise of immigration controls by British officials at the “Gare du Midi” in Brussels and by Belgian officials at Waterloo International station in London and Ashford international of 1 October 2004.

Executive power:

- Detaining persons
- Arresting persons
- Question persons
- Conduct persons to the territory of their own State

## Legal basis:

- The first paragraph of article 3 of the Protocol concerning non-stop rail traffic between Belgium and the United Kingdom using the Channel fixed link specifies that: *“The officers of the other States shall, in exercise of their national powers, be permitted in the control zone situated in the host State to detain or arrest persons in accordance with the laws and regulations relating to frontier controls of their own State or persons sought by the authorities of their own State. These officers shall also be permitted to conduct such persons to the territory of their own State.”*

Art. 5 of the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the implementation of frontier controls at the Sea Ports of both countries on the Channel and the North Sea of 4 February 2004 (from now on referred to as the Touquet Treaty) foresees that *“The responsible Officers of the State of Arrival may arrest and hold for questioning in the Control Zone those who are being examined for the purposes of immigration control or those who, there are reasonable grounds to suspect, have committed an act that infringes the laws and regulations relating to Frontier Controls...Officers shall also be permitted to conduct such persons to the territory of the State of Arrival”*

## Exceptional powers:

Art. 21 of the aforementioned Channel treaty allows for the contracting parties to take measures derogating from its obligations under the Channel Treaty or any supplementary arrangement, in the event of any exceptional circumstances, such as natural disasters, acts of terrorism or armed conflict, or the threat thereof.

## Executive power:

- Wearing uniform (or a visible distinctive symbol)
- Carry service weapon

## Legal basis:

- Art. 13 of the Touquet Treaty (within the “control zone”)

French officers are allowed to carry service weapons during border control activities on the basis of article 12, 13 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the carrying of service Weapons by French Officers on the territory of the United Kingdom of Great Britain and Northern Ireland of 4 February 2003.

## ARTICLE 12:

*In order to exercise their functions, the officers shall be authorised to carry their service weapon during the journey to and from the control zones of the stations of Cheriton, Ashford International and Waterloo International.*

First paragraph of ARTICLE 13:

*When making checks on board through trains, officers shall be authorised to carry their service weapon throughout the journey.*

### 3.4.2.3 Influencing factors

When comparing the powers of the border guards described in the previous sections, one can ultimately distinguish several factors that influence the degree of powers bestowed to guest officers. These can be categorised as follows:

- The existence of agreements
- The type of activity performed
- The presence and form of supervision by a host officer
- The rank of the guest officer
- Whether or not there is an emergency situation
- The degree to which the guest officer exercises public authority

The following sections comment the various influencing factors in more detail.

#### 3.4.2.3.1 Existence of agreements

##### 3.4.2.3.1.1 Introduction

In most of the Member States, actions of the guest officers are regulated by articles 7 and 47 of the Schengen Implementation Convention or bilateral agreements.<sup>47</sup> Therefore, a very important factor that determines whether or not a State authorises the conferment of particular executive powers depends on the type of agreements they have signed in the domain of border control.

It should be noted that the domain of agreements or arrangements that regulate one or more aspects of border control, is very large. Agreements encompass broad aspects of police cooperation as well as detailed descriptions of processes at certain borders or border crossing points. Hungary is an illustrative example. Hungarian

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<sup>47</sup> Only the German normative framework provides for a provision for the conferment of executive powers in an internal law.

interviewees have reported a total of 49 bilateral agreements or Conventions that were relevant in the domain of border control. This also implies that the international framework of border control is very complex. Several detailed arrangements are furthermore agreed upon in MOUs that are difficult to obtain. The sheer number of agreements, their limited publication and availability of translations are three elements that decrease the transparency of regulation in this domain (both for the practitioner, the local legal expert and the citizen)<sup>48</sup>.

The large variety of agreements in the domain of cooperation in the area of border control also made it necessary therefore to focus our assessment on the core of the study, i.e. the conferment of executive powers to guest officers. Particular attention has been paid to the fact that the agreements of interest were those that *involve a presence* of guest border guard on the territory of a Host State, since some forms of cooperation do not involve any (physical) presence of guest officers abroad.<sup>49</sup>

Moreover it should be noted that emphasis was placed on the analysis and gathering of agreements related to *external borders*. Even though provisions related to border control will not cease to exist when certain borders have or will become internal borders in the Schengen Framework but will be “re-activated” in the case of a re-installment of internal border control on the basis of Art 2.2 of the Schengen Implementation Convention. Finally, to ensure a clear delimitation of the scope of the agreements, the legal experts in the States under investigation were asked prior to the interviews to point out the agreements that involve the *most important forms of conferment* of executive powers.

### 3.4.2.3.1.2 Comments

92 agreements were enlisted during the interviews. They can be found in the table in Annex 10.8. 50 of them have been examined in detail<sup>50</sup>. The large majority (82) of these agreements, whether bilateral or multilateral, have been signed in recent years (since 1990), which represents also an indicator of a growing need.

This particular focus has resulted in the provision of, and an overview of agreements in the following domains:

#### 1. Agreements allowing checks on foreign territory

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<sup>48</sup> This is certainly an argument for more harmonisation in this field.

<sup>49</sup> An example of this is cooperation with Poland and Latvia for Border Control without an exchange of officers. Each officer performs their activities on their own territory.

<sup>50</sup> Unfortunately, due to the fact that some States didn't provide us their agreements or because they only could present us agreements written in their own language, it was not possible within the framework of this study to analyse all of them.

Simplified border control procedure agreements with neighbouring countries (facilitation of border control via juxtaposed - , one-stop control or hand-in-hand control on trains/ferries)

Those treaties form the basis for the organisation of juxtaposed or one-stop control border crossing points where foreign officers perform control activities on the territory of a host country; or they involve mixed teams on trains, do not involve exchange of tasks (“hand in hand” control) but do entail the presence of officers on the territory of the neighbouring State.

The Channel Treaty<sup>51</sup> for instance, deals with rail traffic, serviced by Eurostar, between Brussels, Paris and London. Within this framework, juxtaposed controls were set up at the different terminals serviced by this rail traffic. The entry-controls for the United Kingdom are performed in Brussels-Midi by British officers, while the entry-controls for Belgium (and France) are performed in Waterloo Station by French officers (also for Belgium).

## 2. **Agreements permitting joint patrols**

Mixed patrol provisions for the surveillance of the border area can often be found in police cooperation agreements.<sup>52</sup>

Normally these agreements contain some provisions on rights such as carrying weapons or uniforms but with respect to executive powers the foreign officer’s executive powers are, in principle, limited to assistance.

## 3. **Agreements laying the legal basis for the creation of joint offices**

These agreements contain provisions related to information exchange. For example, Agreement between Italy, Austria and Slovenia on the cooperation in police centre Thörl – Maglern (support and assistance) of 10 March 2005.

## 4. **Agreements with provisions related to art. 40/41 of the Schengen Implementing Convention;**

These agreements contain provisions related to hot pursuit and surveillance. These activities can be closely linked to

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51 Agreement of 15 December 1993 between the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Belgium and the Government of the French Republic concerning frontier controls and policing, and co-operation in criminal justice in respect of rail traffic between Belgium and the United Kingdom using the Channel Fixed Link (with protocol).

52 Art. 14, 26 Bilateral Agreement on police cooperation Austria-Slovakia (13 February 2004).

Art. 16, 29 Bilateral Agreement on police cooperation: Austria Slovenia (28 October 2003).

Art. 16 of the trilateral agreement between Austria, Switzerland and Liechtenstein on trans-border cooperation of security and customs officers (27 April 1999).

border activities. E.g. Bilateral Agreement on police cooperation Austria-Slovakia (13 February 2004)

## 5. Other areas of cooperation.

Based on our assessment of the overview of agreements, several clusters of agreements were identified based around the North and Baltic seas, Western and Northern Europe<sup>53</sup>. These are the regions where most of the multilateral agreements that have created a stronger framework for police and judicial cooperation have come about. It is also the region at the origin of Schengen and where the Prüm agreement has been developed. For Northern Europe, the Nordic Passport Control Agreement and Baltic Sea Border Control Cooperation are also important multilateral frameworks for cooperation. This statement drives us to the conclusion that 9 States out of 28 (AT, BE, DE, FI, FR, LU, NL, SE, NO<sup>54</sup>) represent 55% of the total number of agreements indicated by the interviewees. Another important implication is that many agreements relate to borders that can currently be regarded as internal borders (where border controls do not take place in principle) and that police cooperation is often the main focus.

Less than 20 percent of the agreements are multilateral. An overall rule is thus the use of bilateral agreements. Agreements generally exist between neighbouring countries that are more familiar with each other's legal systems, practical and geographical environment. A shared border or neighbouring State is an important stimulus for increased cooperation.

Therefore, four types of cooperation described in the analysed agreements can be distinguished.

The first category (represented by the *blue circle* on the picture below) covers the very generic cases where authorities of one State act on behalf of another State.

The second type of cooperation is a subcategory of the first one. The *red circle* addresses the specific case of delegation by one country of powers to authorities of another State, allowing it to act on its behalf, even on the territory of the first State.

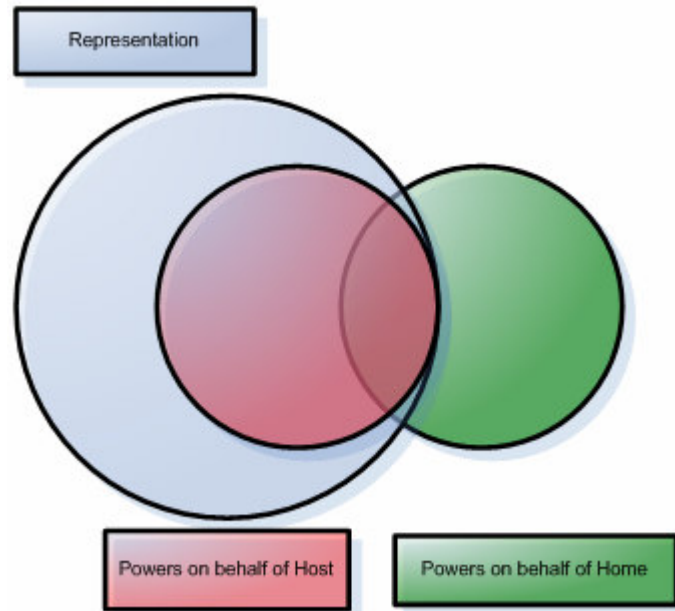
The third category, represented by the *green circle*, describes all these cases where countries authorise foreign authorities to perform certain prerogatives on their territory, while acting in their own interest (e.g.: hot pursuits,...).

Finally, the intersection of the circles describes these cases where authorities of two countries, e.g. in the framework of joint patrols, act together for the benefit of both States.

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53 Another cluster of bilateral agreements can be found in central Europe but that cluster is not rooted within a multilateral framework.

54 Clusters around DE, AT (13%), SE, NO and FI (20%), FR, LU, BE, NL (22%).



**Figure 3: Categories of agreements**

#### 3.4.2.3.2 Type of activities

The distinction between police related activities and administrative tasks is a factor that clearly has an impact on the level of sensitivity of the task and, consequently, on the extent to which it can be bestowed to guest officers.

This distinction is important for several reasons:

1. Border control being an EC competence, the common legal instrument that could be recommended and implemented is situated in the first pillar. The domain of police cooperation in the strict sense of the word is therefore not included.
2. Many law enforcement services in Europe that are responsible for border control are an integral part of the federal police, whereas in other States they are a specialised service that have no competences in the field of criminal investigation or carry no weapons (UK, Malta). Restricting the type of activities that are conferred to the domain of administrative tasks, thus serves the purpose of referring to the common denominator that links these services, since the type of tasks that can be considered to be administrative in nature are shared by almost all the law enforcement services involved in border control activities.<sup>55</sup>

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<sup>55</sup> For a description of the services involved see Annex 10.3.

3. Activities situated in the administrative sphere can be considered less sensitive to confer to foreign authorities since they are less closely related to the principles of State sovereignty and the State's monopoly on the use of force.

Providing a general or global definition of administrative powers as opposed to police powers is a difficult exercise, as this is widely depending on the various legal orders. Usually, only police powers are defined – e.g. in the most recent Benelux-convention on cross-border police cooperation<sup>56</sup> – and administrative powers are defined in a negative way (everything but police powers).

Nevertheless, as the term ‘administrative officer’ refers to an officer of the executive department of a government (usually of inferior rank) or a ministerial or executive officer (distinguished from a judicial officer)<sup>57</sup> and the adjective ‘administrative’ pertains to organisational functions,<sup>58</sup> the conclusion can be made that administrative powers are the organisational functions performed by an officer of the executive department of a government (usually of inferior rank) or a ministerial or executive officer (as distinguished from a judicial officer).

Police powers are the powers exercised by a “peace officer” responsible for preserving public order, promoting public safety, and preventing and detecting crime.<sup>59</sup>

If we transpose these criteria to the framework of this study we can define administrative activities in the domain of border control as:  
*Performance of organisational functions that are not police powers, by an officer of the executive department of a government or executive officer with a view to ensuring proper application of border control legislation and, where necessary, checking the irregular nature of operations which appear to breach that legislation.*

In this sense, all border control tasks could a priori be considered as administrative in nature, in comparison with police and judicial cooperation in criminal matters (Title VI TEU). However, the purpose for which an action is carried out influences its nature. Accessing databases can for instance not be categorised as an

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<sup>56</sup> Benelux 2004 Convention on Cross-Border police cooperation, art. 1,b) : Cross-border police intervention : the intervention of officials of a Contracting Party on the territory of another Contracting Party in order to maintain law and order and security either within the framework of the protection of persons and goods, or with a view to preventing and searching for criminal offences.

<sup>57</sup> B.A. Garner (ed.), Black's Law Dictionary, St. Paul, Minn., West Group, 1999, 7<sup>th</sup> edition, p. 1113.

<sup>58</sup> C. Rossini, English as a legal language, London-The Hague-Boston, Kluwer Law International, 1998, p.226-227.

<sup>59</sup> B.A. Garner (ed.), Black's Law Dictionary, St. Paul, Minn., West Group, 1999, 7<sup>th</sup> edition, p. 1178.



administrative or a police task as such. It is clearly the motivation for controlling information on someone (to check that entry/exit conditions are met or to eventually proceed to a criminal investigation) that determines the nature of the act.

Consequently, even with a general definition it is not always easy to draw the line between administrative activities and activities of a police nature. The example from Sweden, where civilian staff can be employed as passport control officers, places the discussion in a more concrete setting.

In Sweden, contractual staff (non civil servant) can be employed by individual police authorities on a County basis. It is indeed up to each County to define its level of delegation of tasks, in accordance with the rules defined in the Aliens Act and in the Police Act. If no such delegation of task was done at County level, all tasks should possibly have to be carried out by the County Commissioner, who is the official police authority. This delegation is done in the area of border control through the use of “passport control officers”. These officers, being employed by, and therefore part of the police, must have the Swedish nationality (Section 5 of the Police Act).

Concretely, Chapter 5 section 1 of the Aliens Act states that: “(...) an alien must show his passport to a **police authority** (...)” according to which the task of checking a passport can be bestowed to a civilian passport control officer.

In opposition, section 2 states that “(...) a **police officer** may subject an alien to body search and investigate his luggage (...)” which implies that this task can only be bestowed to police officers themselves. However, this section continues by stating that “when entry controls are operated (...) with assistance from a specially appointed passport control officer (...) these officers shall have the same powers as are indicated in sub-section one”.

Again, the powers bestowed to the passport control officers are defined at County level, but the general competencies are related to first line checks, which consist of:

- Checking documents;
- Stamping documents;
- Accessing the SIS.

The set of these activities eventually leads to allowing entry/leave (even though this task is not defined as such in any act). Whenever a problem arises or further investigation is needed based on the documents check or the control in the SIS, the case is immediately transferred to the police officer who is constantly supervising the shift. It has been stressed that passport control officers do not have the right to take any coercive measures whatsoever.

Civilian staff is employed for efficiency reasons. They can only be employed for a limited set of tasks, but their training is shorter than the 3-year official training of police officers. It is up to the County Commission to assess the need for using such resources.

The Swedish case serves as a good example but the analysis of the legal framework of other States has identified several other countries with generic provisions enabling virtually any civilian (i.e. also guest border officers) to perform certain border control activities.

Examples were found for the following States:

**Finland:**

Art 35 of the Border Guard Act states that if an officer needs assistance, he can request support from a civilian who is then conferred border guard powers. This can only be done under specific circumstances (important mission, urgent need for assistance). One Finnish interviewee commented that this article was not meant for foreigners, and that one should definitely not abuse it.

**Iceland:**

Art 20 of the Police Act enables foreign officers to assist an Icelandic police officer since “the police may summon any adult person to assist them...”.

It was also noted that this can only be practically considered in very rare cases of extreme emergency (e.g.: plane crash, where the police staff would not be sufficient to cope with the emergency situation and may request support from civilians). Support from foreign officers could therefore only be considered in very special emergency situations and should always follow an explicit request<sup>60</sup>.

**Germany:**

Section 63 (2) states that:

*The Federal Border Police shall have the right to appoint suitable persons as auxiliary police officers who shall perform certain duties if this is deemed necessary*

- *in monitoring the borders and checking cross-border traffic,*
- *in averting danger in the field of railway facilities of the federal railways,*
- *in order to prevent attacks on aviation security or*
- *in order to protect the constitutional organs of the Federal Government and the Federal Ministries and to protect the facilities of the Federal Border Police,*

*Any such appointments can be revoked at any time.*

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<sup>60</sup> As stated during interviews in Iceland, where the Ministry of Justice would be the competent authority to request such assistance.

Malta:

In Malta, chapter 217 of the laws of Malta, § 3 (3) (4) Immigration Act allows for the authorisation by the Principal Immigration Officer to exercise powers on his behalf and for the temporary stationing of officers in a specific branch of the police. In the case of border control, this would be the Special Branch. However this provision does not specifically address foreign officers.

*“3) The Principal Immigration Officer may authorise in writing any public officer to exercise or perform on his behalf any powers (except the power granted by this sub-article) or duties under this Act or regulations made thereunder.*

*(4) Authority under the last preceding sub-article may be granted either personally to a public officer or impersonally to any public officer for the time being performing any specific duties in the public service.”*

Latvia:

Section 28 of Border Guard Law:

*“In order to fill positions, which, due to various circumstances, it is not possible to staff with other border guards, employees may be hired for such positions.”*

In Estonia, the first section of art 21 of the Law on Border Guard of 30 June 1994 stipulates that:

*“The personnel of the Border Guard shall consist of:*

- 1. Officials of the Border Guard;*
- 2. Persons working under a contract of employment.”*

However, the second section of the same article clarifies that persons working as personnel of the Border Guard that are not officials of the Border Guard cannot perform border control duties in the strict sense:

*“...A person working under the contract of employment shall not be entrusted with duties connected with the immediate guarding and defending of the borders and guaranteeing the observance of the border regime.”*

### 3.4.2.3.3 Supervision

Supervision and control of the Host State are important aspect of conferment of power by public authorities, at it is the condition to preserve States' sovereignty. This can be applied to all border control tasks. It does not allow, as such, making a distinction between them. Most States have expressed concerns that they would not allow foreign officers to work without supervision. It is therefore necessary to examine the concept of supervision in more detail. Does it imply a direct physical presence of a home officer, or is it sufficient if control is exercised from a certain distance? Is public authority exercised by the persons executing a certain task,

or is it sufficient that the person who is bestowed with public authority exercises a certain amount of control over the person executing the task?

According to the French Conseil d'Etat related to the topic of the presence of foreign officers acting in France and using force on French territory, *“these powers can therefore, in principle, only be executed by a French public authority or under its control”*<sup>61</sup>.

It is debatable whether this notion of “control” would actually imply the necessity of a physical presence of a French officer, or whether it could also include control from a distance with constant contact (e.g. over the radio).

It is clear that the notion of control is also closely related to giving instructions to persons. Here it is relevant to note that art. 33 of the Senningen Agreement<sup>62</sup> allows for the use of force under an order or instruction by the competent authority from the host State. Depending on the interpretation of the provision, this order or instruction could also be made over the radio.

A foreign officer working under supervision of host officers can have specific grounds for refusal to cooperate in the framework of a particular agreement. An example of this can be found in art. 9 Agreement between Italy, Austria and Slovenia on the cooperation in the police centre Thörl-Maglern 10 March 2005 which states that:

*“Jede Vertragspartei ist befugt, sich unter Angabe der Beweggründe zu weigern, Informationen weiterzugeben oder zu kooperieren, falls dadurch die allgemeinen Interessen oder die öffentliche Sicherheit und Ordnung des eigenen Landes gefährdet werden könnte.”*<sup>63</sup>

Under such circumstances, it is clear that the supervision that the host supervising officer exercises is very different from exercising command over an officer of the host country since the guest officer has a particular legal basis to refuse to cooperate.

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61 Free translation from: Section III first paragraph of the Opinion by the French Conseil d'Etat Nr. 370.452 of 25 November 2004.

62 Treaty between the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxemburg concerning cross-border police intervention of 8 June 2004.

63 Free translation: “Every contracting party has the authority to refuse, while stating the reasons, to transmit certain information or to cooperate if that could endanger the general interests or the public safety and order of the home state.”

#### 3.4.2.3.4 Rank

A France official stressed the potential impact related to rank requirements when assessing the feasibility of conferring powers to guest officers. In this country, only officers with a certain qualification can indeed take the decision of refusing entry. A similar remark was made by officials from Iceland, Finland and Norway<sup>64</sup>.

It is common practice everywhere that officers<sup>65</sup> ask the permission of the staff supervisor prior to making such important decisions. A recommendation in this area should therefore logically not deviate from this practice and consequently not confer important decision-making powers to guest officers.

#### 3.4.2.3.5 Emergency situations

Certain executive powers that would, under normal circumstances, not be conferred to foreign officers, are bestowed under circumstances of emergency. This can occur in the framework of two forms of cooperation:

1. Agreements or forms of cooperation that allow for stronger participation of foreign officers on the host territory that are limited to a certain period or circumstance of emergency
2. Agreements or forms of cooperation where certain executive powers are exceptionally conferred in certain cases of emergency

An example of a particular circumstance of emergency and consequent form of cooperation is the Convention between Belgium and the Netherlands in the context of the European Football Championship. This convention included provisions concerning the conferment of specific powers for police officers operating on the territory of the other State. In the same context the Council of the EU has included a 'Handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved'. The agreement on assistance in the case of emergencies between France and Switzerland (14 January 1987), also describes how certain powers are conferred to officers from another State in the case of emergencies (Art. 9).

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<sup>64</sup> Whereas the Swedish Police Ordinance was amended so that one needs no more be a police officer. Civilian staff can do it, provided they have followed a specific training.

<sup>65</sup> E.g. in Germany, Spain, The Netherlands or Malta.

An example of the exceptional conferment of an executive power within the framework of a general agreement can be found in the Agreement between Switzerland, the Republic of Austria and the Kingdom Liechtenstein on the trans-border cooperation between security- and customs authorities of 27 April 1999: Exercising police powers implying the exercise of public powers is only allowed if “the success of a necessary police measure, without such power, would be defeated or seriously endangered or the actions would otherwise offer no prospects or would be seriously more difficult” (free translation of art. 15 (1) of the Agreement of 27 April 1999, last section. The same type of provision exists for the right to exercise coercive measures. This is allowed if “the success of the action would be endangered or would be seriously more difficult without the involvement of the guest officer” (free translation of art. 16 (3) of the Agreement of 27 April 1999, last section.)

Related to the general discussion on the relationship between the conferment of executive powers and emergency situations, the comment of the Icelandic authorities is also interesting:

*Support from foreign officers could be considered for border control tasks only:*

- *in exceptional emergency situations*
- *if the Minister of Justice would explicitly call for support*
- *if this sort of Rapid Intervention Team could operate in cooperation with Icelandic Officers*

During interviews with the expert members of the project team<sup>66</sup> it was mentioned that a useful definition of the term emergency can be found in the police cooperation handbook in the framework of article 39 of the Schengen Convention: “*when passage via the central authority so prolongs the transmission of the request to the local authorities as to jeopardise the success of the preventative or investigative action.*”

Transposed to the particular case of border control, a useful definition of emergency in the field of border control is:

*When awaiting authorisation of the home officer would seriously jeopardise the success of the action or the safety of the persons involved.*

On the basis of the comparative legal analysis of the agreements and legislation in the field of border control we can conclude that:

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<sup>66</sup> Mr. Patrick Zanders: Chief superintendent and director for international police policy within the Belgian Federal Police.

Some tasks are only allowed to be performed by foreign border guards under specific circumstances:

1. stop a person trying to cross the border during surveillance activities (i.e. outside authorised border crossing points)(task 5.03a and b Interview Guide (IG))
2. engage in pursuit of and stop persons trying to cross the border in the framework of surveillance activities (task 5.07 IG)
3. apprehend a person in the context of border checks (who refuses to provide identity information, who is in possession of illegal goods, for preventive or for enforcement measures) (task 6.19 IG)
4. temporarily take possession of vehicles (task 6.20 IG)

A comment that illustrates the general view of the interviewees related to the first task “stop a person trying to cross the border”, is a comment made by the interviewees in Iceland related to this task.

*“The use of force to stop a person should be done by an Icelandic officer in order to hold up in front of an Icelandic Court. Officially, it will always have to be the Icelandic officer who exercised power on his own. However, officers are always sent on the field in teams. A foreign officer could **work as back-up** of an Icelandic officer. A provision of the Schengen acquis foreseeing such use of force by a foreign officer could be good for emergency situations, but it is not enough. It would also have to be transposed in Icelandic law in order to hold in front of a Court.”*

With respect to the second task “engaging in pursuit of/stop persons trying to cross the border”, it is already possible in some cases on the basis of agreements within the Schengen framework of art. 40 and 41<sup>67</sup>. Austria has also indicated that when the Schengen “acquis” is implemented in its neighbouring States, art. 40 and 41 of the Schengen Implementation Convention will be the basis for that. The Icelandic Deputy National Police Commissioner has reformulated its response to question 5.3: a foreign officer could not do it on his own, but within a team lead by an Icelandic officer.

With respect to the third task: “apprehending a person”. Four States have been identified that have a legal basis for certain foreign officers to apprehend a person: Austria, Luxemburg, Slovakia and Switzerland. In the case of Austria, this is based on bilateral agreements with provisions on mixed patrols where foreign officers can do this in emergency cases when home officers would otherwise intervene too late. In the case of Switzerland: it should be noted that even Swiss border guard officers only have the authority to apprehend a person for a short period (‘Vorübergehende

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<sup>67</sup> See comments from Spain or Finland for instance.

Maßnahme’). They have to hand over the person immediately to the police. Czech interviewees have indicated that a foreign officer is not allowed to apprehend a Czech citizen. During mixed patrols, they can assist but they can, in principle, not perform any other acts.

With respect to the fourth task: “temporarily take possession of vehicles”, two States were identified where foreign officers have this executive power within the current legal framework. Sweden noted that some of these actions may not require new legislation under the rules on self-defence and emergency actions, whereas in Switzerland, foreign officers can do this only on a provisional basis until the host officer is active.

### 3.4.2.3.6 Exercise of public authority

In short, public authority can be defined as ‘a governmental power or jurisdiction’.<sup>68</sup>

There is no uniform European definition of Public authority. It results from case law, or has been defined in specific matters<sup>69</sup> or according to the context<sup>70</sup>. In a wide sense it covers not only the public administration, but all natural or legal person performing administrative functions, or performing services “under the control or supervision” of the previous<sup>71</sup>.

In the framework of border control, three objective criteria (and 10 sub-criteria) were defined on the basis of case law, against which border control tasks can be matched so as to define the “degree” of

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<sup>68</sup> B.A. Garner (ed.), *Black’s Law Dictionary*, St. Paul, Minn., West Group, 1999, 7<sup>th</sup> edition, p.127-128

<sup>69</sup> Vitu A. *Jurisclasseur Pénal*, Art 432-11 n°55 : « On entend par « dépositaire de l'autorité publique » la personne qui est titulaire d'un pouvoir de décision et de contrainte sur les individus et les choses, pouvoir qu'elle manifeste dans l'exercice des fonctions, permanentes ou temporaires ».

<sup>70</sup> For example, article 2.2 of Directive 2003/4/EC of The European Parliament and of The Council of 28 January 2003 on public access to environmental information:

*‘Public authority’ shall mean:*

(a) *government or other public administration, including public advisory bodies, at national, regional or local level;*

(b) *any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the (concerned public matter or policy);*

*and*

(c) *any natural or legal person having public responsibilities or functions, or providing public services, relating to the (concerned public matter or policy) under the control of a body or person falling within (a) or (b).*

<sup>71</sup> In a matter of phone call tapping, an external informer (who was not a State’s official) recorded a private conversation “on police premises in the presence of a Chief Superintendent, who retained in his possession the relevant tape”. The Court decided that “the public authorities are involved (in the illegal action) to such an extent that the State’s responsibility is engaged” (European Court of Human Rights A. v. France Nr 14838/89 (23 November 1993) Nr. 34 & 35).



public authority that they imply, allowing us to objectively assess their sensitiveness.

The defined criteria were the following:

- The impact on personal freedoms of certain acts (with respect to privacy, use of coercive measures,...);
- The extent to which the officer has the right to exercise discretionary powers;
- The fact that the action of the officer binds the State legally (stamping documents, writing reports,...)

The following section explains the criteria in more detail.

#### 3.4.2.3.6.1 Impact on personal freedoms

The condition and the rights of the person who is being checked at the border should be at the heart of the considerations describing the exercise of public authority by guest officers. In this respect, case law from the European Court on Human Rights is an enriching source of information. The case *Conka vs Belgium* (ref 51564/99) opposed 4 Slovaks to the State of Belgium. The impossibility for the four applicants for asylum to have access to information and remedies in a language they could understand was deemed as a violation of Art 5 of the Convention.

This example illustrates the sensitive aspect of any interactions between citizens and official authorities pointing to the fact that the presence of foreign officers should certainly not give rise to language issues preventing the travellers from fully exercising their rights. Indeed, an important guideline when assessing the feasibility of conferring powers to guest officers is that, from the point of view of the persons checked, the nationality of the border officer controlling them should not have any impact.

Other elements illustrating the aspects of public authority and sensitiveness linked to certain activities can be found in other case law from the ECHR such as *Argenti vs Italy*<sup>72</sup> (with respect to impacts on privacy) or *McCann and others vs. United Kingdom*<sup>73</sup> (with respect to the use of force), which were taken into consideration to design the table on public authority tasks (or powers) that can be consulted in Annex 10.7. The legal use of coercion is a commonly agreed landmark delineating the exercise of public authority, as expressed by the French Conseil d'Etat in the previously mentioned Opinion: “*in application of the constitutional values according to which the defence of public order and the protection of liberties belong exclusively to national authorities, an*

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<sup>72</sup> 56317/00

<sup>73</sup> 18984/91

*act of police, from the moment where it implies the use of force and is susceptible to lead to a deprivation of liberty, is part of an exercise of the essential conditions of national sovereignty. These powers can therefore, in principle, only be executed by a French public authority or under its control.”*

#### 3.4.2.3.6.2 Exercising discretionary powers

The first case dealing with article 39(4) TEC was *Sotgiu v. Deutsche Bundespost*<sup>74</sup>. In this case the Advocate General Mayars stated that the public service exception should only be applicable if the person possesses a power of discretion with regard to individuals or if his activities involve national interests, in particular those which are concerned with the national or external security of the State.

In the field of border control, the most important discretionary power is granting or refusing entry to the territory. The power to stamp (or sticker) documents, even though it is not discretionary in itself, derives generally from this executive power. In fact it is so closely related to it that only Germany has indicated they allow this activity to be performed by guest officers since the States want to retain this decision as a national competence.

However, refusing entry or refusing exit to a person has stronger implications for the person involved and is therefore more closely linked to the national or external security of the State. Allowing entry is more based on objective criteria (except in the UK where the credibility criteria is applied) and formal document check, where hit/no-hit databases play a more important role. Allowing entry/exit in/from the Schengen area could even be considered as the non-exercise of a discretionary power (contrary to the decision to refuse someone after 2<sup>nd</sup> line check inquiry). However, in today's context, only Germany allows guest officers to exercise complete prerogatives.

#### 3.4.2.3.6.3 Taking actions that bind the State legally

An important aspect of exercising public authority in the domain of border control is the executive power to prepare official reports or issue VISAs or laissez-passer-documents at the border.

Several types of informative reports can be identified in the context of border control:

- Reports on interviews performed;

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<sup>74</sup> Case 152/73, ECR 153. See also C-405/01 *Colegio de Oficiales de la Marina*; C-47/02 *Anker and others*; C-149/79 *Commission vs Belgium*.

- Searches performed ;
- Information gathered ;
- Evaluation of operations.

We can furthermore make a distinction between preparing informative reports and official reports or documents. Official reports are reports on the basis of which decisions on persons at the borders can be made and that can be used to inform them of decisions.

Issuing a VISA is not allowed for guest officers in any EU Member State. Moreover, preparing official reports should also remain the prerogative of the officer of the Host State according to most of the interviewees.<sup>75</sup> However guest officers are allowed to write official reports (on searches, or interviews performed) in Switzerland, Germany, Denmark, the UK, Lithuania, Latvia, Norway and Sweden.

An important element that has to be taken into account here is the link with language requirements related to public documents. Public documents are normally required to be prepared in the official language of the host country.

#### 3.4.2.3.6.4 Public authority and delegation of tasks in the domain of border control

When matching border control tasks against these criteria as done in the table inserted in Annex (10), one obtains the following results, giving an indication on what could be acceptable for most EU Member States with respect to delegation of tasks to guest officers.

The tasks involving no exercise of public authority in the sense of the described criteria are:

- Observe the area close to the border (without specific instruments);
- Make use of detection devices (to establish the authenticity of documents, to detect dangerous goods) and provide technical support for the use of instruments;
- Wearing a uniform;
- Perform threat analyses and risk assessment;
- Make use of surveillance instruments to detect human presence;

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<sup>75</sup> Some examples of participation to the document process exist already however in other domains.

Attention is drawn to the fact that art. 15 of the 1969 Benelux Convention on cooperation in administrative and criminal cases, provides in the mutual recognition of official reports in the States involved. However, in the framework of the joint investigative teams, seconded members operating in the Netherlands were not given the mandate – when acting in the Netherlands – to draw up official documents or reports under Dutch law.

The tasks involving a certain degree of public authority in view of the described criteria are:

- Request a person trying to cross the border to stop (on a voluntary basis);
- Request travel documents;
- Stamping travel documents;
- Consult a hit/no hit type of database;
- Take biometric data of persons<sup>76</sup>;
- Search a person (for additional ID information);
- Notify the person willing to cross the border of admission or refusal of admission/exit;
- Interviewing persons (on their ID, financial situation, travel route)<sup>77</sup>;
- Carrying service weapons or coercive instruments;
- Make use of force in self defence circumstances.

On the other hand, tasks that – in view of the described criteria - clearly fall under the State monopoly of exercising public authority within its territory are:

- Command and control activities (giving orders to national law enforcement authorities, making decisions,...);
- Use of coercion and use of force;
- Activities related to criminal investigation.

### 3.4.2.3.7 Type of border

According to the experts involved in the Study and FRONTEX representatives, there is no major distinction to be made between the types of borders with respect to the way border checks are carried out. However, the major starting point when discussing border control at different types of borders is that, even though land, sea and air borders present similarities, they all have very specific aspects that require a dedicated staff specifically trained for their management. The present chapter describes these specific aspects that need to be kept in consideration when assessing the feasibility of conferring powers to guest officers.

#### 3.4.2.3.7.1 Sea borders

As explained in the feasibility study on the control of the European Union's maritime borders<sup>78</sup>, sea borders are specific in nature since

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<sup>76</sup> It should be noted that it is possible to make a distinction based a request for voluntary action and ordering a specific action with the possible use of coercive force. However, this distinction appeared as theoretical to practitioners since one has no authority to request voluntary actions in practice if one does not have the possibility to take coercive measures in the case of a refusal to cooperate.

<sup>77</sup> This task is distinct from producing official reports based on these interviews and making decisions based on these interviews.

they typically constitute the line of the coast marking a separation between the territory of a Member State and the adjacent territorial sea<sup>79</sup>, which consequently imply that they do not constitute a shared responsibility between neighbouring States. Under Schengen rules, every sea border constitutes an external border<sup>80</sup>. The consequent important number of external authorised border crossing points combined with the even more numerous possibilities for landing a ship outside these authorised points across the EU and their proximity with third countries from which illegal immigration is frequent turn these borders into sensitive areas.

Border control at sea borders involves several distinct aspects that depend on the type of traffic<sup>81</sup> and the distinction between territorial waters and open sea regulated by international maritime law. Territorial waters (extending up to maximum 12 nautical miles measured from baselines determined in accordance with the Montego Bay Convention<sup>82</sup>) are the area adjacent to the State's territory where it exercises its full sovereignty. However, according to Art 17, Part II – Section 3 of the Montego Bay Convention, ships of all States carrying a flag have a right of “innocent passage” in the territorial waters of the signatories; which restrains the possibility of a systematic check of all ships<sup>83</sup>. However, Art 19(g) limits the concept of “innocent passage” and excludes, among others, a passage that engages in “loading or unloading of any (...) person contrary to the (...) immigration (...) laws and regulations of the coastal State”. For the purpose of preventing infringement of, a.o., immigration laws, Art 33 of the Montego Bay Convention also defines a contiguous zone, enabling the signatories to protect themselves against illegal immigration up to 24 nautical miles away from their coast.

A substantial part of the checks at maritime borders does not imply a physical contact between the border guard and the passengers and could therefore be more easily delegated to guest officers. A control of the SIS is often done on the basis of crew lists and passenger lists.<sup>84</sup> In practice, however, the administrative control of the lists does not guarantee the thoroughness of the check. This is one of the reasons why it can be necessary to board civilian ships or

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<sup>78</sup> 11490/1/03 from the Secretariat General of the Council.

<sup>79</sup> Broader interpretations also include part of the open sea in maritime borders (e.g. the Canary Islands Channel or the Gulf of Sirte).

<sup>80</sup> Except for intra-Community ferry routes.

<sup>81</sup> With respect to seaports, four major non-exclusive categories can be distinguished that are relevant for this Study: fishery ports, pleasure ports, cargo ports and passenger ferry ports.

<sup>82</sup> United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982

<sup>83</sup> It should be noted that many boats carrying illegal immigrants do not have a flag (like the “pateras” in Spain), which makes the innocent passage principle inapplicable to them.

<sup>84</sup> Directive 2002/6/EC lays down the obligation for the captain of a ship to provide the passengers and crew list for the EU area.

boats in territorial waters or the harbour to question the captain about his itinerary and check passenger's identities. For this activity a special profile and training can be required.

The same holds for particular regions (e.g. the Mediterranean region) where immigrants often voluntarily provoke distress situations so as to be "rescued at sea". Safeguarding the life and health of human beings having primacy above any legal principle that might enter in conflict with it, immigrants will often be rescued by law enforcement authorities that will bring them towards their own territory rather than forcing them to sail back to their country of departure on precarious embarkations. Search and rescue activities are also regulated by international conventions<sup>85</sup> defining Search and Rescue areas between countries, which do not always coincide with territorial waters, thereby contributing to a complex landscape creating, according to experts<sup>86</sup>, frequent uncertainties and cumbersome situations. This complexity clearly reinforces the need for specifically trained personnel to carry out operations on this type of border.

Another aspect of sea borders is that the involvement of military services is often higher with respect to checks and even more when it comes to surveillance. Due to the necessity of high cost resources and specific equipments needed for surveillance (e.g. boats or radars) a law enforcement service of a military nature can be involved during surveillance activities.

#### 3.4.2.3.7.2 Air borders

Authorities of international airports have an international obligation to design the airport in such a way that passengers are automatically directed towards the border crossing points before they enter the territory. This implies a relatively straightforward and standard approach to border checks while surveillance is often less important. Schengen airports are clearly identified and the flow of entry is more predictable since the country or departure is well known.

Persons crossing borders via airways are usually better off financially than persons crossing the border over sea. Moreover

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<sup>85</sup> Convention on the High Seas, 1958; International Convention for the Safety of Life at Sea, 1974 and its protocol from 1978; International Convention on Maritime Search and Rescue, 1979; and the UNCLOS from 1982.

<sup>86</sup> Mr Georgios Vourekas, Head of Sea Operations at FRONTEX agency, Interview in Warsaw, December 7, 2006, or Jose Antonio Pastor Ridruejo, Professor of International Law, Head of the Spanish Department of International Legal Affairs, quoted in "Informe emitido por el capitán Ramiro Santalices Fernández acerca de las posibilidades de actuar que tiene la Guardia Civil sobre embarcaciones que se dedican al transporte de inmigrantes".

they often make use of false documents in order to try to go through the border crossing points.

### 3.4.2.3.7.3 Land borders

For border control at land borders there can be a constant flux of persons (particular border crossing points or focal point offices) on the one hand. On the other hand it is possible in certain areas that a constant work/ or tourist migration takes place related to small border traffic. Also, territorial continuity stresses the importance of cooperation between the services of the neighbouring countries (i.e. a Member State and a third country in the case of external borders) as opposed to sea borders where the border directly concerns only one country. This can involve very specific agreements and arrangements.<sup>87</sup> For surveillance of land borders, knowledge of the terrain of the neighbouring States can also be crucial, since geographical factors play an important role for an effective surveillance. Another specificity of the control of this type of borders is the limited involvement of carriers in comparison with air and sea borders.

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<sup>87</sup> For example agreements allowing the right to foreign officers to make use of certain roads that cross the border at various points. E.g. the Protocol of 13 August 2004 between Slovenia and Croatia on crossing the State territory of the other contracting party with the aim of taking action on one's own State territory.

### 3.4.3 Comments

We structured above the collected. More precise country per country information is available in Annex **10.3**.

What appears from this chapter is that the powers of border guards, with some variations, are similar across countries. However, the contrast with the powers of these same officers when they operate abroad is striking. These are currently limited and based on bi- and multilateral agreements.

Besides the existence of agreements between countries, several factors were then brought forward that have an impact on the powers bestowed. As we have seen, these are:

- The type of activities carried out, administrative tasks being more easily conferred;
- The supervision by host officers, which can take several forms and provides certain guarantees to the host country;
- Ranks, which rarely make a strong legal difference in the powers of the border guards but which are in practice commonly used to ask for advice before making decisions;
- The circumstances of the action, emergency situations typically allowing guest officers to perform more activities;
- The extent to which the activity involves the exercise of public authority and therefore touches upon the sovereignty of the State;
- The type of border, which, according to experts is not a main factor, provided one takes into consideration only harbours and territorial waters, airports and land border crossing points, leaving out the complex aspects of open sea.<sup>88</sup>

Guiding principles can also be drawn from this first part to keep in mind when making a proposition on conferring executive powers:

- The host country remains in control of border control activities performed by guest officers to a certain extent;
- The host country maintains the final decision on allowing entry/exit in principle. Exceptions can be made in the case of manifest and objective reasons to allow or refuse entry or exit;
- The host country should, in principle, be allowed to refuse the presence of foreign officers and revoke any cession of sovereignty;
- Executive powers having a direct impact on fundamental rights of citizens are/shall only be allowed under exceptional circumstances.

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<sup>88</sup> A specific profile and training might be required however.



# 4 Operations in other countries

## 4.1 Section summary

This section gives a generic overview of cases where officials from one country operate abroad in coordination with local authorities.

Its first part describes the joint operations at the external border of the Schengen area and joint removal actions of third country nationals with the participation of other Member States. After presenting generic concepts with respect to the organisation and functioning of such operations, this section elaborates on practical aspects drawn from interviews with practitioners and evaluation reports. It appears from these sources of information that the cooperation as it is today is already very useful and well appreciated by the Member States. However, the presence of guest officers could be made more efficient if they were bestowed more executive powers. The fact that they have no powers indeed limits the added value of the guest officers, possibly lowers their motivation and may even create an extra burden for the host officers under the responsibility of whom they are operating.

As an illustration of what can be achieved, this section then presents other areas where cooperation has reached a more advanced stage and foreign authorities exercise extensive powers on the territory of other countries. Interesting examples of this type of cooperation can be found in the field of police cooperation e.g. in the case of hot pursuits or the area of criminal investigation through Joint Investigation Teams. Another area of interest is the area of cooperation between customs authorities.

## 4.2 Border control and return

### 4.2.1 Joint Operations

#### 4.2.1.1 Introduction

One situation where guest border control officers are operating abroad is during joint operations in the domain of border checks or border surveillance.

There are two types of joint operations. On the one hand there are operations that are taking place on a regular basis within the

framework of bilateral or multilateral agreements<sup>89</sup>. On the other hand there are joint operations that were coordinated under the auspices of the centres (co-funded by the EC) and are coordinated since 1 May 2005 by the FRONTEX agency. The latter type of operation does not necessarily take place within the framework of bilateral or multilateral agreements since guest officers can be seconded by States with which the Host State does not have an agreement in the area of border control. This section focuses on the second type of operations since they are truly situated within a European approach on integrated border management. The implementation of these types of Joint Operations (JOs) covers the field of border surveillance and border checks along the EU's external borders.

The first joint operations coordinated by the centres were launched in 2002. There have been joint operations at land, sea and air borders.

From 1 December 2002 until 1 November 2005, 30 joint operations at land borders were coordinated by the centre of land borders. This involved the participation of 172 guest officers, an average of 6 guest officers per JO. The operations mainly took place in central Europe, Germany, Austria, Poland and Hungary. On 11 occasions, the host country was Germany. Guest officers had various nationalities but usually the States that have sent the most guest officers were Austria, Germany, Italy, the UK and France.

Joint operations at air borders consisted mainly of the exchange of information and the participation to certain actions at the same moment. Those operations therefore did not involve a participation of guest officers on the territory of the Host State<sup>90</sup>.

Sea joint operations have been organised so far under the aegis of both the Eastern and Western Sea Borders Centres, as well as in the framework of the Baltic Sea Border Control Cooperation, covering most of the EU external maritime borders. The Eastern Mediterranean centre has organised nine joint operations during the last four years.

There are three types of operations taking place at sea<sup>91</sup>:

1. Operations to the open sea  
e.g. joint patrolling<sup>92</sup>.

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<sup>89</sup> In some cases the legal situation of guest officers is further clarified in Memorandums of Understanding or protocols with a regional domain of application.

<sup>90</sup> Only one joint air operation until now has involved the presence of guest officer at an airport on the territory of another State. It was organised in the autumn of 2005 and no evaluation report is currently available.

<sup>91</sup> Based on information from Mr. Vourekas, Sea Operations Principal Officer of the FRONTEX agency.

<sup>92</sup> E.g. joint operation "Neptune IV" (the maritime area around Italy, Libya and Tunisia).

2. Operations to the ports  
e.g. safety controls during embarkation and disembarkation of passengers on ferries<sup>93</sup>
3. Mixed operations

Certain operations have involved the presence of guest officers onboard of vessels of other Member States<sup>94</sup> or have allowed for the provision of operational means<sup>95</sup>. The Operation Ulysses conducted in February 2003 is a concrete example of operations at sea involving ships from different Member States (Spain, Italy, France, Portugal and United Kingdom) navigating through territorial waters of different countries (Spain and Italy) as well as in open sea, from Algeciras to Palermo. Preliminary meetings allowed defining the legal framework of this operation as follows:

- In case of interception of illegal migrants in territorial waters, the ship of the sovereign State would intervene. The other ships would provide support and operate as instruments of control, to detect threats and protect the ship that is intervening;
- In case of interception in open sea, the operation would be carried out in compliance with international maritime law. The need for action in open sea on a suspect ship carrying the flag of one of the participating countries would be assessed by the ship of this country, taking into consideration the principle of personality<sup>96</sup>
- While always acting in a way such as to guarantee the security of the persons on board.

In the framework of this operation, it was agreed to limit interventions in open sea to cases of rescue or unavoidable interventions. More recently, the same principles were applied for the operation “Guanarteme” (protection of Atlantic, North and Baltic sea borders, organised by the Western Sea Borders Centre (WSBC) which took place in January 2005.

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<sup>93</sup> E.g. Joint operation “Fer IAS”: Ferries Pilot Project in the Ionian and Adriatic Sea, where Italy, Greece and Germany participated in the controls of passengers/crew/cargo of specific Greek and Italian ports.

<sup>94</sup> During operation Ulysses (25 January- 8 February) on the Canary Islands where Italy, the Netherlands, Germany and Europol have participated as observers to the surveillance activities. Spain and France were assigned to the route Palma Cagliari being escorted from the south of Sardinia towards the destination by an Italian vessel. In some cases, the participating Member States exchanged crew Members on a bilateral basis.

<sup>95</sup> From 13 to 17 December 2004, a Joint Operation (Triton II) was carried out in specific maritime areas of the Eastern and Central Mediterranean Sea. Greece, Italy, Cyprus, Germany and France joined the operation either with operational means (air – land – sea) or as observers.

<sup>96</sup> Defined as ‘the capacity of an individual or entity to hold rights and be subject to obligations within a particular legal system’. Source: Legal Evaluation of the Operation “Ulises”, by Ramiro Santalices Fernandez.

When a joint operation at sea is organised in such a way that it involves foreign vessels this usually implies that the foreign vessels anchor or moor in the ports of the hosting country. Patrolling activities are, in that case, usually carried out outside of the territorial waters.<sup>97</sup>

Officers from European Member States normally participate as observers or advisors to the coordination centers to the ports or to the patrol vessels. Sometimes they have a more active role but this depends on the normative framework of the hosting country. The third countries' guest officers usually participate as observers in the coordination centers. The only exception until now was operation Netuno II in which Libyan officers were present in Italian patrol vessels during patrols.

#### 4.2.1.2 Organisation

In order to initiate or coordinate joint operations, the responsible unit at FRONTEX is in touch with a network of contact persons within the Member States. Based on a threat assessment and a risk analysis, a particular joint operation is proposed by FRONTEX for a particular border crossing point or border region. Then States and organisations are invited to express their interest to cooperate (host a joint operation or send guest officers). The contacts within the States inform the centres of their willingness to participate in the mission. In parallel, an operational plan is prepared containing the main objectives of the operation. This plan is sent by FRONTEX to the States. Headquarters of those States then select the candidates who will participate in the mission. The usual duration of a joint operation is in between two to five weeks. After the completion of the joint operation, an evaluation report is prepared containing an evaluation of the participating officers that is sent directly to FRONTEX.

#### 4.2.1.3 Functioning

##### 4.2.1.3.1 General

In most of the Member States, the legitimacy for the activities of the guest officers is based on articles 7 and 47 of the Schengen Implementation Convention or on bilateral agreements. This implies that guest officers usually participate as observers to border check or border surveillance procedures, thus having very limited

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<sup>97</sup> Based on information from Mr. Vourekas, a bilateral agreement exists between Italy and Albania that does allow for Italian patrol vessels mooring in Albanian ports and patrolling their regional waters.

executive powers. Guest officers would then assist host officers by providing advice with respect to the profile of the traveller, the methodology that could be used, the documents, etc. In report n°8301/05 on the activities of the Centre for Land Borders, it was stressed that guest officers' assistance had been very useful especially in situations when the travellers' final destination is the country of origin of the guest officer. For this reason, one of the main tasks of guest officers was recognizing forged/falsified travelling documents, contacting home authorities or private accommodations or companies, etc. to verify the real travel intentions of the person being checked.

The (additional) knowledge of the guest officers – e.g. the ability to communicate in several languages – made border control inquiries much more effective.

#### 4.2.1.3.2 In practice

Cases have been reported where practitioners on the field have taken on more responsibilities, participated in interviews or conducted certain controls independently. This demonstrates the fact that it is not always easy for practitioners to clearly distinguish the legal limits in which they act since they are faced with very real circumstances or needs.

This potential legal uncertainty and complexity is illustrated by a quote from the evaluation report of the Joint Operation “Guanarteme” of the Western Sea Borders Centre (WSBC) (18-27 January 2005):

*“The incidents that may happen related to the participation of a given vessel in operations carried out in territorial waters of another State or in the high sea, could be solved by the signature of previous agreements between the participant countries. However, it would be desirable that the European Union, within the framework of the plan for the management of the external borders of the Member States, could advance in this respect, by reaching agreements. For this reason and although in this operation there were not such problems, it is necessary to have an adviser in legal matters in case any incident takes place.”*

This complexity is furthermore illustrated by the example of a joint operation at the German Polish border (Frankfurt-Oder 4- 29 July 2005).

On 20 July 2005, an interview was conducted with the participants of an ongoing joint operation in Frankfurt-Oder. This operation took place under the command of a German officer<sup>98</sup> at a one-stop

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<sup>98</sup> The Host State was Germany in this case but the operation took place on Polish territory.

border crossing point<sup>99</sup> on Polish territory. This border crossing point is a busy traffic point (2000 lorries / 12 hours) with seven lanes in total: for busses, lorries and cars. Since this border is situated within the internal market enabling the free movement of goods, there are no customs officers present. There were two UK immigration officers present (because final destination of immigrants – sometimes hidden in lorries - is frequently UK) and one Polish officer. The Polish officer had signed the letter of assignment with the German government clarifying the scope of executive powers that had been conferred to him, but this assignment was not valid on the territory of Poland since its effect was limited to the German territory. The Polish officer could carry a weapon due to the fact that he was in Poland but he did not carry a weapon since he chose not to. The UK officers were members of the UK immigration service: they did not sign the letter of assignment with Germany because they did not have police powers in their home country. From a legal point of view and due to the lack of mutual conferment of minimal powers, guest officers were thus restricted to a role of observation and assistance.

Even limited as above, the added value of the guest officers in performing border control activities were:

- Sharing knowledge on other ways to operate;
- Bringing knowledge from other State's intelligence and experience on suspicious cars and lorries (certain companies for example);
- Help with document checks.

An example of the vagueness of the boundaries of observation/assistance and participation is the following case where the guest officers phoned home authorities for more information: An Irish citizen was often crossing the border at Frankfurt-Oder. Since additional information was needed, a UK guest officer called authorities in the UK where they checked the local intelligence. Apparently, an arrest warrant had been issued against that person. Afterwards, a German officer addressed the UK authorities directly, by way of a letter to examine which further steps could be taken.

The German commanding officer remarked that the presence of the guest officers was very useful since she had learned a lot about checks on vehicles. If guest officers would be able to perform activities independently and had more executive powers this would nevertheless increase their motivation and tasks could be divided more efficiently. The Polish officer remarked that during his regular activities at the Polish-Ukrainian border, a Polish officer could issue

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<sup>99</sup> One stop border control: The check point is on Polish territory but German officers perform entry checks also at that location in order to avoid travellers having to undergo border control at two different locations.

an administrative decision to cancel a non-Schengen VISA on the basis of art 48 of the Polish Foreigners Act. He did not have this type of executive power during the aforementioned joint operation. One UK officer noted that he would like to carry out the same tasks as a German officer but that it would mean he would have even more powers than he has in the UK since UK immigration officers do not have the same scope of competences as German Police officers.

#### 4.2.1.3.3 Comments

This example shows the complexity of the legal environment in which the participants of joint operations find themselves. However, a number of general findings can be made on a high level:

- Guest officers are allowed to wear their uniforms in all the States visited during the Study;
- Only five States allow them to carry their service weapons for self-defence purposes only during joint operations at land borders. (Germany, Austria, Slovenia, Lithuania and Latvia)<sup>100</sup>;
- With respect to the perspective of citizens, it can be noted that citizens have not reacted to foreign officers assisting in Border Control. At the time the interview was conducted, no formal complaints have been made based on the fact that a foreign officer assisted in border control activities.

On the basis of interviews with representatives<sup>101</sup> of the Centre of Land Borders in Berlin on 20 July 2005 the following expert opinions were gathered on the necessity of executive powers guest officers in the future:

- Guest officers should be able to execute basic tasks independently for reasons of efficiency, motivation, specialisation, etc. Examples are:
  - Stopping a car;
  - Interviewing a person;
  - Asking and taking documents;
  - Performing data checks.

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<sup>100</sup> This finding is based on a report from the Land Centre. This is however less than what the results of the interviews reported. According to them, guest officers would indeed be allowed to carry their services weapons in Belgium, Denmark, Estonia, France, Italy, Norway, Portugal, Spain, Sweden, Switzerland and The Netherlands as well. This can be explained by the fact that this figure was based on the results of participation by guest officers of all Member States to specific joint operations at land borders whereas the study also considered other cases of foreign law enforcement presence in domains that are related to border control, or the framework of bilateral agreements.

<sup>101</sup> Karl Hoerlein and Mervi Pehkonen from the Centre of Land Borders.

- However, it should also be noted that, because border control activity involves searching persons or goods or the use of coercion or force which means they include activities that could mean an infringement of basic rights, the officers involved should know the law in detail. This is very difficult to achieve for short missions: JOs last for a maximum of five weeks and training is often very limited (e.g. in Germany: ½ day). That is also the reason why home officers should, in principle, be present during the type of operation described in the beginning of this bullet point.<sup>102</sup>
- It is very important that foreign officers carry a document stating their authority, because of the possible refusal of people to cooperate. Furthermore, it can be useful if they wear a certain “EU” symbol during border control activities since they often wear the uniform of their home country.<sup>103</sup>

## 4.2.2 Joint Removal Actions

### 4.2.2.1 Introduction

Another situation where guest officers can be present on the territory of another State is during joint removal actions. Based on the study, the following conclusions can be made:

- Only ten States have already participated in joint removal actions, namely: DE, MT, BE, LU, NL, FR, ES, IT, UK, IE;
- Even though removal operations also occur by land and sea, joint removal operations occur via air.

Joint removal actions via air were formalised by the Council Decision 2004/573/EC, which provides a legal framework for the cooperation between Member States with respect to return enforcement activities of third country nationals in an illegal situation. To a large extent, the Decision defines the competences of the escorts, or at least the way they should be defined<sup>104</sup>. The way joint operations are organised and carried out is also described in the decision.

Similar to the status within the framework of the Council Decision 2004/573 a division of responsibility (Escorts of a certain Member State remain responsible for the escorted persons under their supervision) is created when there are administrative agreements

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<sup>102</sup> This is also the reason why guest officers in FPOs could have a higher added value because in that case guest officers could be present for a longer period.

<sup>103</sup> Guest officers have worn an EU arm brace during some joint operations already (e.g. the joint operation at the German-Polish border (Frankfurt-Oder: 4 – 29 July 2005).

<sup>104</sup> Paragraph 3.2(e) of the Annex to the Decision provides that participating MS shall agree on a list of authorised restraints in advance.



related to Joint Removal operations. These types of agreements therefore do not provide a legal basis for the conferment of executive powers in the strict sense, but they contain details on the manner of cooperation.<sup>105</sup>

Most of the readmission agreements include provisions on transit. The law enforcement service of the country in that case performs surveillance over the transit and confirms that the person involved has left the territory. In that case, the local law enforcement service maintains public order if it is necessary.

Art. 3, 1 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft<sup>106</sup> stipulates the general principle that the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board<sup>107</sup>. For ensuring safety on board however, it is the aircraft commander who is ultimately responsible according to article 6 of the Tokyo Convention. It is thus the commander who has the right to impose reasonable measures on all passengers (including the escorts) to ensure this safety. This ultimately leads to the consequence that all escorts work under the supervision of the commander of the flight. Once the doors of the airplane are shut, all officers are therefore in the same situation with respect to the scope of their competences. If it is necessary all persons on the plane (including the escorts) can however take certain urgent measures to ensure the safety on board on the basis of art. 6, 2 of the Tokyo Convention.

For the sake of convenience, article 6 of the Tokyo Convention is included below:

*1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:*

- *to protect the safety of the aircraft, or of persons or property therein; or*
- *to maintain good order and discipline on board; or*
- *to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.*

*2. The aircraft commander may require or authorise the assistance of other crew members and may request or authorise, but not*

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<sup>105</sup> E.g. Administrative agreement (MOU) between Austria, Germany and Switzerland, Administrative agreement (MOU) between Austria and France.

<sup>106</sup> Signed in Tokyo on 14 September 1963 and known as the Tokyo Convention.

<sup>107</sup> Art 5,2 of the Tokyo Convention specifies that an aircraft shall for the purposes of this Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.

*require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorisation when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.*

The supervision of the aircraft commander does not restrict individual liability (e.g. in case of voluntary offences) or/and the States' civil liability (in case of un-voluntary offence committed on board by one or more States' civil servants).

In the *Semira Adamu* case, who died in 1998 during a forced deportation (that was organised by Belgium alone and was therefore not a joint removal action), the 20 year old Nigerian girl whose ankles were shackled, was put on a plane going to Lagos in Nigeria and her face was pushed into a cushion and held there. She became unconscious and died later in hospital.

The Brussels Court found four of the Belgian police officers in charge of the removal action guilty of assault, battery and negligence.

The Court<sup>108</sup> stated that:

*"it has always been clear that governments and State officers have a responsibility to ensure respect for the physical safety and inherent dignity of all people in their custody, including deportees..."*

*Government and law enforcement officers have an ongoing responsibility to ensure and respect the physical safety and inherent dignity of deportees and, as underlined by the Council of Europe's Commissioner for Human Rights: "where forcible expulsion is unavoidable, it must be carried out with complete transparency in order to ensure that fundamental human rights have been observed at all times".*

The court also ordered the Belgian State to pay damages to the victims' family, declaring the State liable ("civilement responsable") for the death caused (involuntarily, the Court said) by its officers.

#### 4.2.2.2 Organisation

In practice, the preparation of the removal is done nationally and the escorts from all participating Member States are responsible for their own DEPAs, applying the practices in use in their own Member State, and ensuring security by using their own instruments<sup>109</sup> only (e.g. French escorts use specifically designed

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<sup>108</sup> Tribunal Correctionnel of Brussels, 12 December 2003.

<sup>109</sup> Handcuffs, leg restraints, baton, taizer pepper spray.

belts to control DEPAs. They may not lend their belts to foreign officers).

A joint removal operation can be organised according to different approaches. The DEPAs can be brought to the organising country or the organising country stops in all the participating countries to pick up the escorts and the DEPAs. The manner in which the joint removal operation is conducted depends on the country of destination, the type and number of DEPAs. Limiting the number of working hours of the crew members is an important objective in order to reduce the costs involved since removal operations are, by their nature, very costly operations.

The following examples illustrate the variety of approaches used for the organisation of joint removal operations. For one particular Belgian operation, Belgian officers would bring their DEPAs to the Netherlands by car. In a second phase, a plane from the UK flew to the Netherlands from where they continued. For another operation, Germany had organised a large joint removal operation in September 2005 with seven participating countries with several countries of destination (Togo amongst others). Other removal operations in which Switzerland participated were small chartered flights containing 2 or 3 persons to Sierra Leone.

Organising joint removal flights can be difficult to coordinate since it requires DEPAs from the same country of origin to be ready for departure at the same moment. This is one of the reasons why there are typically not more than three participating countries per joint removal flight and not every country has already participated to them. In the last two years (2004 and 2005), Germany participated to 6 joint removal operations. Belgium, a country that has been very active in this field, has organised 16 joint operations and participated in 7 more in 2004. Since 2002, France has taken part in 24 joint removal flights.

#### 4.2.2.3 Functioning

As explained in section 4.2.1.1, once the doors of the airplane are closed, the commander of the plane is responsible for maintaining the security on board. On an operational level, escorts of a certain Member State remain responsible for the escorted persons under their supervision and usually the overall supervision of the operation is performed by an officer of the organising State. However they no longer have the final authority with respect to maintaining the security on board. This also implies that officers are in the same situation with respect to their competences. Art. 6, 2 of

the Treaty of Tokyo<sup>110</sup> should also be taken into account. In the case of emergency, all persons on board can take certain measures to ensure the safety on board and thus use coercion or force if necessary.

Protocol agreements often exist between organising States on the procedures that apply. Many operations take place between a small number of States that cooperate regularly in this domain, therefore procedures are relatively well known and cooperation goes smoothly. Concrete tasks can also depend on the airline, or the type of charter that is used.

With respect to the procedures vis-à-vis the DEPAs, it is an officer of the organising State who has the overall operational command over the removal operation. Team leaders of the participating countries take the decisions with respect to the DEPAs under their responsibility.

#### 4.2.2.4 Comments

In these types of operations, there is always a risk that certain circumstances might occur under which the use of force is unavoidable. This is one of the reasons why the removal of persons is a very sensitive task, also in the eyes of the citizens. Respecting human rights is crucial. Various cases in different States with respect to human casualties during removal operations have led to different approaches. Therefore it is important that foreign officers are sufficiently trained and qualified before they could be granted more powers exceeding that of self-defence with respect to other countries' DEPAs. This should preferably be accompanied by a harmonisation of relevant national laws<sup>111</sup>. In that case, it could be welcomed if Member States on whose territory a joint return operation is to take place would decide, on a case-by-case basis, whether they want to confer executive powers to guest police officers.

Handing over more responsibility or executive powers to guest officers could allow for more flexibility and cost reductions. Moreover, personnel that are trained for a certain task/type of DEPAs could become active in several countries. Particularly in this domain it is important to reduce the amount of coercive force that is used. A link with the country of destination of the DEPA is very important in this respect.

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<sup>110</sup> Convention on offences and certain other acts committed on board aircraft (Tokyo Convention of 1969).

<sup>111</sup> This opinion was raised by several interviewees and explicitly expressed by the German Ministry of Interior.

A comment made by the Swiss authorities<sup>112</sup> offers a nice best practice example in this field:

*“The readmission agreement with Serbia & Montenegro is the only readmission agreement that allows for officers from that State to enter on the territory of Switzerland and execute powers on that territory during removal operations. This implies in practice that those guest officers come to Switzerland to ‘pick up’ DEPAs. The advantage of such an arrangement is that the DEPAs seem more willing to cooperate since they are confronted with officers from their country of destination immediately. Since these guest officers also escort the DEPAs this enables a serious cost reduction since the normal Serbian airline can be used and chartered planes are not necessary.”*

This also shows the importance of the bilateral relationships of the relevant States with the countries of destination. A different type of relationship with a former colony for example can have a substantial impact on the way joint operations are conducted.<sup>112</sup> Gradually a more European approach could come about in the domain of removal operations.

Several parallel actions could be foreseen in this domain.

- Stimulating joint detention centres (in border regions)<sup>113</sup>
- Stimulating European readmission agreements
- Harmonising European regulation in the field of joint removal operations
- Foreseeing a legal basis for allowing for the conferment of executive powers on a case by case basis

### 4.2.3 Practical obstacles for cooperation

After discussing the manner in which joint operations and joint removal actions are being conducted at present it is important to look at some practical issues that may prove to be obstacles to more efficient cross border cooperation. At a practical level, there are a range of possible issues that could have an impact on the way in which cooperation takes place between host and guest officers and these issues must be given due consideration before making any proposition for the conferring of executive powers. In order to make an assessment of these practical issues, the following questions were included in the interviews performed:

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<sup>112</sup> The relationship between the Netherlands and Indonesia allows for removal operations taking place from the Netherlands to Indonesia for example (and France can do this from France).

<sup>113</sup> Austrian interviewees had stated that this could increase the efficiency of joint removal operations since the point of departure for a joint removal operation could be the same and foreign officers could in practice then also take over more responsibility towards DEPAs from other States if there would be a legal basis to do so.

**Section 11: Obstacles to an efficient cross border cooperation**  
**Questions 11.1-11.10**

*Do you think the following issues are obstacles to an efficient cross-border cooperation?*

- *Financial burden of a joint operation*
- *Difficulties related to the preparation of a joint operation*
- *Differences in equipment used for the operation / technical interoperability*
- *Differences in training, expertise and methodology of the officers participating*
- *The lack of executive powers of guest officers*
- *Difficulties related to access to information and data*
- *Difficulties related to exchange of information and data*
- *Different languages*
- *Cultural differences*
- *Other*

The table below provides an overview of Study interviewees perception about the importance of the issues addressed as possible obstacles to efficient cross border cooperation in joint operations.

<b>Obstacles to cross-border cooperation in Joint Operations (11.1-11.10)</b>				
<b>Issue</b>	<b>Important</b>	<b>Not so important</b>	<b>Not at all</b>	<b>No response</b>
Language differences	22	5	1	
Difficulties related to exchange of information and data	21	4	3	
Differences in training, expertise and methodology	18	7	3	
Difficulties related to access to information and data	17	8	2	1
Financial burden	16	8	3	1
Differences in equipment / technical interoperability	12	12	3	1
Difficulties related to preparation	11	12	5	
Lack of executive powers of guest officers	8	12	7	1
Cultural differences	5	8	15	
Other	3	1		

**Table 7: Obstacles to cross-border cooperation in Joint Operations**

As can be seen from the table, most countries identified language and data exchange difficulties as important issues affecting cooperation. Other significant issues were training differences, difficulties related to access to data, and the financial burden of joint operations.

- *Language differences*: most countries found that the practical problem of communicating with officers who spoke different

languages was an important obstacle - language problems always occur in practice and are often hard to overcome. Although some countries indicated that the general approach of using English as the working language during joint operations is useful, others mentioned specific difficulties since some countries have relatively few border control officers who speak English. This sometimes causes difficulties in finding the appropriate resources in the national services to participate in joint operations. As a result, certain States are able to work together in a much easier way (e.g. Germany and Austria or France and Belgium) than others (e.g. Spain and Poland). It was noted however that the diversity of languages, when it does not adversely affect the communication between officers, can be very useful for the functioning of the joint operation itself.

- *Difficulties related to exchange of data and information:* Since most cross border cooperation that takes place today is based on exchange and sharing of information and data, any problems experienced in this area might prove to be major obstacles to a smooth functioning. Difficulties in exchanging information such as issues with interoperability, procedural factors and data protection could have an important impact on efficient cooperation. For instance it is sometimes cumbersome to get information from a foreign authority which is of a different type (e.g. military to civil etc.) or from a State that has not yet fully applied (or will not apply) the Schengen “acquis”. Moreover, IT-infrastructure and related systems or databases are different in various Member States, and exchanging data can often be complicated by compatibility and interoperability issues.
- *Differences in training, expertise and methodology:* many countries have placed a high emphasis on the importance of common levels of training and expertise of the officers sent to participate in joint operations. A good preparation before the joint operation regarding the specific objectives of the operation as well as the host country’s legislation, language and culture are considered extremely important. The development of a core curriculum in order to have a level-playing field would make cooperation easier. The establishment of a common vocabulary was also mentioned as useful.
- *Difficulties related to access to data and information:* the foremost issue in this question relates to the differences in access rights of the different services of the relevant States with the main distinction being between those that do and those that do not have access to SIS. There are also technical difficulties in accessing home-country databases (including SIS) while an officer is operating abroad. Also, data protection provisions are an obstacle to granting access to foreign

officers. It is clear that when personal data has to be exchanged the lack of a legal basis to exchange this information in the context of border control operations is an important issue.

- *Financial burden of joint operations:* many relevant States considered the financial burden of importance. Since the States sending the officers for the joint operation have to bear the costs for their officers, some remarks mentioned that it would be easier if an EU agency (e.g. FRONTEX) could finance these operations. Financial obstacles sometimes restrain cooperation between affluent and less affluent States.

On the question whether the lack of executive powers was an obstacle to efficient cooperation, it is interesting to note that only 8 of the relevant States indicated that it is. Some of the opinions expressed in this context indicated that there was no need to confer executive powers since the joint operations that have been conducted have been successful and have met their stated objectives of exchanging information and practices, advising and learning from each other. As a result, the lack of executive powers was considered quite irrelevant since the information exchange and advisory role played was adequate in itself. In the future however, this lack of executive powers could be crucial if the objectives of the joint operations would change in such a way that they required guest officers to fulfil a more active role other than observer or advisor. In this scenario many States did agree that the lack of powers would be an important issue. However, even in this situation it was difficult for certain border control officers of some States<sup>114</sup> to envisage a situation in which their State might be required to grant executive powers on their territory to guest officers since they could not imagine a situation in which an operation of such a type might be needed on their territory. As mentioned by one State, reciprocity in this context is not easily applied since the specific border control needs can be very specific to a certain border region.

### ***Non-legal obstacles to conferring executive powers***

The practical obstacles to cross border cooperation in which we addressed, among others, the issue of the lack of executive powers conferred to guest officers have been extensively developed above. In order to complete the picture, it is useful to look at other non-legal obstacles such as cultural issues or political standpoints that might pose problems for the conferring of these executive powers to guest officers.

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<sup>114</sup> This holds in particular with respect to those States where there are a relatively limited number of border control related problems (e.g. Denmark).



This question was addressed during the interviews conducted, by the following question:

**Section 3: Obstacles to conferring executive powers to guest border control officers**

**Question 3.2:**

*Are there obstacles of a practical, political or cultural nature that prevent guest border control officers from other countries to exercise powers in your country?*

The table below presents an overview of the numbers of countries that mentioned obstacles of a cultural, political or practical nature for the conferring of executive powers.

<b>Non-legal obstacles to Conferring Powers (3.2)</b>		
<b>Obstacle</b>	<b>Countries</b>	<b>Examples</b>
Cultural	8	<ul style="list-style-type: none"> <li>• Historical associations with invasions and occupations by other nations</li> <li>• Euro-sceptic social climate</li> <li>• Citizens will not easily accept foreign officers operating on their territory</li> <li>• Historical cultural issues with certain other nations</li> </ul>
Political	11	<ul style="list-style-type: none"> <li>• Border control activities are very politically sensitive</li> <li>• Issue of sovereignty - more confidence and political will required</li> <li>• Political climate not conducive to allowing foreign officers to operate (especially independently)</li> <li>• Any change in this context will require strong political support</li> </ul>
Practical	12	<ul style="list-style-type: none"> <li>• Language differences - both for interacting with fellow officers and visitors as for report writing (inadequate interpretation)</li> <li>• Financial aspects of sending officers to participate in joint operations</li> <li>• Knowledge of host country legislation and legal scenario</li> <li>• Access to information and data</li> <li>• Exchange of information and data - data privacy and interoperability issues</li> <li>• Rank-based powers</li> <li>• Knowledge of the region (geography, terrain, culture, history)</li> <li>• Differences in training levels</li> </ul>

**Table 8: Non-legal obstacles to conferring powers to guest border control officers**

As can be seen in the table above, most obstacles mentioned tend to be practical in nature and were also covered by the previously discussed questions in Table 7.

An important and often cited political obstacle is the sovereignty issue - the control of its borders is closely associated to the sovereignty of a nation and is therefore an obstacle that requires political will to overcome. Moreover, governments often do not favour allowing foreign officers to operate on their territory and this too will require effort to change.

With regard to cultural obstacles, a few countries stated that the presence of a foreign officer operating on their territory would not be acceptable to their citizens especially if the foreign officers happen to be from a nation with whom they have a history of invasion, occupation or other historic or cultural issues.

For more details on the responses of the individual States, please refer to the information contained on the CD-ROM.

### **Practical problems arising due to the lack of executive powers**

The lack of executive powers for guest officers has practical implications for the way in which the officers exercise their duties and prerogatives when operating abroad. A number of issues and practical problems were identified during the discussions with the representatives of the relevant States:

- Limited added value of guest officers who are allowed to only provide advice and not concretely contribute to controlling the border, especially when it could be opportune to address a crisis situation or when a mission has a long duration (e.g. an operation with a duration of longer than just a few weeks).
- De-motivating effect for officers who are trained to perform a full range of duties but are limited to only a few, in an observational capacity. Officers are trained (and even have the obligation and duty) to act when they are confronted with illegal activity (at the border). It can be psychologically difficult for these officers when involved in an operation abroad not to act when they are confronted with the same issues.
- Inadequate use of training and skills - officers with a specialist training in certain areas cannot use their training since they can only act as observers.
- Time-consuming effect and a significantly reduced efficiency if each guest officer needs to be accompanied by a host officer.

An often expressed opinion during the discussion was that all cross-border activities would be more efficient if the approach towards

conferring executive powers was more harmonised, or at least more symmetrical and reciprocal since the current situation exhibits wide differences between Member States.<sup>115</sup> Moreover, as stated by one representative, “for any future initiative in the area of sharing border control tasks and providing e.g. rapid intervention teams, to take off in any meaningful way, the lack of executive powers for guest officers would be an important obstacle”.

### 4.3 Other examples of cooperation

The next part of this document gives a short overview<sup>116</sup> of some interesting examples of other areas of cooperation that show similarities with the joint operations that were taken into consideration for this study. All of them involve officers on mission for external operations.

Some of them were selected because they describe a cooperation environment in the domain of border control, as for example the Canada-US cooperation. Others were selected because they describe cooperation in other areas such as customs, competition policy or police cooperation where the legislative framework or the practice is already in a more advanced stage. Examples of organs that represent such types of cooperation are on the one hand the European Gendarmerie Force (EGF or EuroGendFor) and on the other hand, OLAF, the European Anti-Fraud Service. These three types of cooperation will be examined in further detail in this chapter and the annexes but it goes without saying that other areas of European cooperation exist. Peacekeeping activities take place under the aegis of the UN and the Eurocorps (1992). Customs is another domain where trans-national cooperation has been put into practice that allows for the exercise of certain rights by officers on the territory of a particular Member State. Joint Investigation Teams have been operating in the domain of criminal investigation based on the Convention on Mutual Assistance in Criminal Matters. Guest officers in such teams have been granted relatively comprehensive prerogatives under the supervision of the host authorities. Extensive powers have been conferred in the area of police cooperation (e.g. in the framework of hot pursuits under Art 41 of the Schengen Convention). A closer cooperation in the area of border control should in principle not face additional obstacles if the adequate legal basis would be developed, since the concept of burden sharing and the need for an integrated management of the external borders have been stressed repeatedly by the Member States through the Council. The following examples illustrate areas that have proven

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<sup>115</sup> E.g.: whereas the German normative framework offers a legal basis for the conferment of executive powers in its police act, this does not occur in other national normative frameworks.

<sup>116</sup> The Annexes present three areas into more details.

the feasibility of a close cooperation between officials from various countries or sui generis institutions, to operate on the territory of a host country.

#### 4.3.1 Integrated Border Enforcement Teams at the US-Canada border

A good example of mutual conferment of powers in the domain of border control can be found outside Europe, at the long border between the U.S. and Canada. Trans-border cooperation between the various law enforcement services involved is crucial to balance the economic interests with the interests of national security. Both countries share the same objectives namely to ensure that the border is open for legitimate business, but closed to crime and illegal immigration. As far as executive powers are concerned, joint operations are already taking place in the maritime context where foreign police or custom officers can be present and assist during operations at the borders. In this context, the integrated Border Enforcement Teams (IBET) have been created, providing multi-agency law enforcement teams that were originally developed in 1996 as an innovative method to address cross-border crimes along international land and marine borders between British Columbia and Washington State.

In the Canadian system there are no obstacles for foreign authorities interviewing a person as long as this person cooperates on a voluntary basis. US officers do not have the powers to arrest persons however, or to seize goods. In the criminal field: there are agreements in the domain of mutual legal assistance in criminal matters allowing Canadian authorities to perform certain compulsory measures on behalf of foreign investigators. A foreign Court can request a Canadian Court to take compulsory testimonies for example.

#### 4.3.2 EuroGendFor

The EuroGendFor (EGF) is a new project gathering five European Member States (France, Spain, Italy, Netherlands and Portugal). Its creation aims at gathering personnel from police organisations with a military character and creating a European force that could be “at the disposal” of different institutions but first and foremost of the European Union to maintain order in crisis zones outside of the territory of the European Union (normally the Petersberg missions e.g. in FYROM etc., but with particular regard to Substitution Missions this includes security and public order missions, advice for local police in their day-to-day work and conducting public

surveillance, traffic regulations, border policing<sup>117</sup> and general intelligence). The EuroGendFor is an intergovernmental cooperation, without legal personality. Therefore all “common” decisions are taken unanimously, and moreover, each country has full freedom to participate in a specific action or not. The operational hierarchy - a permanent staff where each member stays appointed by his Home State - is divided in three levels: the headquarters, the working group and the CINIM. This structure, represent a mixture of military officers, technicians and diplomats. By definition, the project is reserved for countries having “gendarmerie type” forces (this is a barrier for the enlargement of the initiative to other Member States).

### 4.3.3 European Anti-Fraud Service (OLAF)

Besides the areas of cooperation presented above, there are some other areas of interest. One of them is OLAF administrative investigations in the Member States. These operations are also relevant for the study to the extent that they authorise the presence (as observers) of other Member States’ officials and foresee for the execution of certain powers by Commission officials.

OLAF officials can perform investigative activities in the Member States in the framework of strengthening the fight against fraud, corruption and any other irregular activity adversely affecting the Community’s financial interests, as well as any other act or activity by operators in breach of Community provisions. In the framework of our study, Unisys has interviewed Mr. Walton George, Head of Unit Customs, Cigarettes and VAT. His team is composed of Commission staff and national experts.

The Regulation concerning investigations conducted by the European Anti-Fraud Office<sup>118</sup> specifies the nature of the investigation activities by OLAF officials. Article 2 of this regulation defines the term administrative investigations as meaning all inspections, checks and other measures undertaken by employees of the Office in the performance of their duties, in accordance with Articles 3 and 4, with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation.

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<sup>117</sup> Conducting border policing missions and training police officers as regard international standards are tasks that EuroGendFor expects to deliver: [http://www.eurogendfor.org/mission\\_tasks.htm](http://www.eurogendfor.org/mission_tasks.htm)

<sup>118</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) Official Journal L 136 , 31/05/1999 P. 0001 – 0007.

Article 3 of this Regulation describes the scope of the powers in the domain of external investigations. The first paragraph of article 3 states that: “*The Office shall exercise the power conferred on the Commission by Council Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot inspections and checks in the Member States*”.

In a recent proposal of 2004<sup>119</sup> amendments were proposed to article 3 of the Regulation concerning investigations conducted by the European Anti-Fraud Office allowing for a broader scope of executive powers for external investigations. If the proposal would be adopted: OLAF officials will require the power to, under certain circumstances,

- be given access to any relevant information held by the institutions, bodies, offices and agencies connected with the matter under investigation
- pass on this information to the competent authorities of the Member State

OLAF officials cannot impose sanctions directly. They are allowed to investigate to find proof of fraud, the final authority remaining in the hands of the local institutions. On the other hand, the reports that are the results of the investigative activities of OLAF officials can be used as evidence in administrative or judicial proceedings (opened within the Member State in which the investigation took place).<sup>120</sup>

#### 4.3.4 Cooperation between customs administrations

Another interesting example of the conferment of executive powers can be found in the domain of cooperation between customs administrations. The domain of customs administrations is of course different from the domain of border control, since the focus is on the fight against cross-border crime through the prevention, detection, investigation and prosecution of activities in the areas of irregular or illegal movement of *goods* and the trafficking in prohibited goods. Nevertheless there is a clear link between border control related to persons (the object of this study) and border control activities related to goods. This is due to the geographic

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<sup>119</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) COM/2004/0103 final – COD 2004/0035.

<sup>120</sup> Art 8(3) of the Regulation 2185/96 on “on-the-spot” checks by the European Commission (OLAF) agents stipulates the admissibility of the Office reports as evidence in administrative or judicial proceedings (opened within the Member State in which the investigation has been done).

delineation of their competences (the border area) and the fact that in some of the Host States custom authorities also participate in activities related to border control (related to persons). In Switzerland the main border control authority is in fact part of the customs department.

The competences of customs administrations differ widely between Member States. In some Member States of the European Union, customs have much greater competence than in other Member States and are law-enforcement agencies with powers of criminal investigation and even prosecution. EU customs provisions are generally wholly within the jurisdiction of national customs administrations.

The Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations (from here onwards referred to as the Naples II Convention) contains a number of provisions allowing customs administrations to engage in different forms of cross-border cooperation. Cross-border cooperation is defined in article 4, 9 of the Naples II Convention as “cooperation between customs administrations across the borders of each Member State”. This also means that customs officers can be on missions in the territory of another Member State.

Art. 20 of the Naples II Convention<sup>121</sup> describes the scope of the competences of guest officers in the framework of hot pursuit. Pursuing officers may carry their service weapons (except for cases (i) and (ii) described in art. 20 e), but they may only use them in case of legitimate self-defence.

Furthermore the scope of their competences includes the right to apprehend if competent authorities in whose territory the pursuit is taking place are unable to intervene quickly enough (art. 20 paragraph 2 (b)). In that scenario, the guest officer has the right to perform a security search, use handcuffs during transfer and seize objects carried by the pursued person (Art. 22, 4, f).

Art. 21, 3 of the Naples II Convention describes the scope of the competences in the framework of cross-border surveillance. Here, the right to apprehend is not included.

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<sup>121</sup> It should be noted here that the Naples II Convention has thus far, not entered into force yet as Italy (as the only Member State at the time of adoption of the convention) has not submitted the required instrument of ratification. However, based on article 32 § 4 of the convention, most Member States have made a declaration of anticipated entry into force, making the provisions of the convention applicable in the relations between these States.

### 4.3.5 Joint investigation teams

The Naples II Convention provides the possibility of setting up joint investigation teams within the scope of the convention. A team set up in accordance with article 24 of the convention is based in a Member State and comprises officers with relevant specialised skills. In order to implement difficult and demanding investigations of specific offences or coordinate joint activities to prevent and detect particular types of offences and obtain information on persons involved, these international officers work together for a limited period of time.

Art. 24, 3 of the Naples II Convention explicitly states that, within the framework of joint special investigative teams “*Membership of the team shall not bestow on officers any powers of intervention in the territory of another Member State.*”

In the domain of joint investigation, there is other EU legislation that is particularly relevant, namely the Framework Decision of 13 June 2002 on joint investigation teams.<sup>122</sup> Art. 1, 6 of this Framework Decision foresees the possibility to entrust second members of the joint investigation team with the task of taking certain investigative measures for a specific purpose and a limited period of time (in particular in the context of investigations into criminal offences having links with other Member States or when coordinated and concerted action in the Member States is necessary).<sup>123</sup> A similar provision can be found in the second additional Protocol of 8 November 2001 to the European Convention on mutual assistance in criminal matters (art. 20, 6 of the second additional Protocol of 8 November 2001) and in article 19 of the United Nations Convention on Trans-national Organised Crime of 15 November 2000.

### 4.3.6 European Commission powers in the area of competition

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<sup>122</sup> The provisions of the Framework Decision are taken from article 13 of the 2000 Convention on Mutual Legal Assistance in Criminal Matters. The article was – due to the terrorist attacks of September 11<sup>th</sup> 2001 – copied into a Framework Decision in order to use the instrument of a joint investigation team before the ratification of the convention was completed. When the convention will enter into force for all Member States, the Framework Decision will cease to exist. In the meantime, similar to the Naples II Convention, declarations for anticipated entry into force of the convention are possible and have been made by several Member States.

<sup>123</sup> The decision of entrusting the seconded member is made by the team leader and can only occur if this has been approved by the competent authorities of the Member State of operation and the seconding Member State.



European Commission officials also have certain executive powers in the area of competition. Art. 11, 7 of the Council Regulation (EC) on the control of concentrations between undertakings of 20 January 2004<sup>124</sup> strengthens the Commission's fact-finding powers by granting the Commission the power to take oral statements to be recorded and used as evidence in proceedings where the interviewee consents. Article 13 of the EC Merger Regulation stipulates the Commission's powers of inspection. For the sake of convenience, the two first paragraphs of the article can be found below:

*Article 13*

*The Commission's powers of inspection*

*1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.*

*2. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:*

*(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;*

*(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;*

*(c) to take or obtain in any form copies of or extracts from such books or records;*

*(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;*

*(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.*

Further paragraphs of this article 13 clarify the obligations of the Commission, the competent authorities of the Member States involved and the accompanying persons. This article does provide for an interesting best practice in the scenario where officials of DG JLS or officials of the Frontex agency for example would be involved directly in joint operations.

Allowing Commission officials and/or accompanying person to conduct interviews, to enter any premises, land and means of transport (article 13, 2 (a)), to examine the documentation ("books and other records" (article 13, 2 (b)), or to ask for explanations on facts or documents relating to the subject matter (article 13, 2 (b)) are all powers that could also be applicable to the domain of border control. The competence to impose fines on persons (art. 14 of the EC Merger Regulation) is another power that could be interesting to confer.

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<sup>124</sup> From now on referred to as the EC Merger Regulation (Council Regulation (EC) No 139/2004.



# 5 Comparative analysis of legal rules

## 5.1 Section summary

This section examines the different approaches towards conferring executive powers to foreign border guards and compares them.

In general it is the constitution of every country that determines the principles or the possibility to confer powers to officers from foreign States or from international institutions (under general conditions like reciprocity or the existence of a specific agreement), while the degree to which certain executive powers can be conferred to foreign officers is based on provisions in the national normative framework (this is the case in the aforementioned German example) or (on the provision of, on the requirement of) international agreements (this is the case in the other relevant States).

This section starts with an examination and comparison of these two cases.

The most important findings are:

- The requirement of (mostly bilateral) international agreements appears to be disadvantageous in an environment with a high number of stakeholders (EU Member States with an interest in EU border control).
- The aforementioned German provision could be considered as a best practice because it:
  - allows for the necessary flexibility to confer executive powers while hosting joint operations.
  - offers the possibility nevertheless to take the specific bilateral relationship with home States into account.
  - creates transparency for bodies that are in charge of coordinating joint operations

To complement the general comparison, this section examines the conferment of specific executive powers in more detail. Overall, the results of the analysis show that the level of conferment of executive powers very much depends on:

- the existence of a legal basis for such powers

- the type of executive power (ranging from an acceptance of the wearing of uniforms by all relevant States to a very limited acceptance of the conferment of sensitive powers such as accessing information systems, accessing private property, deciding on entry/exit, etc...)

The more detailed assessment for the specific executive powers also shows, on the other hand, that best practices do exist. Furthermore, the analysis of the normative framework and the interviews with experts have shown the manner in which these powers are exercised and the legal safeguards.

## 5.2 German approach

### 5.2.1 Description of the relevant provisions

The German normative framework provides the most complete example<sup>125</sup> of a legal basis in the national normative framework for conferring executive powers to foreign officers.

Conferring executive powers to foreign officers is regulated by §64 (4) of the German Police Act<sup>126</sup>.

This paragraph makes a distinction between law enforcement officers of third countries and Law enforcement officers of other EU States.

- Law enforcement officers of third countries are allowed to *perform official tasks* in the area of responsibility of the Federal Border Police if there are international accords. Acts belonging to the States' Sovereignty can only be enforced by officers of other States on the basis of an international agreement according to article 59 paragraph 2 of the German Constitution.
- Law enforcement officers of the EU States can perform duties of law enforcement of the German Federal Police, *without the necessity of an international agreement* in agreement with the competent authorities of other States. The functions and executive powers of this type of officer are limited to the rules concerning section 63 paragraph 2-4 of the German Police Act (Special Constabulary or auxiliary officer).

Paragraphs 2-4 of Section 63 of the German Police Act are shown below:

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<sup>125</sup> Since March 2005, France has also provided a general legal basis for conferring executive powers to foreign officers in the new article 88-2 of the French Constitution.

<sup>126</sup> German Police Act: Gesetz über die Bundespolizei of 19 October 1994.

**Section 63 of the Act on the Federal Border Police  
Law enforcement service, auxiliary police officers**

(2) *The Federal Border Police shall have the right to appoint suitable persons as auxiliary police officers who shall perform certain duties if this is deemed necessary*

1. *in monitoring the borders and checking cross-border traffic,*
2. *in averting danger in the field of railway facilities of the federal railways,*
3. *in order to prevent attacks on aviation security or*
4. *in order to protect the constitutional organs of the Federal Government and the Federal Ministries and to protect the facilities of the Federal Border Police,*

*Any such appointments can be revoked at any time.*

(3) *The auxiliary police officers shall have the powers of Federal Border Police officers within the framework of the duties assigned to them. However, they shall not be authorised to use direct force under Sections 9 to 14 of the Act on the use of direct force by law enforcement officers of the Federal Government when exercising governmental power.*

4) *The Federal Ministry of the Interior shall appoint the competent Federal Border Police authorities who shall be responsible for supervising and recruiting the auxiliary police officers.*

An analysis of section 63 of the German Act on the Federal Police allows us to draw the following conclusions.

Conferring executive powers is possible both for border surveillance as well as border check activities (Section 63, (2), 1 German Police Act). Removal operations however are not included in the list of Section 63 (2). This implies that there is no legal basis in the German national normative framework which currently allows for a conferment of powers in the framework of removal related activities. The same holds for the conferment of executive powers to non-EU officers. Section 64 (4) specifically requires an international agreement for the conferment of official tasks or performance of sovereign acts.

Even for border surveillance and border control activities, certain safeguards exist. The set up of the normative framework is not constructed in such a way that foreign border control officers present in Germany can automatically perform border control activities on the basis of section 64 of the German Police Act. In other words, the conferment of powers is not an automatic procedure. It depends on an explicit appointment by the Federal Border Police. Moreover, the conferment can be revoked at any

moment. This set-up therefore requires an individual appointment for each foreign border control officer. An additional safeguard is the fact that guest border control officers are supervised by home officers when they perform border control activities.

Once the foreign officer has been appointed as an auxiliary police officer, the scope of his/her executive powers are defined ab initio in a broad sense. Section 63 (3) of the German Police Act allows the foreign border control officer to have “all the powers of federal police officers”, with the exception of the powers described in section 9 to 14 of the Act on the use of direct force by law enforcement officers of the Federal Government when exercising governmental power (from now onwards referred to as the Act on the use of direct force).

The powers of federal German police officers are described in a large variety of different legislations. The most important act is the German Police Act. Other relevant acts are mainly the Law on Residence (Aufenthaltsgesetz), the Law on Identity cards (Gesetz über Personalausweise), and many more...<sup>127</sup>.

The general framework of the powers of the Federal Police is described in section 14 of the Federal Police Act (taking the necessary measures to protect the State, life, health, liberty and other essential values). Later sections describe concrete executive powers. Section 22 of the Federal Police Act provides the legal basis for the right to interview, stop persons and request their ID. Furthermore this article states that, if requested to do so, the person shall be obliged to hand over any identity documents they are carrying for inspection. Section 23 provides for the right to check documents and establishing a person's identity. Besides those powers, the federal police has the right to take a person into custody (section 39) and the right to search persons and objects (Section 43 and 44). The right to seize objects (confiscation of goods) is laid down in section 47.

These executive powers are therefore the powers that are conferred to foreign officers when they are appointed as auxiliary officers on the basis of section 64 of the German Police Act.

A closer look at section 9 to 14 of the Act on the use of direct force clarifies the limits of executive powers of foreign officers provided by law. A foreign officer cannot:

- make use of the threat of using service weapons and firing warning shots;

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<sup>127</sup> For a complete list of relevant legislation in the domain of border control the reader is referred to the Interview Guide containing the detailed information on Germany (PBO\_IGJO\_DE). This interview guide can be found on the Cd-rom (Annex 10.1).

- make use of service weapons outside of the scope of self-defence or measures of emergency protection;
- make use of explosives.

It should be noted that foreign officers who have been appointed as auxiliary officers are therefore allowed to make use of coercive instruments (such as handcuffs) in the cases described in Section 8 of the Act on the use of direct force by law (the case of a threat to safety or resistance, the occurrence or suspicion of flight and the possible attempt for suicide).

If we go into more detail, all the tasks enlisted in the interview guide can be performed in Germany by guest officers except for the following:

- Forbid access to an area close to the border (executive power 5.5)
  - German authorities have interpreted this question as making the decision not to allow entry to the territory. The decision not to allow entry to German territory is made by the superior officer. Staff with purely executive assignments gather the information and prepare a document stating that the person does not fulfil the requirements to enter the territory. For the future: if there would be a constant presence of foreign officers acting on behalf of a EU Border Guard, then it might be possible to confer this executive power also.<sup>128</sup>
- Intercept or monitor telecommunications (executive power 5.8)
  - Active listening can not be done by guest officers on the basis of article 64,4 Police Act, since this is a judiciary task and the normal procedure of international legal assistance should be followed.
- Access to property and search it in detail (executive power 5.10)
  - A guest officer cannot do this on his or her own initiative.
- Carry out pre-border checks in third countries (executive power 6.1)
  - A network of liaison officers exists and they advise or train airline- or security companies. They act as liaison officers, not as police officers when they

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<sup>128</sup> It is interesting to note that German interviewees make the distinction between refusing entry and allowing entry. *“Refusing the entry into the territory seems to have a stronger impact on the freedom of the persons and referral to the supervisor is the normal procedure in that case.” For allowing entry (executive power 6.8) this is different.* Guest officers are allowed to take the decision themselves on objective grounds whether or not to allow entry.

- perform such tasks and do not really perform border checks.
- Establish the identity of persons (executive power 6.15)
  - Search a person for additional ID information
    - The *decision* to interfere with basic rights of a person is left to the supervisor.
  - Take biometric data of persons
    - No legal basis exists in the current State of German law to take biometric data from persons. Persons can only be invited to provide biometric data on a voluntary basis.
- Refer the matter to customs authorities (executive power 6.15)
  - The person executing border control gathers information but it is the supervisor who takes that decision.
- Apprehend a person to be handed to national administration, police, customs or judicial authorities
  - The *decision* to interfere with basic rights of a person is left to the supervisor. Holding a person is a right of every citizen in emergency situations (§ 127, 1 Criminal Process Law)
- All the executive powers related to 3th line activities (executive power 6.26-8)
- The right to use a collective service weapon (executive power 8.1)
- The right to issue VISA, Residence Permit, Work Permit, Laissez-passer document (executive power 8.3)
  - These are positive administrative acts that represent public authority where a document is produced with an official signature. Only in the case where a foreign officer would really participate fully in border control operations could it be imagined that the guest officer performs these tasks (issuing a VISA or laissez-passer document) also in Germany.
- Enter data in databases (executive power 8.5)
  - Access to databases is allowed but entering data not.
- Provide logistical support to host officers (e.g. patrol vehicles, helicopters) (executive power 8.11)
- Report to authorities of the host country (executive power 8.12)
- Perform command and control activities (executive power 8.13)
  - A host officer supervises the guest officer.

Even when considering the above exceptions, we can conclude that guest border control officers that have been appointed as auxiliary officers have a large scope of executive powers in Germany.

The following safeguards exist however:



- The competent authority of the home country has to agree on the appointment.<sup>129</sup>
- The powers are limited to the domain of border control and border surveillance.
- The legal basis for the conferment of executive powers is the act of the appointment itself. This appointment can also be formulated in a restricted, or conditional manner if the nature of the joint operation would require this. Moreover the letter of assignment can clarify the scope of the 'border control appointment' in more detail.
- The supervision by host officers is an additional safeguard for a completely discretionary use of powers by the guest officers.

The legal basis of § 64 (4) of the German Police Act only applies in the case when no other bi- or multilateral agreement applies. Germany has ratified a number of agreements that are related to the area of border control. The following table presents an overview of the agreements that were indicated to be particularly relevant by the interviewees.

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<sup>129</sup> Even though no examples of this nature have been identified, specific conditions or constraints for this agreement could also be incorporated in a bilateral agreement with Germany.

<b>Agreement</b>	<b>Year of signature</b>	<b>Type of agreement</b>	<b>Parties involved</b>
Schengen I (Agreement) implemented	1985		15 MS
Schengen II (Convention) implemented	1990	40/41, Others	15 MS
Prüm Convention	2005	40/41,	8 MS
Baltic Sea Region Border Control Cooperation	1997		8 MS
Agreement on juxtaposed control	1979	CA	DE, FR
Agreement (police & customs)	1997	40/41,JO	DE, FR
Police Cooperation Agreement	1996	40/41,JO	DE, LU
Police and customs cooperation agreement	2000 (transposition in Germany law)	40/41	DE, AU
Agreement on police and customs cooperation	2000	-	DE, BE
cross-border cooperation in the police and legal fields	1999	40/41,JO,JP,Other	DE, CH
Police cooperation office	2003	JO	DE, BE, LU
Agreement (police & border)	2000	41,JP,JO	DE, CZ
Agreement on police cooperation	2001	40/41	DE, DK
Agreement on police and customs cooperation	2002	40/41,JO,JP	DE, PL
Agreement on facilitation of border control		CA	DE, PL
Agreement on facilitation of border control		CA	DE, CH
Agreement on facilitation of border control		CA	DE, CZ

The table enlists a large variety of different types of agreements. Certain agreements allow for the presence of guest officers to perform certain tasks on German territory on the basis of provisions in international agreements related to observation or hot pursuit in the framework of the Schengen Implementing Convention (type: 40/41). Other provisions allow for the presence of guest officers in joint offices for the purpose of information exchange (type: JO). Certain agreements contain provisions allowing for joint patrols (type: JP) or checks abroad (type: CA).

The bilateral agreement between the Swiss Confederation and the Federal Republic of Germany on the trans-border police and judiciary cooperation of 27 April 1999 contain the most far reaching provisions with respect to allowing actions by foreign officers on the territory of the host country.

Art. 21 of the agreement of 27 April foresees the exchange of officers without them acting on the basis of “hoheitliche Befugnisse”, or Public Powers. Whereas art. 22 of this agreement describes the cases where officers are allowed to perform actions that would be interpreted as exercising “Hoheitliche Befugnisse”, or Public Powers (including police powers) . It is interesting to note that the exercise of police powers can only be done under supervision of the host officer. Art. 22 (4) specifies that this should imply the presence of the host officer, *in principle*.<sup>130</sup> In stating this as such, it is possible to deduct that exceptions to the rule of presence of the host officer are foreseen within the normative framework. Forms of supervision without the actual presence of the host officer could thus be allowed.<sup>131</sup>

## 5.2.2 Practice

In practice, foreign officers are not allowed to work independently from a German supervisor. In order to organise the operation, the German Federal Ministry of the Interior (BMI) decides whether or not to allow other competent authorities to send officers of other States to Germany. The BMI usually appoints the appropriate BPOLAMT as responsible for the supervision and appointment of foreign officer. The BPOLAMT then informs the foreign officer on his duties and executive powers and confers the permit to carry a service weapon. The appointment of the foreign border control officer and therefore the conferment of executive powers, is documented by a letter of assignment<sup>132</sup>.

This letter of assignment contains the name and signature of the assigned officer and specifically states that:

- the assignment is revocable at any time;
- the officer will be exercising the sovereign rights pertaining to the Federal Police and that she/he is a public official under the terms of criminal law;
- the assignment to law enforcement duties with the Federal Police does not confer civil service status nor does it constitute an employment contract.

Furthermore it contains clarifications on the scope of competences of the foreign officers. The example letter of assignment that was analysed in the context of this study contained an explicit referral to the following executive powers:

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<sup>130</sup> Art. 22 (4) of the bilateral agreement of 27 April 1999 between Austria and Germany concerning the cross-border cooperation “Die nach Absatz 1 unterstellten Beamten dürfen nur unter der Leitung der einsatzführenden Stelle und in der Regel in Anwesenheit von Beamten des anderen.”

<sup>131</sup> More information related to the relevant German-Swiss and German-Polish agreement can be found in section 3.4.2.2.

<sup>132</sup> “Betrachtungsurkunde”

- The right to stop and question persons regarding their identity and to request their identity documents to be handed over for inspection within the borderland;
- The right to stop and question persons in order to prevent unlawful entry and to police cross-border traffic
- The right to use coercion or force if necessary to carry out the duties.
- Authorisation to check personal data against computerised databases;
- The right to carry a weapon

It should be noted that these statements only serve the purpose of clarifying the scope of competences of the guest officer. The paragraph of the letter of assignment containing these executive powers starts with the sentence. “The officer is therefore authorized, *among other things*, to...”. The more detailed list of executive powers that are conferred to guest border guards in Germany can be found in the previous section (5.2.1)

### 5.2.3 Comments

Germany is the only State that foresees a provision of such a general nature on conferring executive powers on border guards, in its national normative framework. This allows for the necessary flexibility with respect to concrete requests for participation in joint operation or with respect to conferring executive powers. It should also be noted that provision § 64, 4 of the German Police Act has to be interpreted in connection with international (bilateral) agreements that might exist. This ensures that the specific bilateral relationship between two countries can also be taken into account.

The new article 88-2 of the French Constitution establishes similar principles, providing that “*the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed*”. This recent provision (March 2005) has not yet received application.

One aspect of the Austrian national normative framework, even though it does not provide for a general provision related to executive powers of foreign border guards in general, is worth mentioning here. The Austrian national normative framework does contain a general provision related to the right of foreign officers to carry service weapons on their territory. More information on this topic can be found in Section 5.5.3.2.

Outside of the scope of border control in the strict sense of the word, certain States have introduced provisions related to the right of foreign police officers to follow persons and apprehend them, within the framework of articles 40 and 41 of the Schengen

Implementation Convention. §20A of the Norwegian Police act provides an illustration of such a provision.

## 5.3 Requirement of international agreement

### 5.3.1 Explicit requirement

In some cases, the existence of an international agreement is explicitly required in the national framework to allow for activities of foreign authorities. A very clear example in this regard is offered by the Slovak legislation.

In the Police Act 171/1993, Art 77 a, b and c deal with performances of foreign authorities in **Slovakia** and Slovak authorities abroad. It states that these authorities can only perform police powers to an extent that has to be stipulated in international agreements.

An interesting counterexample of this approach is provided by **Czech** legislation where article 48 B §2 of the Police Act describes five areas (e.g. the fight against terrorist activities or financial crimes) where it is not necessary to have an agreement as a basis for a foreign police presence. In this case, it is sufficient to have the approval of the Police President and the foreign State. Border Control is currently not one of the five areas, therefore an international agreement would still be required in that field but Czech interviewees indicated that it could be considered to add border control as an extra area in article 48 B §2 of the Police Act.

Here, the **Hungarian** example is also interesting. Article 37 § (1), (2) of the Hungarian Border Guard Act states that:

*“The Border Guard shall co-operate with foreign policing agencies on the basis of international agreements or the principle of reciprocity. On the basis of international agreement, a professional member of the Border Guard may in the course of fulfilling his policing duties act within his scope of authority specified by international agreement. A member of a foreign agency fulfilling border policing duties may act within his scope of authority specified by international agreement in the territory of the Republic of Hungary.”*

This type of provision allows for the necessary flexibility by allowing cooperation with foreign policing agencies to occur on the basis of the principle of reciprocity.

It should be noted that Art. 2a (1) of the constitution of Hungary stipulates the requirement of a treaty to exercise certain constitutional powers jointly with other Member States. Art. 2a (2) of the Hungarian constitution requires a two-third majority vote of the Parliament for the ratification of a treaty of this nature.

**Slovenia** provides an example of a provision in the national normative framework that on the one hand explicitly requires an international agreement but on the other hand gives an indication of the types of executive powers that can be conferred to them. Article 37 of the State Border Control Act on cooperation with foreign security forces states:

*“Notwithstanding the provisions of the preceding Article authorised persons of foreign States may enter the Republic of Slovenia and implement the measures of State border control determined by an international agreement and other tasks of international police cooperation, and Slovenian police officers may also implement such measures and tasks abroad in accordance with international agreements.*

*On a reciprocal basis, members of foreign security forces implementing the tasks and measures referred to in the preceding paragraph of this Article may wear uniform, carry personal weapons or other coercive devices in Slovenia if they are part of their official equipment without a special permit; however they may only use the weapons and other coercive devices if required to avert an illegal attack on themselves or on another person at that time.”*

The examples of explicit requirements that are mentioned above are examples of countries where a specific requirement of an international agreement is contained in regular statutory legislation. Besides these examples, a number of constitutional provisions contain an explicit requirement of a special type of law or treaty for the conferment of executive powers to international organisations, institutions or authorities representing them. More information on these provisions can be found in section 6.6.<sup>133</sup>

A limited number of provisions in constitutions explicitly refer to the conferment of executive powers to nationals of other States.

Art. 9, §2 of the constitution of **Austria** stipulates that legislation *or* a treaty can regulate the activity of foreign States’ agents as well as the activity of Austrian agents abroad. This implies that there is no absolute requirement of an international agreement within the Austrian normative framework. The same holds for **Sweden** where chapter 10, article 5, § 3 of the Constitution allows for the entrustment of an administrative function to another State *by means of a decision of the Parliament*.

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<sup>133</sup> They are also referred to, in the synoptic table (section 6.2) in the second column, using the wording “delegation to international institutions”.

The Constitution of **Ireland** contains the following general provisions enabling the transfer of executive powers for the purpose of international cooperation:

*'2. The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.'*<sup>134</sup>

*'4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.*

*2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.'*<sup>135</sup>

In matters of common concern, there is therefore no explicit requirement of an international agreement for the conferment of powers in Ireland, since the executive power of the State can also be exercised *on the authority of the Government* on the basis of art. 29 §4, 1° and 2° of its Constitution.

The **French** constitutional context does require an international agreement or European instrument based on the treaties for the conferment of executive powers. After the March 2005 revision of its Constitution with the purpose of making it compatible with the requirement of the rules related to the European arrest warrant and with the draft constitutional treaty, provides (art 88-2) that *"Subject to reciprocity... the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed* (meaning agreed in a bi-lateral or multilateral agreement or in a European instrument based on the Treaties, providing the base for an execution or for a transposition in national law by the French authorities).

### 5.3.2 Direct agreements between law enforcement services

The **Irish** Constitution (Art. 29) specifically allows for conferring certain executive functions of the State for the purpose of international co-operation in matters of common concern. Irish interviewees have also indicated the relevance of Chapter 3 §28 and chapter 8 of the Garda Síochána Act in this domain, since they serve as the Irish framework for future cooperation with the law enforcement services of other relevant States. Art. 28 allows the Garda Commissioner to enter into an agreement with a police

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<sup>134</sup> Article 28, §2 Constitution of Ireland.

<sup>135</sup> Article 29, §4, 1° and 2°, Constitution of Ireland.

service or other law enforcement agency outside the State, with prior consent of the Government.

Such agreements however, cannot be considered as international agreement (between States) and are administrative agreements or memorandums.

## 5.4 Pros and cons

At a time when Member States have decided to move towards an integrated management of the external borders, the lack of explicit provisions related to the conferment of executive powers to foreign border guards raises fundamental issues. Schengen States have a growing responsibility with respect to protecting the external borders on behalf of the other Schengen States. This also implies that more and more participation from officers of other Schengen States will occur. Joint operations are already taking place and the FRONTEX agency will coordinate more of these activities in the future.

There are other arguments that can be made in favour of a general provision (similar to the German provision):

- During the Study, the discussion with national practitioners concerning a framework of executive powers for foreign border guards has demonstrated the willingness to progress more generally, outside the scope of the multiple bilateral or multilateral relationship. General provisions would be at the same time clearer for all stakeholders and should provide enough flexibility to address the particular needs of the various local situations in the field of border control.
- When an ad hoc agreement exists between two neighbouring States, this does not clarify the situation of guest officers from other States (when their State is not a party in this bi-lateral agreement with the Host State).
- The pre-requisite of (multiple) international agreements makes the legal framework unclear for the FRONTEX agency coordinating joint operations.

By providing general principles, the German framework presents therefore advantages for anyone coordinating joint operations or participating in them, and could be used as an example for the mutual conferment of executive powers to officers of all other Participating States



## 5.5 Analysis per specific executive power

### 5.5.1 Introduction

The previous sections show that different approaches exist towards conferring executive powers to foreign officers. In order to perform a detailed comparative analysis it is therefore necessary to focus on particular executive powers. The following section addresses similarities and divergences.

Our analysis focuses on whether States allow for a particular executive power to foreign border guards on their territory, within their normative framework. This also implies that the legal basis could be found in a particular bilateral agreement thus conferring these types of powers only on border guards of a limited number of States<sup>136</sup>. This information is nevertheless very valuable since it gives indications on the willingness of a certain State to accept executive powers by other officers. Moreover it gives indications on the feasibility of the conferment of executive powers within a certain legal system.

Tables have been used In order to provide an immediate overview of these specific powers. For the interpretation of these tables, it is necessary to understand that:

- An x in a row of a certain State in the first column (y) indicates that the normative framework of that particular State foresees in the conferment of that particular executive power to guest border guards from another State.
- An x in a row of a certain State in the second column (n) indicates the opposite.
- An x in the third column is an indication of interviewees when they felt, based on their experience with joint operations, that it would be useful to confer this power in the future in order to ensure the efficiency of border control operations. It is clear that this answer was not requested in the case where the normative framework already provides for the conferment of this power.

### 5.5.2 Uniform

#### 5.5.2.1 Overview of the results

The following tables represent the results of the comparative analysis with respect to the right or obligation to wear a uniform:

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<sup>136</sup> And thus not offering a general provision allowing this for all relevant States.

Wearing uniforms (8.7a)				
Name	Y	N	F	Source
Austria	X			Prüm Convention Art 28 Agreement Slovenia-Austria facilitation control raid and road traffic (1999) art. 4
Belgium	X			Prüm Convention Art 28
Cyprus				Obligation according to interview
Czech Republic	X			Right: Art 11, 1 (a) German-Czech police and border control cooperation agreement (2000), obligation in hot pursuit situation: Art 8, 2 (e) German-Czech police and border control cooperation agreement (2000)
Denmark		X	X	Yes only in limited cases (framework of art. 40, 41 Schengen Implementation Convention): Police Cooperation Agreement with Germany (2002) (art. 13 (1))
Estonia				Obligation
Finland				Obligation
France	X			Prüm Convention, Art 28
Germany	X			Prüm Convention, Art 28 Art. 18 (3), 1 Germany-Poland Agreement on the cooperation between police and border control officers (2002)
Greece	X			Interview
Hungary		X		
Iceland				Obligation
Ireland	X			May be the case in joint operations. In Agreement between Ireland, UK and Northern Ireland on Police cooperation of April 2002, Article 2(b) on secondment of officers foresees that these officers shall have the right to wear a uniform, as a member of the Garda Síochána
Italy	X			Chambéry Agreement with France on Police Cooperation of 1997, Art 9(6)
Latvia	X			According to interviewees, in the agreement with Estonia on organising joint border checks of 1997
Lithuania	X			Interview
Luxembourg	X			Prüm Convention, Art 28
Malta				Malta has no relevant cooperation agreement. Consequently, nothing

				specified with respect to foreign officers wearing uniforms
Norway	X			Interview
Poland	X			Art. 18 (3), 1 Germany-Poland Agreement on the cooperation between police and border control officers (2002)
Portugal	X			Hot pursuit agreement with Spain, in accordance with Schengen Implementation Convention: Art 41(5.d)
Slovakia	X			Agreement on police cooperation and border control between the Czech Republic and Slovakia
Slovenia	X			Protocol on mixed patrols of 2004 with Croatia, Art 16, and Agreement Slovenia-Austria facilitation control raid and road traffic (1999) art. 4
Spain	X			Prüm Convention, Art 28
Sweden	X			Police cooperation agreement with Germany mentioned during interview
Switzerland	X			Art 30: German-Swiss trans-border police cooperation agreement (1999) <sup>137</sup>
The Netherlands	X			Prüm Convention, Art 28
United Kingdom	X			Toucquet Treaty between the UK and France on controls at Sea ports on the Channel and North Sea, Art 13(1)

**Table 9: Right for guest officers to wear their uniform**

### 5.5.2.2 Analysis of the results

In all the States that have been visited, there is a legal basis for guest border guards to wear uniforms of their home country within the framework of agreements. In some cases, not only the right exists, but even an obligation exists to wear these uniforms, as in Finland and Iceland, whereas it appeared from the information gathered in Portugal that the right or obligation to wear a uniform depends on the specific agreement concerned.<sup>138</sup>

<sup>137</sup> Allowed except when one State would not allow wearing a uniform or a weapon in a particular case under specific circumstances.

<sup>138</sup> Such as the Agreement between the Kingdom of Spain and the Republic of Portugal related to juxtaposed control and border traffic of 7 May 1981 and the Agreement between Spain and Portugal on mobile controls of 17 January 1994.

The legal framework of Hungary and Poland currently do not regulate this point. Interviewees from these States have indicated that this right or obligation therefore depends on the operational plan of each (joint) operation<sup>139</sup>. During the interview in Denmark it was specified that officers in uniform are only accepted within the 25 km from the border with Germany and Sweden where German/Swedish authorities can carry out hot pursuits under agreements based on Art 40 and 41 of the Schengen Implementation Convention.

### 5.5.3 Service weapons

#### 5.5.3.1 Introduction

Carrying firearms is a recurring problem in cross-border police actions, given that not every Member State provides legislation that allows foreign police officers to carry their firearms on their territory and vice versa. The same holds for the particular area of border control.

The cultures of the various law enforcement services show remarkable differences related to carrying service weapons. These distinctions are illustrated as follows:

- Border control officers do not have the right to carry weapons in every State (e.g. the **UK, Malta**). In other countries like **Norway**, police officers are usually not armed when operating in home forces, but carry a weapon when they participate in U.N. missions;
- **Polish** officers are, in principle not allowed to take their service weapon abroad based on a provision<sup>140</sup> in the Executive Act of the Polish Border Guard Act. However it is possible with authorisation from the Commander-in-Chief of the Border Guard. The organiser of the Joint operation should inform in advance if the weapon is required for the operation.
- According to the Internal Regulations of the National Police, **French officers** have the obligation to carry their service weapon when they wear their uniform. This has been the subject of discussions with Slovakia for example when it organised a JO authorising foreign uniforms but not weapons.

It should be noted that none of the Participating States have indicated an explicit prohibition to import weapons in their national

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<sup>139</sup> For every joint operation coordinated under the auspices of the FRONTEX: an operational plan is prepared.

<sup>140</sup> See Section 5.5.3.

normative framework<sup>141</sup> during the interviews. The right to carry a weapon is however strictly regulated and a permit is normally required. Therefore, since there was no legal basis for it (with the exception of Germany and Austria)<sup>142</sup>, it was not allowed outside of the scope of agreements. This is one of the reasons why only two countries have allowed foreign officers to import service weapons during joint operations organised under the auspices of the border centres, namely Germany and Austria.

The German example has been discussed previously in section 5.2.

### 5.5.3.2 Provision in the Austrian normative framework

In **Austria** a special provision (§ 8a) in the Weapons Act (1996)<sup>143</sup> was inserted in 2003 to provide for a legal basis for foreign authorities to import, own and carry weapons, that are not war material, in a limited number of cases. Relevant cases for border control are described in §8a:

- nr. 4: mixed patrols
- nr. 15: cooperation between national and foreign organs of security agents<sup>144</sup>

Wearing the service weapon is only allowed in relation with, and when it is necessary for, exercising their function and is limited in time.

Officers still need a permit (“Glaubhaftmachung”) to carry weapons, which still needs to be requested on an ad-hoc basis. They are obliged to carry this permit and to be able to show it on request.

The regulations of § 8a of the Austrian Weapons Act do not apply in cases where the right to import or carry weapons already exists on the basis of an international agreement or law.

### 5.5.3.3 Other provisions and practices related to service weapons

In addition to general regulations related to the possession and transport of firearms, and to provisions related to possible use of

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<sup>141</sup> However, Cyprus has very strict rules on carrying weapons, even in its Constitution (Art 7)

<sup>142</sup> Slovenia, Lithuania and Latvia have apparently also allowed this, on an occasional basis (based on information contained in an evaluation report from the land centre).

<sup>143</sup> Inserted in Weapons Act 1996 by BGBl. II Nr. 459/2003 of 30 September 2003.

<sup>144</sup> Der Zusammenarbeit zwischen inländischen und ausländischen Organen der Sicherheitsbehörden”

these arms for self defence or to protect life<sup>145</sup>, a limited number of national frameworks provide specific provisions applicable to guest border control officers.

**Slovenia** allows for importing and carrying weapons without a special permit, on a reciprocal basis (an international agreement is required). Art. 37, second paragraph of the Slovenian State Border Control Act specifies that foreign security forces may wear uniform, carry personal weapons or other coercive devices in Slovenia if they are part of their official equipment without a special permit; however they may only use the weapons and other coercive devices if required to avert an illegal attack on themselves or on another person at that that time.

The **Prüm agreement**<sup>146</sup> between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria allows for the use of weapons, ammunitions and other instruments that can be used for coercive measures in the case of legitimate defence of oneself and others for officers from a State party who are involved in a joint operation within another State party's territory. Outside of the scope of legitimate defence, the officer of the host country can also authorise foreign officers, on a case by case basis, and in respect of national law, to use service weapons, ammunitions and certain coercive instruments.<sup>147</sup>

Art. 28 (1) of the Prüm agreement states the principle that importing and carrying weapons is allowed. However every State also has the right to prohibit the use of certain service weapons, ammunition and coercive instruments.

The following questions with respect to weapons serve as important guiding criteria for a more in depth analysis of the international agreements.

- Do host border control officers have the right to carry service weapons?
- Do foreign border control officers have the right to import service weapons?
- Does an explicit legal prohibition exist with respect to importing and carrying weapons?
- Which types of service weapons are not allowed?
- Do foreign officers need a permit?
- Is there a requirement of reciprocity?
- Under which circumstances can foreign border control officers make use of their weapons?
  - Self defence

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<sup>145</sup> For example in Cyprus, Article 17 of the Penal code (Cap 154) and article 7 of the Constitution clarify cases where of the usage of firearms is authorised.

<sup>146</sup> Signed on 27 May 2005.

<sup>147</sup> Art. 28 (2) Prüm Agreement.

- Emergency defence of others
- Other circumstances

As shown in Table 10, 15 countries have allowed foreign officers to import and carry weapons on their own territory, but normally for a very strict use limited to legitimate defence.

Carrying weapons (8.1)				
Name	Y	N	F	Source
Austria	X			Prüm Convention Art 28, Austrian Weapons Act §8 a, Police cooperation Agreement Austria-Germany (2000) Art. 6 (2)
Belgium	X			Prüm Convention Art 28, Senningen Agreement
Cyprus		X	X	
Czech Republic	X			Yes only in limited cases (framework of art. 41 Schengen Implementing Convention): Art. 13 (2) German-Czech Police Cooperation Agreement (2001)
Denmark	X			Police Cooperation Agreement with Germany (2002) (art. 13 (5))
Estonia	X			Cooperation Agreement with Latvia on Organising Joint Border Control (1994).
Finland	X			Agreement on Police Cooperation based on Schengen 40,41 between Sweden, Finland and Norway
France	X			Prüm Convention Art 28
Germany	X			§ 64 Police Act, Prüm Convention Art 28
Greece		X		
Hungary		X		
Iceland		X		
Ireland		X		
Italy	X			Chambéry Agreement with France on Police Cooperation of 1997, Art 9(6). Practical solutions to importing weapons often found outside a strict legal framework
Latvia		X		
Lithuania	X			Reference to officers in Focal Point offices during interview
Luxembourg	X			Prüm Convention Art 28
Malta		X		
Norway	X			Agreement on Police

				Cooperation based on Schengen 40,41 between Sweden, Finland and Norway
Poland	X			Art. 18 (3), 2 Germany-Poland Agreement on the cooperation between police and border control officers in the border areas (2002)
Portugal	X			Hot pursuit agreement between Portugal and Spain
Slovakia		X		
Slovenia	X			Protocol on mixed patrols with Croatia of 2004, Art 5(4) and 16
Spain	X			Prüm Convention, Art 28
Sweden	X			Provisions in the Weapons Act allow for carrying weapons under specific circumstances
Switzerland	X			Art 30: German-Swiss trans-border police cooperation agreement (1999)
The Netherlands	X			Prüm Convention, Art 28
United Kingdom			X	

**Table 10: Right to carry service weapons**

#### 5.5.3.4 Analysis of the results

The normative framework of 19 countries currently allows guest officers to carry weapons on the host territory. The legal basis for this can be found within national statutory legislation (Germany, Austria, Slovenia) or in various international agreements (see also section 3.4.2.2).

Depending on the legal context, a further distinction can be made between:

- A general right of guest officers to carry service weapons during the execution of border control activities
- The right of guest officers to carry service weapons only in very particular situations (e.g. hot pursuit)
- The right of guest officers to carry service weapons based on ad-hoc arrangements

The question could be raised whether wearing a weapon is necessary for guest border guards. This depends on the type of action undertaken. On the basis of the conducted interviews it can be concluded that wearing weapons becomes more important when the risk related to the border control activity is higher (for protection and self-defence purposes). The example of the right to



import and carry service weapons shows that harmonisation in this field is not a short term goal to strive for.

Due to the fact that officers of some services do not carry weapons (for example UK immigration officers) it would not be wise to impose any obligation to accept a foreign officer wearing a weapon in any European legal instrument. Countries themselves can then specify what they would accept. Moreover, for the purpose of all administrative border control tasks, officers do not need to carry weapons.

## 5.5.4 Access to private property

### 5.5.4.1 Overview of the results

The following tables represent an overview of the results of the analysis with respect to the question whether or not there is a legal basis in the national normative framework for a guest border guard to access private property: The first table represents the results in the case where the access to private property is accompanied by searching the property in detail. The second table represent the results for the scenario where a simple right of access to property is conferred, without searching the property in detail.

Search in detail (5.10)				
Name	Y	N	F	Source
Austria		X		
Belgium		X		
Cyprus		X		
Czech Republic		X		Only allowed for public premises (Police cooperation agreement with Germany: hot pursuit art. 8, 2 (d))
Denmark		X		
Estonia		X		
Finland		X		
France		X		
Germany		X	X	A guest officer cannot do this on his or her own initiative.
Greece		X		
Hungary		X		
Iceland		X		
Ireland	X			Immigration Act 2004 - section 15 (2) allows for searches to be conducted with a warrant. It also allows for a named member of the Garda to be

				accompanied by “such other persons as may be necessary” to carry out the search
Italy		X		
Latvia		X		
Lithuania		X		
Luxembourg		X		
Malta		X	X	
Norway		X		
Poland		X		
Portugal		X		
Slovakia		X	X	
Slovenia		X		
Spain		X	X	
Sweden		X		
Switzerland		X		
The Netherlands		X		
United Kingdom		X		

**Table 11: Right to access private property and search it in detail**

Without searching (5.9)				
Name	Y	N	F	Source
Austria		X		
Belgium		X		
Cyprus		X		
Czech Republic				Answer provided only for public premises
Denmark		X		
Estonia		X		
Finland		X		
France		X		
Germany	X			§ 64, 4 Police Act (BPolG)
Greece		X		
Hungary		X		
Iceland		X		
Ireland	X			Immigration Act 2004 - section 15 (2) allows for searches to be conducted with a warrant. It also allows for a named member of the Garda to be accompanied by "such other persons as may be necessary" to carry out the search
Italy		X		
Latvia		X		
Lithuania		X		
Luxembourg	X			Interview only, no legal basis produced
Malta		X	X	
Norway		X		
Poland				No legal basis identified
Portugal		X		
Slovakia		X	X	
Slovenia	X			Happens based on protocol on mixed patrols, e.g. art 5 (2) of the protocol with Croatia (2004).
Spain		X	X	
Sweden		X		
Switzerland		X		
The Netherlands		X		
United Kingdom		X		

**Table 12: Right to access private property without searching it in detail**

### 5.5.4.2 Analysis of the results

There is a difference between searching private property in detail and simply allowing a guest officer to access private property<sup>148</sup>. In the first case, only Ireland allows for a participation of a guest officer. In the second case, four States allow guest officers to perform this task.

In Ireland, a legal basis for the participation of guest border guards to searches in detail exists in the Immigration Act (2004). A guest border guard could do this on the basis of the Ireland Criminal Justice Act 1994 and the Immigration Act 2004 - section 15 (2) that allows for searches to be conducted with a warrant. It also allows for a named member of the Garda to be accompanied by “such other persons as may be necessary” to carry out the search. Legal experts of several States did not want to highlight this access as an “executive power” since the exercise of such power necessitates a prior Judicial Authority decision. This is also the reason why Germany does not have a legal basis for guest officers to conduct searches in detail in private property.

Concerning the simple access to private properties, without searching it in detail, Ireland has the same legal basis as for searches in detail. The Luxembourg legislative framework provides for the legal basis for such access in police cooperation agreements. In Slovenia guest border guards can access private property on the basis of agreements with provisions related to mixed patrols, e.g. in the agreement on mixed patrols with Croatia and under the competence of the host officer. Even though the protocol on mixed patrols between Slovenia and Croatia (2004) contains no specific provision dealing with this matter, art 5(2) states that “*police officers of the other Contracting Party shall provide [host officers] with assistance*” for police tasks other than establishing the identity of persons and stop those attempting to evade police controls.

In the UK practice, only specifically trained officers may conduct search operations in private premises. These powers are conferred by paragraph 25A of Schedule 2, and by Sections 28 B, C, D, E, F, F (a) and F (b) of the 1971 Immigration Act. UK interviewees mentioned the fact that it is difficult to see how this power might apply to joint border control operations, although there may be some value for it to for example search buildings along the external borders. They also stressed the fact that a special training would have to be imparted for this.

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<sup>148</sup> the case for example of boarding civilian ships or boats in the territorial waters of a Member State to question the captain about his itinerary and check passenger’s identities.

## 5.5.5 Requesting ID and travel Documents

### 5.5.5.1 Overview of the results

A distinction was made between two important aspects of checking documents:

- Requesting ID and travel documents;
- Checking the correctness of the information that is provided.

Ask for ID and travel docs (6.4)				
Name	Y	N	F	Source
Austria	X			Agreement Austria-Slovakia on facilitation of border control on railroad and ship traffic (1992) Art. 2 (3) Agreement Slovenia-Austria facilitation control road and road traffic (1999) art. 4 Austria-Hungary Police cooperation agreement on prevention and the fight against cross-border criminality (2004), Art. 18 (2)
Belgium	X			Channel Treaty (Transposition in Belgian normative framework), Art 4
Cyprus				No answer
Czech Republic	X			Agreements between Germany and Czech Republic on the cooperation of police authorities and border control officers (2000) – article 8
Denmark		X	X	
Estonia		X	X	
Finland		X		
France		X	X	
Germany	X			§ 64, 4 Police Act (BPolG)
Greece		X		
Hungary	X			Austria-Hungary Police cooperation agreement on prevention and the fight against cross-border criminality (2004), Art. 18 (2)
Iceland		X	X	
Ireland		X		
Italy		X	X	
Latvia		X		
Lithuania	X			Agreement on organising joint border control between Lithuania and Latvia of 31 August 1994
Luxembourg		X	X	
Malta		X	X	

Norway		X		
Poland		X		
Portugal		X		
Slovakia	X			Agreement Austria-Slovakia on facilitation of border control on railroad and ship traffic (1992) Art. 2 (3)
Slovenia	X			Protocol on mixed patrols with Croatia (2004), Art 5(1) Police Cooperation Agreement with Germany (2004): mixed patrols: Art. 14 (2) Agreement Slovenia-Austria facilitation control raid and road traffic (1999) art. 4
Spain		X	X	
Sweden		X		
Switzerland	X			Art. 22 of the Agreement on the trans-border police and judiciary cooperation (1999) Interview: implies the exercise of public authority, decided on an ad-hoc operational basis whether the foreign officer performs this task
The Netherlands		X	X	
United Kingdom		X	X	

**Table 13: Right to request travel documents**

The normative framework of eight States provides for the conferment of this task. Interviewees of ten States have given expression to their view that it would be useful to allow for the conferment of this task in the future (“F” column).

Requesting ID and travel documents is an essential part of border control. This explains the relatively high number of interviewees that expressed the need for the conferment of this power to guest officers in the future.

## 5.5.6 Access to information systems

### 5.5.6.1 Introduction

Participation to border control operations by guest officers during first line check procedures can require the use and access to databases.

The legal issues in this domain revolve around the following questions:

1. Does the guest officer have access to a local information system of the host country?
2. Does the guest officer have or will have access to international information systems or to common information systems (SIS /VIS in the future or EURODAC)
3. Does the guest officer have access to databases from his home country?

Another distinction we can take into account should be made with respect to:

- Hit/no-hit databases that are used in first-line border check activities
- Other information systems that contain information that can be required for more in depth investigation (during second-line border check activities)

#### 5.5.6.2 Access to a local information system of the host country

Only Germany has the legal basis to allow guest officers to query a local database during the execution of border control tasks. This principle received practical applications during joint operations. Login and password are required in order to obtain access. A German officer who has a login and password assists the foreign officer to obtain access in practice and supervises him.

An interesting comment was written by interviewees from the UK. *“For UK officers during joint operations, host country information systems might be the SIS (see point 6.9) or other host country national databases, to which individual national legislation would apply. No current UK access to these.*

*In terms of guest officers having access to the WI (Warning Index) during operations in the UK, generally this is not permitted. However there is provision for making case by case requests for access to the WI to the Joint Accreditation Panel which makes an assessment of the risk to the WI against the business need for individual operations. During one recent example, guest officers in the UK were allowed to be informed of hit/no hit results where they asked IO's to do WI checks for them in the UK. This is practically difficult to arrange though.*

*Legally, UK officers are only permitted limited access to SIS information i.e. not Art 96/immigration information. So any information they might access during EU joint operations would need to be filtered to prevent their accessing unauthorised material.*

*Access to permitted SIS information in the UK was intended to be via PNC but this is not currently technically possible.*

*Unclear if EU officers operating in the UK might be legally/ technically able to access SIS during joint operations and whether immigration decisions might be made in the UK on the basis of SIS information.”*

### 5.5.6.3 Access to Community databases

Even though these information systems are designed to be accessed from all Participating States (e.g. SIS or EURODAC, and VIS in the future), their access is provided through a national interface. This creates some problems linked to the right of access and the practicalities of accessing such databases.

A number of States have indicated with respect to the SIS that if it is technically possible foreign officers can access the SIS via their own NSIS<sup>149</sup> but there is currently no legal basis to allow access to the NSIS of the host country in most countries. The normative framework of Germany allows for access to Community databases via the German interface (on the basis of §64,4 Police Act).

In addition, interviewees of the following countries indicated “yes” to the question whether a legal basis existed in their normative framework to allow guest officers access to an international database since they interpreted it as access via the channels of the Home State:

- Finland (comment: access to SIS for MS implementing the SIS)
- Hungary (comment: if technically possible)
- Latvia

The comment made by Swedish interviewees further clarifies the issues involved.

*“The interface is in Swedish, and, anyways, access is limited to civil servants. Also, accessing the Swedish N-SIS also gives access to other national DB. Foreign officers could possibly access their own NSIS”.*

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149 During mixed patrols during the joint operations conducted by the W. Sea Border Centre, the Portuguese officers used their laptops to access their home databases in Spain.



#### 5.5.6.4 Access to an information system from the home country

Here there is some uncertainty with respect to the legal environment. A comment<sup>150</sup> of the UK interviewees is illustrative in this regard:

*“Unclear if it’s legally possible for UK officers to conduct WI checks from abroad, although in technical terms would probably need a secure phone line. It is also unclear whether the result of a WI check could be used as the basis for an immigration decision abroad.”*

*Also not clear what the position is for guest officers using their own national databases to inform decisions they might be involved with while on an operation in the UK.”*

The interview guides from PL, LU<sup>151</sup>, MT, CY, UK contain no answers to the question whether or not foreign officers have the right to access an information system from the home country. The main reason for this answer is the current lack of any legal basis.

The other States involved in the study have indicated a yes answer. Spain indicated that Spanish officers had managed to access their intranet to consult national databases during joint operations in Romania and Hungary.

#### 5.5.6.5 Comments

Access to Databases is closely linked to the ongoing evolutions in the field of the availability of law enforcement information in the European Union. The Hague Programme of November 2004<sup>152</sup> (THP) states that *“strengthening freedom, security and justice requires an innovative approach to the cross-border exchange of law enforcement information. The mere fact that information crosses borders should no longer be relevant (2.1)”*

THP further states that, with effect from 1 January 2008, the exchange of information should be governed by *the principle of availability*, which means that *“throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the*

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<sup>150</sup> Interview guide PBO\_IGJO\_UK.

<sup>151</sup> It could currently happen on a case by case basis.

<sup>152</sup> The Hague Programme on strengthening Freedom, security and justice in the European Union, OJ. C 53, 03.03.2005, p.1.

*stated purpose, taking into account the requirement of ongoing investigations in that State.”*

In order to engage guest officers in border control procedures, it would be very useful to develop the availability principle and foresee the possibility of allowing access to certain hit/no-hit databases (national or EU).

Access to certain information systems is currently only organised via joint offices. The UK example, where a right to be informed of the hit/no-hit results has been granted for certain joint operations seems rather cumbersome. The German legislative framework which is the only national normative framework that does provide guest officers with the right to access host- and community databases definitely allows for a more flexible approach.

## 5.5.7 Interview persons

### 5.5.7.1 Overview of the results

To guarantee the necessary level of detail with respect to the right to interview persons, the interview guides distinguished four different types of tasks:

- Interviews about their ID;
- Interviews about the financial situation;
- Interviews related to the goods persons carry;
- Interviews related to their itinerary.

A closer examination of the results of the analysis with respect to the question whether or not there is a legal basis in the national normative framework for a foreign officer to perform this task has led to the following results:

About their ID (6.24)				
Name	Y	N	F	Source
Austria	X			Agreements on one-stop border control (e.g. Art. 1 (2) of the German-Austrian Agreement on the facilitation of railroad, road- and ship traffic)
Belgium	X			Channel Treaty (Transposition in Belgian normative framework), Art 4
Cyprus		X		
Czech Republic		X		
Denmark		X		
Estonia		X	X	

Finland	X			According to interviewees, falls under the advisory role of guest officers under Art 7 and 47 of the Schengen Implementation Convention
France		X	X	
Germany	X			§ 64, 4 Police Act (BPolG)
Greece		X		
Hungary		X		
Iceland		X	X	
Ireland		X		
Italy		X	X	
Latvia	X			Agreement between Lithuania and Latvian (1995)
Lithuania		X		
Luxembourg	X			Benelux Treaty on cross-border interventions of 2004, Art 5
Malta		X	X	
Norway		X		
Poland		X		
Portugal		X		Interview comment: Not independently, performed together with Spanish authorities
Slovakia		X		
Slovenia		X	X	
Spain		X	X	
Sweden	X			According to interviewees, can be done in conjunction with the carriers. For official purposes, additional legislation may be necessary
Switzerland	X			Art. 21, 22 – Police cooperation agreement Switzerland-Germany (1999)
The Netherlands	X			Benelux Treaty on cross-border interventions of 2004, Art 5(1.f)
United Kingdom		X	X	

**Table 14: Right to interview people**

In general, the same results were noted for the questions related to the financial situation, the goods persons carry and their itinerary. Only small differences can be found in the responses from Swiss and Dutch interviewees. No foreign officer has the right to ask more information on the goods persons carry in both States.

### 5.5.7.2 Analysis of the results

The normative framework of ten States<sup>153</sup> already allows for guest officers performing or participating in interviews. Practitioners of nine States where this legal basis does not exist have indicated that it would be useful to have it in the future. It was often mentioned that a guest officer could be of important added value during interviews since he/she might have additional knowledge on the culture of the persons who want to enter the territory, or on his or her country of destination. This, in itself is a good reason to confer such powers. It is self-evident that language may constitute an obstacle in this respect. However, when the language spoken in the host country is similar to that of the home country of the guest officer (e.g. Germany and Austria, Belgium and the Netherlands), this can work as an advantage and in those cases it can be of considerable added value to have the guest officer present.

### 5.5.8 Checking for the correctness of information

#### 5.5.8.1 Overview of the results

In some cases and during second line procedures, a more thorough investigation is needed to assess whether the documents are falsified or not and to check the correctness of the information that was provided<sup>154</sup>. The following table represents the results of the comparative analysis for this particular task:

Check correctness of provided information (2 <sup>nd</sup> line) (6.18)				
Name	Y	N	F	Source
Austria	X			Prüm Convention Art 21
Belgium	X			Prüm Convention Art 21
Cyprus		X		
Czech Republic		X		
Denmark	X			Sweden-Denmark agreement on police cooperation in the Öresund region (2000)
Estonia		X	X	
Finland	X			Article 5 and 7 of the Police cooperation agreement between Nordic Police (2 September 2002)
France	X			Prüm Convention Art 21

<sup>153</sup> See “yes” answers in the first column.

<sup>154</sup> Example given: the person states that he or she will work in a particular hotel in the country of destination. It can be verified whether this is true or not.

Germany	X			Prüm Convention Art 21
Greece		X		
Hungary		X		
Iceland	X			Article 5 and 7 of the Police cooperation agreement between Nordic Police (2 September 2002)
Ireland		X		
Italy	X			Interview: falling under advisory role of guest officers under Art 7 and 47 of the Schengen Convention
Latvia	X			Interview: falling under advisory role of guest officers under Art 7 and 47 of the Schengen Convention (example of Germans helping to control Turkish passports)
Lithuania	X			Interview: falling under advisory role of guest officers under Art 7 and 47 of the Schengen Convention
Luxembourg	X			Prüm Convention Art 21
Malta		X	X	
Norway	X			Article 5 and 7 of the Police cooperation agreement between Nordic Police (2 September 2002)
Poland		X		
Portugal		X		
Slovakia	X			Interview: falling under advisory role of guest officers under Art 7 and 47 of the Schengen Convention
Slovenia	X			Interview: falling under advisory role of guest officers under Art 7 and 47 of the Schengen Convention
Spain	X			Prüm Convention Art 21
Sweden	X			Article 5 and 7 of the Police cooperation agreement between Nordic Police (2 September 2002)
Switzerland		X	X	
The Netherlands	X			Prüm Convention Art 21
United Kingdom		X	X	

**Table 15: Check correctness of provided information**

- Sixteen States have allowed for the conferment of this executive power.
- In the legal framework of twelve States, this is not the case.
- During six interviews with the States where this is currently not foreseen, the need for this executive power for the future was expressed.

### 5.5.8.2 Analysis of the results

The variety of the answers for this specific activity can be explained by difference in the legal value that can be granted to it. Conferring this specific power results from the practice that has been developed in the framework of joint operations. It is falling under the “advisory” role conferred to guest officers under Art 7 and 47 of the Schengen Convention and is therefore deemed conferrable in countries with the most experience in joint operations.

## 5.5.9 Deciding on entry/exit

### 5.5.9.1 Overview of the results

A closer examination of the results of the analysis with respect to the question whether or not there is a legal basis in the national normative framework for a foreign officer to decide on entry/exit has led to the following results:

Decide on entry/exit (6.8)				
Name	Y	N	F	Source
Austria		X		
Belgium		X		
Cyprus		X		
Czech Republic		X		
Denmark		X		
Estonia		X		
Finland		X		
France		X		
Germany	X			§ 64, 4 Police Act (BPolG)
Greece		X		
Hungary		X		
Iceland		X		
Ireland		X		
Italy		X		
Latvia		X		
Lithuania		X		

Luxembourg		X	
Malta		X	
Norway		X	
Poland		X	
Portugal		X	
Slovakia		X	
Slovenia		X	
Spain		X	
Sweden		X	
Switzerland		X	
The Netherlands		X	
United Kingdom		X	

**Table 16: Right to decide on allowing entry/exit**

Only in Germany there is a legal basis that allows foreign officers to decide on entry/exit of persons. None of the practitioners have indicated that it would be useful if foreign officers would be able to take this decision in the future.

The right to decide on entry/exit is closely related to the right to stamp documents. The results of the analysis related to this task are therefore very similar to the table on the right to decide entry/exit. The only difference is that Finnish interviewees have indicated a yes answer on the basis that “stamping is not regulated by law”. Interviewees from Denmark, France, Iceland, Luxemburg, Malta and Switzerland had indicated that they consider it a useful right for the future.

### 5.5.9.2 Analysis of the results

This result shows the flexibility that is offered by §64, 4 of the German Police Act. Arguments for the non-existence of a legal basis were often expressed on the basis that this decision was too closely related to exercising public authority in the domain of border control. Objections to this executive power are also closely related to the discussion on discretionary powers (see Section 6).

Since any participation to first line check activities almost immediately involve the decision to allow or refuse entry/exit it is necessary to make a further distinction. In cases where a manifest reason exists to reject entry/exit or allowing entry/exit the level of discretion is extremely small. In these cases sufficient reasons exist to allow a guest officer to take this decision. Taking this type of decision based on objective facts and when there is no objections

from the person whose entry is refused can in be considered as an executive task, just like stamping the document<sup>155</sup>.

In cases where there is a decision to take, including a margin of discretion (e.g. deciding if a document is authentic or not) as to whether allowing or refusing entry or exit is in order, the final decision resides with a home officer. A comment made by the Finnish interviewees points to another interesting aspect of this decision, the aspect of accountability.

*“Art 38 BG Act refers to “the border guard acting as the superior of the border-crossing point”. A decision is something that you can appeal. Who is accountable for the decision taken by the guest officer? Making decisions is something that should be done by host officers.”*

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<sup>155</sup> Or placing a sticker on the document.



## 5.5.10 Preparing official reports

### 5.5.10.1 Overview and analysis of the results

It is important to make a distinction between the completion of processes leading to decisions related to the entry of persons at the external border (including the information communicated to these persons) on one hand and preparing reports recordings or evaluation activities during joint operations on the other hand.

Preparing official reports that could be considered as valid evidence and components of the case (and accepted as valid by a judicial Court as it may be) is equally important. Activity reports are necessary tools for any joint operation. Evaluation reports are prepared and sent to the respective Border Centres (now FRONTEX). The legal basis for information reports that are prepared by liaison officers can be found in agreements related to liaison officers (situation in the framework of art. 47 of the Schengen Implementation Convention)

With respect to the right to prepare official reports, the following statements can be made:

- None of the agreements examined in the area of border control have provisions that allow guest border guards to prepare official documents that have a legal validity within the territory of the Host State.
- The German normative framework offers a legal basis for this (§7, 39 Police Act: linked with §74,4) but only if it is within the framework of the assignment of duties to the border guard.
- Regulation related to language requirements of official documents has to be taken into consideration.
- The practical solutions that can be used when necessary are witness statements by guest border guards.<sup>156</sup>

Interviewees from seven States: Denmark, Germany, Latvia, Norway, Sweden, Switzerland and the UK answered positively (in a first stage) to the conferment of this particular task, without being able to provide a legal basis for it (in a second stage). Swedish authorities remarked that provided that guest border guards would have the power to exercise certain executive powers, they could also report on this exercise. The lack of legal basis makes very uncertain the decision of a Court in case such evidence would be produced.

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<sup>156</sup> E.g. in the UK, visiting officers can, and are in fact obliged to make witness statements in the form of a sworn statement.

Even though the power of establishing official reports is very closely linked to public authority, international agreements and Community instruments exist in related areas that do provide interesting examples that could be used in the domain of border control. The following example is worth mentioning:

- Art 8(3) of the Regulation 2185/96 on “on-the-spot” checks by the European Commission (OLAF) agents stipulates the admissibility of the Office reports as evidence in administrative or judicial proceedings (opened within the Member State in which the investigation has been done)<sup>157</sup>;
- The 1969 Benelux Convention on cooperation in administrative and criminal cases: art. 15 (art. 19 = collection of evidence) provides for the mutual recognition of official reports in the States involved.

However, even in countries having established a close cooperation, such a key prerogative is not always granted, as in the following example:

- In the framework of the JIT, seconded members operating in the Netherlands were not given the mandate – when acting in the Netherlands – to draw up official documents or reports under Dutch law

## 5.5.11 Use of coercion or force

### 5.5.11.1 Overview of the results

A closer examination of the results of the analysis with respect to the question whether or not there is a legal basis in the national normative framework for a foreign officer to use coercion or force has led to the following results<sup>158</sup>:

<b>Use of coercion or force (8.6b)</b>			
<b>Name</b>	<b>Y</b>	<b>N</b>	<b>F</b>
Austria		X	
Belgium		X	
Cyprus		X	
Czech Republic		X	
Denmark		X	

<sup>157</sup> See section 4.3.3

<sup>158</sup> Since the notion of the “use of force” and the “use of coercion” are used in different ways in the Member States, the notion of “use of coercion or force” is used to encompass both interpretations.

Estonia		X	
Finland		X	
France		X	
Germany	X		§ 64, 4 Police Act, Act on the use of coercion or force, the right of self defence, §§ 32, 34 Criminal Code and § 127 par. 1 Criminal Procedure Code
Greece		X	
Hungary		X	
Iceland		X	
Ireland		X	
Italy		X	
Latvia		X	
Lithuania		X	
Luxembourg	X		Interview only – no legal basis communicated
Malta		X	
Norway		X	
Poland		X	
Portugal		X	
Slovakia		X	
Slovenia		X	
Spain		X	
Sweden	X		Police Act, Art 10: anyone can be asked by a Police officer to assist him, and consequently gets some executive powers. The requesting officer remains responsible for what the “assistants” (civilians) do
Switzerland	X		Interview: in the framework of hot pursuits, possibility to use handcuffs and perform security checks; also Art. 22 Police Cooperation Agreement with Germany
The Netherlands		X	
United Kingdom		X	

**Table 17: Use of coercive force**

The normative framework of three States provides for a specific legal basis for foreign officers to use coercion or force in some cases.

Based on general law principles, coercive measures based on self defence are allowed in all States except for the Netherlands, Malta and Cyprus.

### 5.5.11.2 Analysis of the results

Even when allowed, the use of coercion or force is always highly restricted.

Swedish interviewees answered positively to the question, with the remark that it would depend on the situation and the proportionality of force used. Those actions would be based on the last paragraph of Section 10 of the Police act which allows a Police officer to ask anyone (any person, which may also be a guest officer) to assist him and consequently receive some executive powers. The officer remains responsible for the actions of the "assistant" in that case.

In Switzerland: foreign officers can make use of handcuffs and perform security checks in the framework of hot pursuit and observation.<sup>159</sup>

For an in depth explanation of the German case the reader is referred to Section 5.2. Foreign officers are allowed forms of coercion or force that do not involve the use of weapons: such as the use of handcuffs. The principle of proportionality is a general guiding principle here.

A legal basis for legitimate defence<sup>160</sup> exists in the normative framework of all the States visited. The exceptional negative answers here are cases where legal counterparts had considered legitimate defence as a type of defence that is distinct from the general right of legitimate defence belonging to every citizen.

In Hungary and Austria: a guest officer has the right to stop a person during mixed patrols on the basis of the Austria-Hungary Police cooperation agreement on prevention and the fight against cross-border criminality (2004), Art. 18 (2)

*(2) In Ausübung des gemischten Streifendienstes sind auch die Beamten des anderen Vertragsstaates befugt, die Identität von Personen festzustellen und diese, sofern sie sich der Kontrolle zu entziehen suchen, nach Maßgabe des innerstaatlichen Rechts des Vertragsstaates, auf dessen Hoheitsgebiet die Amtshandlung erfolgt, anzuhalten.<sup>161</sup>*

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<sup>159</sup> This type of coercion or force exists in other States also, however this information can be found in section 5.5.11.3 on apprehending person.

<sup>160</sup> The notion of legitimate defence includes the notion of self-defence as it was used in the interview guide (PBO\_IGJO: executive power: 8.6).

<sup>161</sup> Free translation: "During the exercise of the joint patrol, guest officers are also allowed to establish the identity of persons and, in the case that they attempt to escape from the control, to apprehend the person, in due respect of the law of the host country.

### 5.5.11.3 Apprehending persons

#### ○ Overview of the results

The following table represents a summarising overview of the results of the analysis with respect to the question whether or not there is a legal basis in the national normative framework for a guest border guard to apprehend a person:

Apprehend (6.19)				
Name	Y	N	F	Source
Austria	X			Agreement Austria-Switzerland and Liechtenstein on trans-border cooperation (1999): art. 16: in the framework of mixed patrols
Belgium		X		
Cyprus		X		
Czech Republic		X		
Denmark		X		
Estonia		X		
Finland		X		
France		X		
Germany		X		
Greece		X		
Hungary		X		
Iceland		X	X	
Ireland		X		
Italy		X		
Latvia		X		
Lithuania		X		
Luxembourg	X			Interview only – no legal basis communicated
Malta		X	X	
Norway		X		
Poland				No legal basis identified
Portugal		X		
Slovakia	X			Agreement on police cooperation and border control between Austria and Slovakia (2005)
Slovenia		X		
Spain		X	X	
Sweden		X		
Switzerland	X			Art. 22 trans-border police and judiciary cooperation with Germany (27 April 1999)
The Netherlands		X		

United Kingdom		X		
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**Table 18: Right to apprehend someone**

The normative framework of Austria, Luxembourg, Slovakia and Switzerland allow for guest border guards apprehending persons.

### ○ Analysis of the results

If the role of border guards is restricted to simply assessing the eligibility of persons for entry into the UK, apprehending persons is not really necessary. This is also the reason why UK immigration officers do not have the executive power to apprehend persons on UK territory. In some cases however: the right to apprehend a person can depend on the specificity of the context:

- Apprehending a person who refuses to provide identity information
- Apprehend a person in possession of illegal goods
- Apprehend a person for preventive measures (for a concern of public order) or to prevent him from fleeing
- Apprehend a wanted person for enforcement measures

Apprehending someone (the French “Interpellation”) can be interpreted in different ways, depending on legal national frameworks. This is one of the reasons for the distinct answers in this respect. Several bilateral agreements exist with provisions where guest officers are allowed to capture or hold a person on a provisional basis and under certain circumstances where immediate action is required and as long the host officer cannot take the person in charge. For an analysis of agreements that contain provisions related to capturing or holding a person, see section 3.4.2.2.

# 6 Assessment of requirements and barriers

## 6.1 Section summary

This section provides an overview of legal requirements and some potential legal barriers related to the conferment of executive powers to guest border guards. The findings are based on the assessment of the national normative frameworks and the interviews conducted.

The most important barrier at the moment is the lack of a legal basis in 26 of the 28 concerned States.<sup>162</sup> Besides this, four main types of potential barriers have been identified; barriers related to nationality and language requirements, barriers related to preserving the sovereignty of the States, the conferment of executive powers and other potential obstacles. Legal barriers can be constitutional or based on statutory regulations.

The section starts with a synoptic table that contains an overview of the main requirements in the 28 concerned States. Afterwards, the main types of potential barriers are examined in more detail.

Member States have the right under article 39(4) TEC to reserve specific posts for their nationals. However, although reflecting the State's concept of public authority, the State's restrictions (which are never an obligation) concern the right to become a civil servant of the "Home State" and should not have a direct legal impact on the conferment of powers to foreign visiting officers.

The preservation of national sovereignty is a more pertinent argument, and the concept is clarified in consideration of the positions taken by constitutional courts. Another important aspect that hampers the need for sovereignty is the reality of European integration: border control activities have broader implications than only safeguarding the general interests of any one specific State.

Based on analysis, we estimate that nationality and sovereignty requirements do not present any impediments for the acceptance of well delimited conferment of powers to guest officers.

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<sup>162</sup> See the table in section 6.2.

With respect to the language requirement, the option of imposing specific requirements upon guest officers, such as the restriction of their missions to tasks that do not involve direct contact with citizens of the Host State, could be considered (knowledge of several languages is a normal requirement in the framework of external border control activities).

However, the language spoken by travellers is always undetermined and therefore it is not realistic to expect from each participant to an EU joint operation a substantial knowledge of all possible languages – or even the knowledge of “the most probable ones”: One of the interest of joint operation is the possibility to expand the number of languages spoken by the team, such knowledge being shared between several officers representing the European diversity.

The real limits of the conferment of executive powers are closely related to the limitation of the scope of the conferment (the non-discretionary character of this conferment) since there are no explicit prohibitions of conferring executive powers in any of the concerned States’ constitutions.

Other potential barriers such as provisions in the field of criminal law or data protection are not insurmountable either and examples in other areas (e.g. joint investigative teams) have already demonstrated this. In general, overcoming the barriers is definitely possible but will depend on several factors:

- The level of control that the Host State will keep on the initiatives regarding joint operations;
- The limited scope, the limited duration, area and the clarity of the decision making process regarding the proposed conferment;
- The level to which the concerned authorities are convinced of the need and utility of such a conferment.

## 6.2 Synoptic table

The following table provides in a synoptic view a list of constitutional and other legal provisions to consider prior to conferring executive powers on guest officers. The first column addresses the most commonly reported obstacle, i.e. that the relevant States have no legal bases to do so. This category distinguishes:

- Countries that have a developed basis to confer powers;
- Countries that have a provision in their normative framework stating that an international agreement is required (AR) to confer powers.
- Countries (the majority) that do not provide for a legal basis.



The second column addresses constitutional provisions whereas the third one focuses on other regulations.

This table should be looked at in parallel with the present chapter and not extracted from it so as to avoid shortcomings in its interpretation.

Country	Existing Legal Basis	Constitutional Provisions	Provisions in other legal acts
Austria	N	Delegation to international institutions (Art 9) Constraint on powers in territory (Constitutional High Court Austro Control Decision)	Constraints on access to information (Data protection provisions, Schengen rules on SIS)
Belgium	N	Nationality Requirement (Art 10(2)) Delegation to international institutions (Art 34) Constraint on powers on territory (Art 37 & Art 185 for military presence)	Language Requirement (Art 45 Law on use of languages in administrative affairs) Nationality requirement (Regulation on general admission conditions in the Police) Constraint on powers on territory (Art 227 Criminal Code)
Cyprus	N	Nationality Requirement (Art 130) Language Requirement (Art 3)	Constraint on powers abroad (Art 8A Act 73(I)/2004)
Czech Republic	AR (Art 48 Police Act and Ch II Art 4(4) of Act on Residence of Aliens)	Language Requirement (Art 3) Delegation to international institutions (Art 10a)	
Denmark	N	Nationality Requirement (Art 27) Delegation to international institutions (Art 20)	Constraint on powers on territory (Art 108 Criminal Code) Data protection (Denmark Accession to Schengen on access to SIS)
Estonia	N	Nationality Requirement (Art 30) Language Requirement (Art 51) Delegation to international institutions (Art 121, 123)	Nationality Requirement (Art 23 Law on Border Guard) Language requirement (Art 23 Law on Border Guard)
Finland	N	Nationality Requirement (Art 125) Language Requirement (Art 17)	

Country	Existing Legal Basis	Constitutional Provisions	Provisions in other legal acts
France	AR (Art 88-2 introduced in Constitution March 2005)	Constraint on powers on territory (Constitutional principle, expressed in Conseil d'Etat 370.452/2004) The transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas <i>may be agreed</i> (a specific or general agreement is therefore necessary)	Nationality Requirement (Law on Public Functions, Art 5)  (No secondary law so far)
Germany	Y (Art 64-65 Police Act)	Nationality Requirement (Art 33) Delegation to international institutions (Art 24)	
Greece	N	Nationality Requirement (Art 4(4)) Delegation to international institutions (Art 28) Constraint on powers on territory (Art 27)	
Hungary	AR (Art 37 §1,2 Border Guard Act)	Nationality Requirement (Art 70(4)) Delegation to international institutions (Art 2a)	Constraint on powers on territory (Art 4 Act 54/2002)
Iceland	N	Nationality Requirement (Art 20)	Nationality requirement (Art. 38 Police Act)
Ireland	AR (Art 28 and 51 Garda Siochana Act)	Language Requirement (Art 8) Delegation to international institutions (Art 28 & 29)	
Italy	N	Nationality Requirement (Art 51)	
Latvia	N	Nationality Requirement (Art 101) Language Requirement (Art 104)	Nationality requirement (Ch II, Art 7 Border Guard Law)
Lithuania	N	Nationality Requirement (Art 33)	Nationality requirement Art 18 Border Guard Act)
Luxembourg	N	Nationality Requirement (Art 11(2)) Delegation to international institutions (Art 49bis)	
Malta	N	Language Requirement (Art 5)	

Country	Existing Legal Basis	Constitutional Provisions	Provisions in other legal acts
Netherlands	N	Nationality Requirement (Art 3) Delegation to international institutions (Art 93)	Constraint on access to information (data protection provisions) Constraint on powers on territory (Art 5(20) Law on Public Administration and Art 46 Aliens Law)
Norway	N	Nationality Requirement (Art 92) Language Requirement (Art 92) Delegation to international institutions (Art 25 & 93)	
Poland	Y for competences Polish officers abroad: Art 147c-n Border Guard Act	Nationality Requirement (Art 60) Delegation to international institutions (Art 90)	Nationality requirement (Border Guard Act) Language Requirement (Polish language act) Constraint on powers abroad (Executive Act of Border Guard Act)
Portugal	N	Nationality Requirement (Art 7(6) & 15)	
Slovakia	AR (Art 77 Police Act)	Nationality Requirement (Art 30(4))	Nationality requirement (Act 73/98)
Slovenia	AR (Art 36&37 State Border Control Act)	Language Requirement (Art 62) Delegation to international institutions (Art 3a)	Language requirement (Public procedure act) Nationality requirement (Regulation on employment in public administrations)
Spain	N	Nationality Requirement (Art 13 & 23) Delegation to international institutions (Art 93)	
Sweden	N	Nationality Requirement (Ch 11, Art 9(3)) Delegation to international institutions (Art 5(3))	
Switzerland	N		

Country	Existing Legal Basis	Constitutional Provisions	Provisions in other legal acts
United Kingdom	N	Nationality Requirement (Art 20(2))	Nationality requirement (policy choice)
Impact Assessment	Community Instrument	Special majority law or Constitutional modification (Rem: for Switzerland, possibly a referendum)	Amendments in mentioned acts

**Table 19: Legal requirements**

For a closer examination of issues related to the lack of legal bases, please refer to section 7.2.

### 6.3 Typology of legal requirements

When conferred with executive powers at the external borders of another Member State or during operations in the context of return enforcement, foreign officers perform operational functions on the territory of a Member State and where another legal order is applicable. Therefore, the requirements of national legislations of each Member State on whose territory foreign officers provided with executive powers are operating must be evaluated.

These requirements may be provided by fundamental or constitutional law principles or by derived laws.

The comparative legal research in all Member States plus Iceland, Norway and Switzerland has shown that the number of Member States that include provisions directly related to border control and return enforcement in their national constitutions is small. The majority of the national provisions are laid down in regular statutory legislation.

Concerning border control and return enforcement, the analysis of legislations reveals four types of possible (constitutional and regular statutory) questions:

- 1) The **requirement of nationality** for the execution of public powers.

- 2) **Requirement** regarding the **language** to be used while executing public powers.
- 3) Possibility and requirements in order to confer **executive powers to foreign officers** present in the Host State according to the Constitution and derived laws – Compatibility with the **States' sovereignty**
- 4) Provision related to the presence and powers of home force officers when they are **sent to other countries**
- 5) A limited category of **other potential obstacles** related to the execution of public powers is listed.

## 6.4 Requirement of nationality

The nationality requirement for becoming a civil servant has no direct impact on “guest” border guards, as these do not become civil servant of the host State by their presence in joint operations. However, such a requirement could obviously become an obstacle if it was interpreted as forbidding any conferment of executive powers to “foreigners”. This is the reason why the States’ legislation regarding this requirement must be screened.

A number of States (Cyprus, Denmark, Italy, Norway and Spain) have included in their national constitution a requirement of nationality related to the exercise of public authority (mostly complemented with further rules in regular statutory law regarding the nationality requirement to become public servant). In other States, non-constitutional nationality requirements exist, as in Belgium, France, the Netherlands, Iceland, Italy, Latvia, Lithuania, Poland, Slovakia, Slovenia and the UK<sup>163</sup>. A counter example is provided by the Irish national legislation where there is no citizenship requirement to become a member of the Irish Garda Síochána.

The requirement of nationality means that the State links - concerning its own civil servants (this does not exclude conferment to servants from international organisations or from other States) - the exercise of public powers to its citizenship.

On this point, States may be divided into three categories:

- Having a strict requirement regarding nationality;
- Having no explicit exclusion, but establishing rights for their own citizens;
- Having a general requirement with exceptions.

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<sup>163</sup> See the synoptic table for the relevant sources of law.

## 6.4.1 Strict nationality requirement

A minority of States have included constitutional requirements of nationality regarding the admission as a civil servant, leaving no room for exceptions.

### 6.4.1.1 Cyprus

The constitution of the Republic of Cyprus, is specific for historic reasons and due to the existence of two communities:

*'1. The security forces of the Republic shall consist of the police and gendarmerie and shall have a contingent of two thousand men which may be reduced or increased by common agreement of the President and the Vice-President of the Republic.*

*2. The security forces of the Republic shall be composed as to seventy per centum of Greeks and as to thirty per centum of Turks: Provided that for an initial period and in order not to discharge those Turks serving in the police on the 11th February, 1959, except those serving in the auxiliary police, the percentage of Turks may be kept up to a maximum of forty per centum and consequently that of the Greeks may be reduced to sixty per centum.'*<sup>164</sup>

The Cypriot Constitution states clearly in article 122 that the term 'public service' does not include the security forces of the State (such as police and gendarmerie). Therefore, article 130 provides for a separate nationality requirement for these forces.

### 6.4.1.2 Denmark

In Denmark, the nationality requirement to become a civil servant is a constitutional rule, complemented by regular statutory law in order to regulate the organisation of the civil service:

*'(1) Rules governing the appointment of civil servants shall be laid down by Statute. No person shall be appointed a civil servant unless he is a Danish subject. Civil servants who are appointed by the King shall make a solemn declaration to the effect that they will adhere to the Constitution Act.*

*(2) Rules governing the dismissal, transfer, and pensioning of civil servants shall be laid down by Statute, confer Section 64.*

*(3) Civil servants appointed by the King shall only be transferred without their consent if they do not suffer any loss in the income accruing from their posts or offices, and if they have been offered the choice of such transfer or retirement on pension under the general rules and regulations.'*<sup>165</sup>

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<sup>164</sup> Article 130, Constitution of Cyprus.

<sup>165</sup> Article 27, Constitutional Act of Denmark.

### 6.4.1.3 Italy

In Italy, a pre-requisite for becoming a member of the Border and Foreign Police Service is to be member of the Italian Police, and this requires the Italian nationality, based on article 51 of the Italian Constitution requiring citizenship for access to public functions:

*‘(1) Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To this end, the republic adopts specific measures in order to promote equal chances for men and women.*

*(2) The law may, regarding their right to be selected for public positions and elective offices, grant to those Italians who do not belong to the republic the same opportunities as citizens.*

*(3) Anyone elected to public office is entitled to the time necessary for the fulfilment of the respective duties while keeping his or her job.’*

### 6.4.1.4 Norway

Norway is a Schengen State (although not an EU Member). The constitution of Norway includes the following provision that only relates to ‘senior official posts’:

*‘To senior official posts in the State may be appointed only Norwegian citizens, men or women, who speak the language of the Country, and who at the same time*

- 1. either were born in the Realm of parents who were then subjects of the State;*
- 2. or were born in a foreign country of Norwegian parents who were not at that time subjects of another State;*
- 3. or hereafter have resided for ten years in the Realm;*
- 4. or have been naturalized by the Storting.*

*Others may, however, be appointed as teachers at the university and institutions of higher learning, as medical practitioners and as consuls in places abroad.’<sup>166</sup>*

### 6.4.1.5 Spain

The Spanish constitution provides that Spanish nationality is required for access to public functions and positions (article 13, §2 and article 23, §2):

*‘(2) Only Spaniards shall have the rights recognized in Article 23 except that which in keeping with the criteria of reciprocity may be established by treaty or law for the right to active and passive suffrage in municipal elections.’<sup>167</sup>*

*‘(2) They also have the right to accede, under conditions of equality, to public functions and positions, in accordance with the requirements established by law.’<sup>168</sup>*

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<sup>166</sup> Article 92, Constitution of Norway.

<sup>167</sup> Article 13, §2, Constitution of Spain.

## 6.4.2 Right for citizens

Eight States – Germany, Hungary, Latvia, Lithuania, the Netherlands Poland, Slovakia and the United Kingdom – have articulated their constitutional provision concerning the admission as civil servant as a right for citizens (instead of limiting the admission to national citizens). Nevertheless, statutory laws of these States can contain further restrictions related to nationality.

### 6.4.2.1 Germany

The German provisions regarding citizens' rights are as follow:

*(1) Every German shall have in every Land the same political rights and duties.*

*(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements.*

*(3) Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or nonadherence to a particular religious denomination or philosophical creed.*

*(4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.*

*(5) The law governing the public service shall be regulated with due regard to the traditional principles of the professional civil service.'*<sup>169</sup>

### 6.4.2.2 Hungary

Equally, Hungary has enacted non-restrictive constitutional provisions:

*'(4) All Hungarian citizens have the right to participate in public affairs, and furthermore to hold public office in accordance with their suitability, education and professional ability.'*<sup>170</sup>

### 6.4.2.3 Latvia

Article 101 of the Latvian constitution encompasses the right for every citizen to hold a position in the civil service. The latter is regulated in detail in statutory law:

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<sup>168</sup> Article 23, §2, Constitution of Spain.

<sup>169</sup> Article 33, Constitution of Germany.

<sup>170</sup> Article 70, §4, Constitution of Hungary.



*‘Every citizen of Latvia has the right, as provided for by law, to participate in the activities of the State and of local government, and to hold a position in the civil service. Local governments shall be elected by Latvian citizens who enjoy full rights of citizenship. The working language of local governments is the Latvian language.’<sup>171</sup>*

In the regulatory statutory framework: the nationality requirement for border guards is specifically mentioned in Chapter II, Section 7 of the Border Guard Law.

Here, it states that:

- a. *A border guard is a **citizen** of Latvia who has joined the Border Guard service, has given an oath to the Republic of Latvia to protect and defend the State border, has completed the professional preparation course for border guards, holds a specific position in the Border Guard and has been awarded a border guard service rank.*
- b. *A border guard, while performing the duties of the service, within the scope of his or her competence, represents State authority.*

#### 6.4.2.4 Lithuania

Lithuania has included a similar provision in its Constitution:

*‘(1) Citizens shall have the right to participate in the government of their State both directly and through their freely elected representatives, and shall have the equal opportunity to serve in a State office of the Republic of Lithuania.*

*(2) Each citizen shall be guaranteed the right to criticize the work of State institutions and their officers, and to appeal against their decisions. It shall be prohibited to persecute people for criticism.*

*(3) Citizens shall be guaranteed the right to petition; the procedure for implementing this right shall be established by law.’<sup>172</sup>*

With respect to non-constitutional provisions, article 18 of the Border Guard Act reformulates the nationality requirement in the specific domain of border control.

*Art. 18*

*1. The officers of the service (hereafter the officer) shall be a citizen of the republic of Lithuania, enrolled in the Service as a statutory public servant and have the powers of public administration over persons not subordinate to him.*

#### 6.4.2.5 The Netherlands

The Dutch constitution provides the right to equal access to the public service for Dutch nationals:

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<sup>171</sup> Article 101, Constitution of Latvia.

<sup>172</sup> Article 33, Constitution of Lithuania.

*'All Dutch nationals shall be equally eligible for appointment to public service.'*<sup>173</sup>

This constitutional principle is further clarified in provisions that can be found in public administration law.

#### 6.4.2.6 Poland

The Polish legislation has included the requirement of full public rights in its constitutional provision regarding access to the public service:

*'Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.'*<sup>174</sup>

The nationality requirement is further described in the Polish Border Guard Act.

#### 6.4.2.7 Slovakia

Slovakia has included a similar provision in its national constitution:

*'(4) Citizens have access to elected and other public posts under equal conditions.'*<sup>175</sup>

Act 73/98 contains further details on the nationality requirement in Slovakia on the level of regular statutory law.

#### 6.4.2.8 United Kingdom

Similar to the above states, the constitution of the United Kingdom has a provision regarding access to the public service is expressed in wide terms:

*'(2) Everyone has the right of equal access to public service in his country.'*<sup>176</sup>

The general principle above is complemented with statutory law: the Immigration Act of 1971. Immigration officers for the purposes of this Act shall be appointed by the Secretary of State, and he may arrange with the Commissioners of Customs and Excise for the employment of officers of customs and excise as immigration

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<sup>173</sup> Article 3, Constitution of the Netherlands.

<sup>174</sup> Article 60, Constitution of Poland.

<sup>175</sup> Article 30, §4, Constitution of Slovakia.

<sup>176</sup> Article 20, §2, Constitution of the United Kingdom.

officers under this Act<sup>177</sup>. Executive powers (including e.g. the power to take a person in custody) may be conferred to “*any person acting under the authority of an immigration officer*”<sup>178</sup>.

No explicit nationality requirement is imposed: on the contrary, in addition to the general acceptance of “visiting forces”<sup>179</sup> (being a body, contingent or detachment for the time being present in the United Kingdom on the invitation of Her Majesty's Government in the United Kingdom), the provisions of the Immigration Act, relating to those who are *not* British citizens, say that the Act shall not apply to these “foreigners” provided that the related person “*is subject, as a member of the home forces, to service law*”. This, as the same act defines “the home forces” as any of Her Majesty's forces, indicates – at least implicitly - that non-British citizens may also be appointed as members of the home forces.

During the UK interviews, it was reported that employment rules stipulate that Immigration Officers are British citizens, with an additional requirement to have lived in the UK continuously for the last five years<sup>180</sup>.

### 6.4.3 General provision with exceptions

The third category of States – including Belgium, Estonia, Finland, France, Greece, Iceland, Luxembourg, Portugal and Sweden – have a general constitutional provision supplemented with one or more exceptions.

#### 6.4.3.1 Belgium

The Belgian constitution opens exceptions to the nationality requirement on the condition of a legal basis:

*‘(2) Belgians are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases.’*<sup>181</sup>

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<sup>177</sup> UK ST 1971 c 77 Pt IV s 37.

<sup>178</sup> UK ST 1971 c 77 Sch 2 (I) Para 18.

<sup>179</sup> UK ST 1971 c 77 Sch 1, 4 /c - a) This is not in direct relation with conferment of powers, but in relation to the fact that visiting forces (including army, diplomatic services) are not submitted to immigration processes – Similar rules exist in all countries.

<sup>180</sup> This is highlighted by employment notices aimed to find resources for the E-Border UK programme: Applicants who joined the Civil Service after 31st May 1996 must be UK nationals and should have been a resident in the UK for 5 years prior to the date of their application.

<sup>181</sup> Article 10, §2, Constitution of Belgium.

### 6.4.3.2 Estonia

The Estonian constitution equally states that legal exceptions are possible and explicitly mentions citizens of foreign States or stateless persons:

*'Positions in State agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These positions may, as an exception, be filled by citizens of foreign States or stateless persons, in accordance with law.'*<sup>182</sup>

### 6.4.3.3 Finland

The Finnish general qualifications for public office and grounds for appointments are:

*'(1) It may be stated in an Act that only Finnish citizens are eligible for appointment to certain public offices or duties.*

*(2) The general qualifications for public office shall be skill, ability and proven civic merit.'*<sup>183</sup>

The use of the term 'certain public offices or duties' refers to exceptions being made in the regular statutory legislation of Finland, regarding the nationality requirement for appointment to public offices or duties.

### 6.4.3.4 France

In article 5 and article 5 bis, the French law on public functions states that members of the administration<sup>184</sup> should have the French nationality, but makes a differentiation when citizens of other Member States of the EU are concerned. The latter are restricted from access to functions when the competences attached to these functions are inseparable from the performance of the State's sovereignty, either entail a direct or indirect participation in the performance of the prerogatives of the public powers of the State or other public societies:

*'Article 5*

*Sous réserve des dispositions de l'article 5 bis Nul ne peut avoir la qualité de fonctionnaire :*

*1° S'il ne possède la nationalité française ;*

*2° S'il ne jouit de ses droits civiques ;*

*3° Le cas échéant, si les mentions portées au bulletin n° 2 de son casier judiciaire sont incompatibles avec l'exercice des fonctions ;*

*4° S'il ne se trouve en position régulière au regard du code du service national ;*

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<sup>182</sup> Article 30, Constitution of Estonia.

<sup>183</sup> Article 125, Constitution of Finland.

<sup>184</sup> Due to the state organisation of France, the term 'public function' refers to both the agents of the state and the agents of the local communities (article 1, Law on public functions).

5° S'il ne remplit les conditions d'aptitude physique exigées pour l'exercice de la fonction compte tenu des possibilités de compensation du handicap.

*Article 5 bis*

*Les ressortissants des Etats membres de la Communauté européenne ou d'un autre Etat partie à l'accord sur l'Espace économique européen autres que la France ont accès, dans les conditions prévues au statut général, aux corps, cadres d'emplois et emplois. Toutefois, ils n'ont pas accès aux emplois dont les attributions soit ne sont pas séparables de l'exercice de la souveraineté, soit comportent une participation directe ou indirecte à l'exercice de prérogatives de puissance publique de l'Etat ou des autres collectivités publiques.*

*Ils ne peuvent avoir la qualité de fonctionnaires :*

*1° S'ils ne jouissent de leurs droits civiques dans l'Etat dont ils sont ressortissants ;*

*2° S'ils ont subi une condamnation incompatible avec l'exercice des fonctions ;*

*3° S'ils ne se trouvent en position régulière au regard des obligations de service national de l'Etat dont ils sont ressortissants ;*

*4° S'ils ne remplissent les conditions d'aptitude physique exigées pour l'exercice de la fonction compte tenu des possibilités de compensation du handicap.*

*Les statuts particuliers précisent, en tant que de besoin, les conditions dans lesquelles les fonctionnaires ne possédant pas la nationalité française peuvent être nommés dans les organes consultatifs dont les avis ou les propositions s'imposent à l'autorité investie du pouvoir de décision.*

*Les fonctionnaires qui bénéficient des dispositions du présent article ne peuvent en aucun cas se voir conférer de fonctions comportant l'exercice d'attributions autres que celles qui sont mentionnées au premier alinéa.*

*Les conditions d'application du présent article sont fixées par décret en Conseil d'Etat.<sup>185</sup>*

In 2004 the Conseil d'Etat of France issued an advice regarding article 41 of the Schengen Implementation Convention. Article 41, §2 allows Member States to optionally grant foreign officers the right to question persons in the course of hot pursuit in accordance with article 41, §1 of the Schengen Implementation Convention. The Conseil d'Etat stated that such powers can not be conferred to foreign officers operating on French soil without amending the Constitution.<sup>186</sup>

The French constitution was therefore amended and a new article 88-2 was introduced in March 2005, providing that, subject to reciprocity and in accordance with the Treaty establishing the European Community, “*the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed*”. This provides evidence that the nationality requirements (to be a member of home forces), that are present in multiple layers of the French legislation, are perfectly compatible with the conferment of powers to officials of another State exercising their powers on the visited territory.

<sup>185</sup> Law on public functions (Loi portant droits et obligations des fonctionnaires, n°83-634).

<sup>186</sup> Conseil d'Etat, Assemblée générale, Advice n° 370.452, 25 November 2004.

### 6.4.3.5 Greece

Exceptions to the nationality requirement with regard to public services in Greece can, in accordance with the Greek constitution, be made by specific legislation:

*'(4) Only Greek citizens shall be eligible for public service save in those cases where exceptions are introduced by specific legislation.'*<sup>187</sup>

### 6.4.3.6 Iceland

Like Norway, Iceland is a Schengen State (although not an EU Member). The constitution of Iceland includes an important exception to its general rule regarding the requirement of nationality for holding public office, in the last paragraph of the following article:

*'The President appoints public officials as provided by law. No person may hold public office unless he has Icelandic nationality. Each public official shall take an oath or pledge to uphold the Constitution.'*

*The President may remove from office any official whom he has appointed. The President may transfer officials from one office to another provided that their official remuneration is not reduced, and that they have an option between such transfer and retirement with a pension, or old-age benefits, as prescribed by law. Certain categories of officials, in addition to those mentioned in Article 61, may be exempted by law from this provision.'*<sup>188</sup>

Article 38 of the Icelandic Police Act imposes nationality.

Relevant section of article 38:

*2. Prospective policemen shall meet the following general conditions:*

*a. They shall be Icelandic citizens aged between 20 and 35 and shall not have been sentenced for a punishable offence under the Criminal Code;*  
*b...*

### 6.4.3.7 Luxembourg

In the same sense, the constitution of the Grand Duchy of Luxembourg provides the general rule of the requirement of nationality for civil service but makes specific exceptions by law possible:

*'(2) Luxembourgers are equal before the law; they alone are eligible for civil and military service, save as the law may in particular cases otherwise provide.'*<sup>189</sup>

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<sup>187</sup> Article 4, §4, Constitution of Greece.

<sup>188</sup> Article 20, Constitution of Iceland.

<sup>189</sup> Article 11, §2, Constitution of Luxembourg.

### 6.4.3.8 Portugal

Article 15 of the Portuguese constitution includes a similar rule:

1. *Aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.*
2. *Paragraph 1 does not apply to political rights, to the performance of public functions that are not predominantly technical or to rights and duties that, under this Constitution or the law, are restricted to Portuguese citizens.*
3. *Citizens of Portuguese-speaking countries may, by international convention and provided that there is reciprocity, be granted rights not otherwise conferred on aliens, except the right to become members of the organs with supreme authority or of self-government of the autonomous regions, to service in the armed forces or to appointment to the diplomatic service.*
4. *Provided that there is reciprocity, the law may confer upon aliens who reside in the national territory the right to vote for, and to stand for election as, members of the organs of local authorities.*
5. *Provided that there is reciprocity, the law may also confer upon citizens of the Member States of the European Union, who reside in Portugal, the right to vote for, and to stand for election as, Members of the European Parliament.*<sup>190</sup>

Concerning its own State's servants, Portugal limits therefore the exercise of public functions by foreign officers to predominantly technical tasks. Exceptions to this rule are made by article 7, § 6 of the constitution based on the principle of reciprocity, as it was requested to become EU Member:

*'6. Provided that there is reciprocity, Portugal may enter into agreements for the joint exercise of the powers necessary to establish the European Union, in ways that have due regard for the principle of subsidiarity and the objective of economic and social cohesion.'*<sup>191</sup>

### 6.4.3.9 Sweden

Sweden has included the nationality requirement in article 9, § 3 of Chapter 11 of its constitution:

- (1) *Appointments to a post in a court or in an administrative authority under the Government shall be made by the Government or by an authority designated by the Government.*
- (2) *When making appointments to posts within the State administration attention shall be directed only to objective factors such as merit and competence.*
- (3) *Only a Swedish citizen may hold or exercise the functions of a judicial office, an office directly subordinate to the Government, a post or commission as head of an authority directly subordinate to the Parliament or to the Government, or as a member of such an authority or its board, a post in the Government Chancery immediately subordinate to a Minister or a post as a Swedish envoy. Also in other cases no one who is not a Swedish citizen may hold an office or carry out a*

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<sup>190</sup> Article 15, Constitution of Portugal.

<sup>191</sup> Article 7, §6 Constitution of Portugal.

*commission, if the holder of such an office or commission is elected by the Parliament. Swedish nationality may otherwise be made a prerequisite of the right to hold or exercise an office or commission under the State or a local authority only if laid down in law or under conditions prescribed by law.*<sup>192</sup>

The Swedish condition of nationality is required for the holding or the exercising of the mentioned functions.

## 6.5 Language requirement

Complementing the requirement of nationality, another requirement – sometimes implicit – is the assumption that an officer should be able to speak the State’s official language and should speak to citizens in their own language<sup>193</sup>. Nine of the relevant States have included the use of language as a specific requirement for the execution of public powers – Cyprus, Czech Republic, Estonia, Finland, Ireland, Latvia, Malta, Norway and Slovenia.

Other States have included this requirement in regular statutory legislation, e.g. Belgium<sup>194</sup>, Poland<sup>195</sup>, France<sup>196</sup> and Slovenia<sup>197</sup> (although Belgium mentions the use of language for acts carried out by the administration and for judicial matters in article 30 of its constitution as an exception to the principle of the freedom of languages).

### 6.5.1 Cyprus

The constitution of Cyprus contains – for historic reasons – an extensive provision regarding the use of the official languages. The relevant provisions in the context of border control and return enforcement are the following:

1. *The official languages of the Republic are Greek and Turkish.*
2. *Legislative, executive and administrative acts and documents shall be drawn up in both official languages and shall, where under the express provisions of this Constitution promulgation is required, be promulgated by publication in the official Gazette of the Republic in both official languages.*
3. *Administrative or other official documents addressed to a Greek or a Turk shall be drawn up in the Greek or the Turkish language respectively.*

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<sup>192</sup> Chapter 11, article 9, Constitution of Sweden.

<sup>193</sup> Even when facing travellers from “outside the European Union” speaking “any” language, this requirement is related to the preparation of official documents in the host country..

<sup>194</sup> See: coordinated laws on the use of languages of 18 July 1966.

<sup>195</sup> The Polish language Act requires that the use of Polish language is mandatory for entities providing public services, which also includes border control.

<sup>196</sup> See: the regulations on the French Public Function.

<sup>197</sup> See: Public Procedures Act.



[...]

7. The two official languages shall be used on coins, currency notes and stamps.

8. Every person shall have the right to address himself to the authorities of the Republic in either of the official languages.<sup>198</sup>

### 6.5.2 The Czech Republic

The constitution of the Czech Republic does not include specific language requirements but article 3 refers to the text of the Charter of Fundamental Rights and Freedoms, which contains a provision concerning the use of language towards national or ethnic minorities:

*'An integral component of the constitutional system of the Czech Republic is the Charter of Fundamental Rights and Freedoms.'*<sup>199</sup>

*'(1) Citizens who constitute national or ethnic minorities are guaranteed all- round development, in particular the right to develop with other members of the minority their own culture, the right to disseminate and receive information in their language, and the right to associate in ethnic associations. Detailed provisions in this respect shall be set by law.*

*(2) Citizens constituting national and ethnic minorities are also guaranteed under conditions set by law*  
*(a) the right to education in their language,*  
*(b) the right to use their language in official contact,*  
*(c) the right to participate in the settlement of matters concerning the national and ethnic minorities.'*<sup>200</sup>

### 6.5.3 Estonia

The Estonian constitution imposes Estonian (with an exception for national minorities):

*'Everyone has the right to address State agencies, local governments, and their officials in Estonian and to receive responses in Estonian. In localities where at least one-half of the permanent residents belong to a national minority, everyone has the right to also receive responses from State agencies, local governments, and their officials in the language of the national minority.'*<sup>201</sup>

### 6.5.4 Finland

The Constitution of Finland refers to two national languages, with an exception for national minorities:

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<sup>198</sup> Article 3, §§ 1-3 and §§ 7-8, Constitution of Cyprus.

<sup>199</sup> Article 3, Constitution of Czech Republic.

<sup>200</sup> Article 25, Charter of Fundamental Rights and Freedoms, Czech Republic.

<sup>201</sup> Article 51, Constitution of Estonia.

*'(1) The national languages of Finland are Finnish and Swedish.  
 (2) The right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language, shall be guaranteed by an Act. The public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.  
 (3) The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.'*<sup>202</sup>

### 6.5.5 Ireland

In accordance with the Irish constitution, regular statutory acts can include exceptions to the rule consisting of the use of two official languages:

*'(1) The Irish language as the national language is the first official language.  
 (2) The English language is recognized as a second official language.  
 (3) Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.'*<sup>203</sup>

### 6.5.6 Latvia

The constitution of Latvia states the right to receive information from State or government institutions in Latvian and provides a separate clause for ethnic minorities:

*'Everyone has the right to address submissions to State or local government institutions and to receive a materially responsive reply. Everyone has the right to receive a reply in the Latvian language.'*<sup>204</sup>

*'Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity.'*<sup>205</sup>

### 6.5.7 Malta

The use of language in the Maltese constitution is extended to both Maltese and English:

*'(1) The National language of Malta is the Maltese language.  
 (2) The Maltese and the English languages and such other language as may be prescribed by Parliament (by a law passed by not less than two-thirds of all the*

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<sup>202</sup> Article 17, Constitution of Finland.

<sup>203</sup> Article 8, Constitution of Ireland.

<sup>204</sup> Article 104, Constitution of Latvia.

<sup>205</sup> Article 114, Constitution of Latvia.

*members of the House of Representatives) shall be the official languages of Malta and the Administration may for all official purposes use any of such languages: Provided that any person may address the Administration in any of the official languages and the reply of the Administration thereto shall be in such language.'*<sup>206</sup>

### 6.5.8 Norway

The article in the Norwegian constitution on the fulfilment of senior official posts by Norwegian citizens who speak the language of the country, has been referred to before. The language in which official acts have to be carried out in a country is something different from the languages that someone needs to know to have access to a specific post.

### 6.5.9 Slovenia

Slovenia formulates language requirements including a reference to regular statutory law:

*'Everyone has the right to use his language and script in a manner provided by law in the exercise of his rights and duties and in procedures before State and other bodies performing a public function.'*<sup>207</sup>

The Public Procedures Act places language requirements in the setting of regular statutory law.

### 6.5.10 Comments

In the context of border control and return enforcement, the knowledge of official language(s) of the host State is a common requirement.

Indeed, border control activities that do imply direct contact with persons are:

- Stop a person trying to cross the border - Ask him to stop on a voluntary basis;
- Stop a person trying to cross the border - Force a person trying to cross the border to stop;
- Interview persons on their reasons for crossing external borders outside the authorised crossing points;

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<sup>206</sup> Article 5, §§ 1-2, Constitution of Malta.

<sup>207</sup> Article 62, Constitution of Slovenia. Article 19 of the constitution refers to the deprivation of a person's liberty. In that case he is entitled to be informed *in his mother tongue or a language he understands*. This provision is therefore not limited to the state's official language and consequently not included in this analysis.

- Carry out pre-border checks in third countries (at gates, before entry in plane/boat...);
- Screen the persons crossing the border;
- Ask for ID, VISA, travel documents;
- Give indications to persons (pedestrian, drivers, pilots, skippers) crossing the border;
- Notify the person willing to cross the border of admission or refusal of admission/exit.

Doctrine and case-law on the use of languages in multi-lingual countries such as Belgium, Luxembourg, Spain or Finland usually consider, with regard to the linguistic communities, that the right of persons to address public authorities in their own language does not require that all the public officials in those authorities are able to speak both or all languages, but that addressing a person in his/her language by one or more officials can be ensured).

Not all concerned persons (travellers coming from outside the EU) will speak the Host States' official language(s): for example, at the Polish border, visitors could even well speak English, Russian or Ukrainian. However, the knowledge of the local language is often required to communicate locally and to be able to understand and complete local documents.

Imposing minimum language requirements for guest officers, depending on the type and location of their mission is therefore an option that could be taken into consideration.

## 6.6 Constitutional Conferment of executive powers

Constitutional and statutory legislations of the Member States occasionally contain provisions concerning the conferment of executive powers to persons who are not appointed by the national administration. These rules can either prohibit, or authorise such conferment.

### 6.6.1 Austria

The Austrian constitution lays down clear provisions related to the possibility of conferring executive powers to foreign officials:

*(1) The generally recognized rules of international law are regarded as integral parts of Federal law.*

*(2) Legislation or a treaty requiring sanction in accordance with Art. 50 para. 1 can transfer specific Federal competences to intergovernmental organisations and their authorities and can within the framework of international law regulate the*

activity of foreign States' agents inside Austria as well as the activity of Austrian agents abroad.<sup>208</sup>

To receive practical applications, the constitutional provision must therefore be complemented by law or treaty.<sup>209</sup>

## 6.6.2 Belgium

The Belgian Constitution includes a provision allowing transfer of powers to institutions under international law:

*'The execution of certain powers can be transferred to institutions under international law by a treaty or by law.'*<sup>210</sup>

In law (and practice) agreements to reinforce the Benelux cooperation within the Schengen Area (mainly the Senningen agreement, extended in 2004) have conferred wide executive powers to officers from the 2 other Benelux States.

## 6.6.3 The Czech Republic

The constitution of the Czech Republic provides – on the condition of a parliamentary approval – the transfer of powers to an international institution:

*'(1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organisation or institution.  
(2) An approval of the Parliament is required to ratify an international agreement stipulated in Subsection 1 unless a constitutional law requires an approval from a referendum.'*<sup>211</sup>

## 6.6.4 Denmark

The constitution of the Kingdom of Denmark does not explicitly refer to, neither does it rule out the conferment of executive powers to officers of other States. However, the Constitution provides for the possibility to grant executive powers to international organisations:

*'(1) Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international*

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<sup>208</sup> Article 9, §§1 and 2, Constitution of Austria.

<sup>209</sup> The Austrian Constitutional High Court has ruled that strict limits – such as the support of a national police officer – should be imposed on the conferment of executive powers to private companies, Verfassungsgerichtshof Österreich, n° 14473, 14 March 1996.

<sup>210</sup> Free translation of article 34, Constitution of Belgium.

<sup>211</sup> Article 10a, Constitution of Czech Republic.

*authorities set up by mutual agreement with other States for the promotion of international rules of law and co-operation.*

*(2) For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Parliament shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in Section 42.<sup>212</sup>*

The verbatim reading of article 20, §1 limits conferment to international authorities “set up by mutual agreement with other States”. Does such precision exclude other national authorities (and therefore their officers)? The practice demonstrates the contrary, because bilateral agreements exist and are in force with other States (Germany and Sweden) based on article 40 and 41 of the Schengen Implementation Convention. These agreements have already conferred specific powers of officers from these States on the Danish territory.<sup>213</sup>

### 6.6.5 Estonia

No specific provision has been found, concerning either limitation or authorisation of conferment of powers to foreign officers.

### 6.6.6 France

The recent Article 88-2 of the French constitution<sup>214</sup>, modified in March 2005 in consideration of the draft European constitutional treaty and of the European Arrest Warrant, has expressly foreseen (second paragraph) the “transfer of powers necessary for the

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<sup>212</sup> Article 20, Constitution of Denmark.

<sup>213</sup> In 2001 the constitutionality of these existing agreements was brought before the Danish Constitutional Court but the case was never formally decided upon. During interviews the Danish officials confirmed that the question of granting executive powers to foreign officers is a matter that has never been the object of an in depth analysis .

<sup>214</sup> French version:

Sous réserve de réciprocité et selon les modalités prévues par le Traité sur l'Union européenne signé le 7 février 1992, la France consent aux transferts de compétences nécessaires à l'établissement de l'union économique et monétaire européenne.

Sous la même réserve et selon les modalités prévues par le Traité instituant la Communauté européenne, dans sa rédaction résultant du traité signé le 2 octobre 1997, peuvent être consentis les transferts de compétence nécessaires à la détermination des règles relatives à la libre circulation des personnes et aux domaines qui lui sont liés.

La loi fixe les règles relatives au mandat d'arrêt européen en application des actes pris sur le fondement du traité sur l'Union européenne.

determination of rules concerning freedom of movement for persons and related areas”

*(1) Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of powers necessary for the establishment of European economic and monetary union.*

*(2) Subject to the same reservation and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on 2 October 1997, the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed.*

*(3) Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty on European Union.*

Therefore, the provisions of the 2005 revised French constitution will not be an obstacle for the acceptance and implementation of a new European instrument related to external border control (the free movement of persons) on the condition that the conferment of powers is reciprocal.

The Constitutional Council has received specific competencies to preserve the compatibility between the Constitution and the Treaties (or any derived instrument) according to article 54 of the constitution:

*If, upon the demand of the President of the Republic, the Prime Minister or the President of one or other Assembly or sixty deputies or sixty senators, the Constitutional Council has ruled that an international agreement contains a clause contrary to the Constitution, the ratification or approval of this agreement shall not be authorised until the Constitution has been revised (art 54).*

Due to the revision made in March 2005, the Constitutional Council should therefore not discover such incompatibility.

During the current debate (in the French Senate) on the extension of powers (hot pursuit) resulting from the Schengen convention, a group of French Senators have planned to request the intervention of the Constitutional Council because the extension would be contrary to the “sovereignty principle” (title 1 of the French Constitution). This is based on their opinion that the new delegation of powers would be discretionary (a “mise sous tutelle” reducing the State’s sovereignty) and would not be limited to specific organised operations, to specific missions, tasks and related powers the Host State could possibly refuse <sup>215</sup>. To avoid such reproach, a new European instrument facilitating reciprocal conferment of

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<sup>215</sup> French Senate, Debate of 9 November 2005 on the constitutionality of the project of Council decision on the improvement of police cooperation between the Member States of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement - COM (2005) 317.

powers during joint border control operations should establish the “non-discretionary” character of the planned operations.

### 6.6.7 Germany

The German Constitution even includes the possibility to transfer federal competences to international organisations.

*‘(1) The Federation may by a law transfer sovereign powers to international organisations.*

*(1a) Insofar as the Länder are competent to exercise State powers and to perform State functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.*

*(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.*

*(3) For the settlement of disputes between States, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.’<sup>216</sup>*

### 6.6.8 Greece

The Greek constitution includes a specific provision regarding the conferment of powers to agents of international organisations under certain conditions:

*‘1. The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.*

*2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organisations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law sanctioning the treaty or agreement.*

*3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.’<sup>217</sup>*

Border control to protect the common space of free circulation serves an important (Greek) national interest and an instrument promoting cooperation with other States could be transposed into national law according to paragraph 3 (majority).

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<sup>216</sup> Article 24, Basic law for the Federal Republic of Germany (Grundgesetz).

<sup>217</sup> Article 28, Constitution of Greece.



## 6.6.9 Hungary

The Hungarian constitution provides for the exercise of powers to the extent necessary for executing an obligation resulting from the participation to the European Union:

*(1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union.*

*(2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament.<sup>218</sup>*

## 6.6.10 Ireland

The Constitution of Ireland contains provisions enabling the transfer of executive powers for the purpose of international cooperation:

*'2. The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.'<sup>219</sup>*

*'4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.*

*2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.'<sup>220</sup>*

## 6.6.11 Luxembourg

Luxembourg provides a general clause for temporary transfer of legislative, executive and judicial powers:

*'The exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law.'<sup>221</sup>*

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<sup>218</sup> Article 2a, Constitution of Hungary.

<sup>219</sup> Article 28, §2 Constitution of Ireland.

<sup>220</sup> Article 29, §4, 1° and 2°, Constitution of Ireland.

<sup>221</sup> Article 49bis, Constitution of Luxembourg.

In law (and practice), agreements to reinforce the Benelux cooperation within the Schengen Area (mainly the Senningen agreement, extended in 2004) have conferred wide executive powers to officers from the 2 other Benelux States.

### 6.6.12 The Netherlands

The Dutch constitution contains an article on the conferment of powers to representatives of international law bodies:

*'Having regard to, if necessary, the provisions of article 91, third paragraph, competences of legislation, administration and jurisdiction, can be conferred to organisations under international law by or in virtue of a treaty.'*<sup>222</sup>

In law (and practice), agreements to reinforce the Benelux cooperation within the Schengen Area (mainly the Senningen agreement, extended in 2004) have conferred wide executive powers to officers from the 2 other Benelux States.

### 6.6.13 Norway

The Norwegian constitution contains a provision concerning the exclusion of the transfer of command over the land and naval forces to foreign powers.

*'The King is Commander-in-Chief of the land and naval forces of the Realm. These forces may not be increased or reduced without the consent of the Storting. They may not be transferred to the service of foreign powers, nor may the military forces of any foreign power, except auxiliary forces assisting against hostile attack, be brought into the Realm without the consent of the Storting.'*

*The territorial army and the other troops which cannot be classed as troops of the line must never, without the consent of the Storting, be employed outside the borders of the Realm.'*<sup>223</sup>

The Norwegian constitution also provides for the conferment of powers to representatives of international organisations:

*'In order to safeguard international peace and security or to promote the international rule of law and cooperation between nations, the Storting may, by a three-fourths majority, consent that an international organisation to which Norway adheres or will adhere shall have the right, within objectively defined fields, to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities, although not the power to alter this Constitution. For the Storting to grant such consent, at least two thirds of the Members of the Storting shall be present, as required for proceedings for amending the Constitution.'*

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<sup>222</sup> Free translation of article 93, Constitution of the Netherlands.

<sup>223</sup> Article 25, Constitution of Norway.

*The provisions of this Article do not apply in cases of membership in an international organisation, whose decisions only have application for Norway purely under international law.*<sup>224</sup>

### 6.6.14 Poland

The Polish constitution also requires a parliamentary approval (or a national referendum) in order to transfer certain powers:

*‘(1) The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters.*

*(2) A statute, granting consent for ratification of an international agreement referred to in Paragraph (1), shall be passed by the House of Representatives (Sejm) by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.*

*(3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.*

*(4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the House of Representatives (Sejm) by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.*<sup>225</sup>

### 6.6.15 Portugal

The Portuguese constitution provides for the principle of reciprocity in order to enable the State to enter into agreements for the joint exercise of powers necessary for the operation of missions requested to apply the European Union’s policies, on the condition that the principle of subsidiarity and the objective of economic and social cohesion are respected.

### 6.6.16 Slovenia

Slovenia has provided in its Constitution that a part of its sovereignty could be transferred to international organisations under certain conditions and following a procedure that may include a referendum:

*‘Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with States which are based on respect for these values.*

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<sup>224</sup> Article 93, Constitution of Norway.

<sup>225</sup> Article 90, Constitution of Poland.

*Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal shall pass at the referendum if a majority of voters who have cast valid votes vote in favour of such. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.*

*Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.*

*In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.<sup>226</sup>*

### 6.6.17 Spain

Spain has adopted a constitutional provision providing a transfer of sovereignty (competences derived from the constitution) to an international organisation or institution:

*'By means of an organic law, authorisation may be established for the conclusion of treaties which attribute to an international organisation or institution the exercise of competences derived from the Constitution. It is the responsibility of the Parliament or the Government, depending on the cases, to guarantee compliance with these treaties and the resolutions emanating from the international or supranational organisations who have been entitled by this cession.'<sup>227</sup>*

### 6.6.18 Sweden

Sweden adheres to the principle of legality; therefore the conferment of executive powers to foreign officials should have a legal basis.

*'(1) The Government may not conclude any international agreement binding upon the Realm without Parliament approval, if the agreement presupposes the amendment or abrogation of a law or the enactment of a new law, or if it otherwise concerns a matter which is for the Parliament to decide.'<sup>228</sup>*

The Swedish constitution only mentions the granting of judicial or administrative functions to international organisations or foreign institutions. During the interviews, Swedish practitioners stated that to a certain extent it would be less critical to confer specific powers

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<sup>226</sup> Article 3a, Constitution of the Slovenia.

<sup>227</sup> Article 93, Constitution of Spain.

<sup>228</sup> Chapter 10, article 2, §1, Constitution of Sweden.

to EU authorities (e.g. FRONTEX officials) as opposed to officers from other relevant States.

*‘(3) Any judicial or administrative function not directly based on the present Instrument of Government may be entrusted to another State, to an international organisation, or to a foreign or international institution or community by means of a decision of the Parliament. The Parliament may likewise authorise the Government or any other public authority to decide on such a delegation of functions in a particular situation. Where the function concerned involves the exercise of public authority, the Parliament’s decision shall be taken by a majority of no fewer than three fourths of those present and voting. A decision to delegate a function of this nature may also be taken in the manner prescribed for the enactment of a fundamental law.’<sup>229</sup>*

## 6.7 Specific provisions concerning the exercise of executive powers by national officers abroad

Few specific or explicit provisions exist in national legislations to restrict or grant the bestowment of executive powers to national officers when they operate outside their home country.

“Service outside the Home State” refers more to service provided to other countries or organisations (this includes for example the participation in Europol or FRONTEX activities), than to serving their own State abroad.

### 6.7.1 Cyprus

Cyprus has stated that the chief of police has to give his approval for sending police officers abroad (Art. 8A N. 73 (I)/2004). Such an explicit provision makes no exception to the general practice (all countries) that the participation in a mission abroad has to be authorised by the hierarchy / and by the receiving country, due to the respect of other countries’ territorial sovereignty.

### 6.7.2 Slovakia

In the Slovakian Police Act<sup>230</sup>, article 77a, b and c deal with performances of foreign authorities in Slovakia and Slovak Authorities abroad. It states that these authorities can only perform

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<sup>229</sup> Chapter 10, article 5, §3, Constitution of Sweden.

<sup>230</sup> Police Act 171/1993

police powers to an extent that has to be stipulated in international agreements.

### 6.7.3 Ireland

Art. 51 of Chapter 8 of the Irish Garda Siochana Act contains the legal basis for the Garda commissioner to assign members of the Garda for service outside Ireland in a limited number of domains:

- Duties of a police character with an international organisation
- Liaison duties with Europol
- Secondment to an international organisation

### 6.7.4 Poland

Poland limits the activities of its border guards abroad in national legislation. The Executive Act of the Border Guard Act states that a Polish Border Guard may not take the following three items out of the country when travelling abroad e.g. on Joint Operations, except with the prior agreement from the Commander-in-Chief of the Border Guard:

1. uniform
2. service identification
3. weapon (arm)

Articles 147c-147n of the Polish Border Guard Act relate to contingents of Polish officers. According to these provisions the Border Guard contingent can be designated to realise the following tasks outside the State territory:

1. organising border control
2. organising border surveillance
3. assurance of security in international communication
4. trainings and exercises for border services
5. organisational arrangements

### 6.7.5 Germany

§65 of the German Police Act explicitly provides for a national legal basis for police officers of the Federal Police to act outside Germany. This requires an international agreement with the competent authority of the other State regulating the performance of German police officers generally or in detail (§65 (2) German Police Act).

### 6.7.6 Czech Republic

In Czech Republic, chapter II, Section 4 (4) Act No 326 1999 on Residence of Aliens in the territory of the State provides: “If the Police performs border control on the basis of an International Agreement outside the Territory, this control and acts carried out as part thereof shall have the same legal effects as border control performed in the territory”.

## 6.8 Other requirements

In the context of border control and return enforcement, additional requirements exist, concerning, for example, the right to carry and use firearms, the right to wear a uniform, the right to drive patrol cars and the right to access certain databases. These requirements do not result from national constitutions but are laid down in the national criminal code, police act or other specific statutory legislations of the relevant States.

### 6.8.1 Criminal law

Provisions of the Criminal Procedure Acts could restrict criminal investigation activities to national authorities. Criminal investigation is, in principle, outside the scope of Border control, and therefore the impact of such restrictions is minimal.

According to the Danish Criminal Code §108:

*(1) Any person who, by any act other than those covered by Section 107 of this Act, enables or assists the Intelligence Service of a foreign State to operate directly or indirectly within the territory of the Danish State shall be liable to imprisonment for any term not exceeding six years.*

*(2) If the information concerns military affairs or if the act is committed during war or enemy occupation, the penalty may be increased to imprisonment for any term not exceeding 12 years.*

In theory, such a provision could prevent foreign police officers from acting on Danish territory. There was a case of gangsters attacking three Swedish police officers in Copenhagen. These foreign officers showed their police tag, thus creating a diplomatic incident.

In Belgium, any “intrusion in public authority” is a criminal offence according to the Criminal code (Strafwetboek): Art. 227 on intrusion in public authority (“Inmenging openbare macht”)

In Hungary, Act LIV of 2002, art 4, point 1 declares that the cooperation cannot be processed against the laws of the Hungarian Republic and cannot threaten the security and public policy of Hungary.

All the limitations above are applicable only if the action of the “foreign officer” is undertaken without the appropriate legal basis or authorisation by the host State, and therefore they have no impact on the adoption of a specific European legal instrument to confer executive powers in the framework of joint operations.

## 6.8.2 Data protection provisions

Depending on the type of executive power foreseen for the guest border guards, data protection provisions should also be taken into account.

The following border control activities can imply that data protection provisions have to be taken into account:

- Checking national hit/no hit databases for first line check
- Checking the SIS database during first line check activities
- Checking information systems with additional information related to persons intending to cross the border
- The host officers request a guest officer to perform an information check
- The host officers perform a check based on a request of the guest officer
- Exchanging information between the authorities of the host and the home State

Data protection provisions are closely related to the right to privacy and cover a wider spectrum of regulations than the provisions related to access to databases.

On the one hand, all Member States have now implemented the provisions of the Directive 95/46EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It was completed by the Directive 2002/58/EC<sup>231</sup> concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

As this framework is harmonised, it will not create substantial issues for guest officers. However harmonisation does not mean

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<sup>231</sup> published in Official Journal of the European Communities, L 201 (page 37 & seqq.), 31.07.2002.



uniformity and the need of more detailed knowledge on data protection regulation of the host country should be considered when training guest officers, in the event that they would be involved in processing personal data in a visited country (meaning the collection, the simple access and query in a database, the retrieval of data). The following table represents an overview of the national legislation related to data protection in the EU Member States.

<b>Country</b>	<b>Data Protection</b>
Austria	Data Protection Act 2000 ( <i>Datenschutzgesetz 2000- DSG 2000</i> ) - the right to information, rectification of incorrect data and erasure of unlawfully processed data
Belgium	Law on the Protection of Private Life (8 December 1992) amended for 95/46/EC on 11 December 1998 (into force on 1 September 2001).
Cyprus	Processing of Personal Data (Protection of Individuals) Law 2001, in force in November 2001.
Czech Rep.	Act on the Protection of Personal Data No. 101/2000 Coll. (4 April 2000) protects privacy. Enforced by the Office for Personal Data Protection
Denmark	Act on Processing of Personal Data (31 May 2000) allows individuals to access their records held by public and private bodies. Enforced by the Datatilsynet (Data Protection Agency).
Estonia	Personal Data Protection Act (PDPA) - June 1996 protects persons regarding “non-sensitive” and “sensitive” personal data and organises access and correction. Amended in 2003 for EU compliance.
Finland	Personal Data Act (March 1999). Amended in 2000. Overseen and enforced by the Data Protection Ombudsman.
France	Law on Informatics and Liberty (6 January 1978), creating the CNIL National Commission for Informatics and Liberty, amended by law Nr. 2004-801 of 6 August 2004 to implement 1995/46/EC.
Germany	Federal Data Protection Act (1990). The strictest data protection law in EU. Amended in 1994, 1997 and August 2002 to align with 95/46/EC.
Greece	Law 2472/1997 on the Protection of Individuals with regard to the Processing of Personal Data. Amended in 2000 and 2001. Enforced by the Hellenic Data Protection Authority. Law 2774/1999 on the Protection of Personal Data in Telecommunications, and Law 3115/2003 that establishes the Hellenic Authority for the Information and Communication Security and Privacy (ADAE).
Hungary	Act No. LXIII of 1992 on the Protection of Personal Data and Disclosure of Data of Public Interest. Application is overseen by the Parliamentary Commissioner for Data Protection and Freedom of Information.
Ireland	Data Protection Act (1988) amended in 2003, under supervision of a Data Protection Commissioner.
Italy	Data Protection Code (30 June 2003 - in force on 1 January 2004) replaces previous laws.
Latvia	Law on Personal Data Protection (23 March 2000, into force on 1 January 2001) protects fundamental human rights. Application is overseen by the State Data Inspectorate.
Lithuania	Law on Legal Protection of Personal Data (11 June 1996). Amended on 21 January 2003.
Luxembourg	The Data Protection Act (2 August 2002). Goes beyond the 95/46/EC framework by covering also moral persons. New data protection authority (National Commission for Data Protection or CNPD).
Malta	Data Protection Act (14 December 2001 - in force in July 2003). Office of the Prime Minister (OPM) and the State-owned IT services company MITTS co-ordinate, advise and assist in implementation.
Netherlands	Personal Data Protection (July 2000, into force 1 September 2001). Overseen and enforced by the Data Protection Authority (CBP).
Poland	Act on the Protection of Personal Data Adopted on 29 August 1997 and subsequently amended.
Portugal	Law on the Protection of Personal Data (26 October 1998) governs the collection and processing of personal data. Enforced by the National Data Protection Commission.
Slovakia	Act No. 428/2002 on Personal Data Protection (3 July 2002) implements 95/46/EC. Enforced by the Office for Personal Data Protection.

Slovenia	Personal Data Protection Act (ZVOP - July 2004, into force on 1 January 2005). Overseen by Inspectorate for Personal Data Protection.
Spain	Law on the Protection of Personal Data (13 December 1999). Enforced by the Data Protection Agency.
Sweden	Personal Data Act (1998:204 - into force on 24 October 1998), replacing the Swedish Data Act from 1973.
U.K.	Data Protection Act (July 1998, into force on 1 March 2000) Contains eight Data Protection Principles.

On the other hand, specific data protection rules are laid down by Regulation (EC) 45/2001 concerning the processing of data placed under the control of the European institutions (this includes the FRONTEX officers), which are also placed under the authority of the European Data Protection Supervisor<sup>232</sup>, who controls that the regulation is complied with by Community institutions or bodies and by their representatives.

Here too the availability of European instruments will facilitate the border control officers' understanding of their duties when accessing data processed in the framework of police cooperation (for example the access to the Schengen Information system)<sup>233</sup>, or, more typically, related to their specific activities when accessing data related to Visas<sup>234</sup>

## 6.9 Legal analysis within the Community context

Based on the above overview of national requirement regarding nationality or language, national sovereignty and the possibility to confer executive powers to non-national officers what could be the impact of such requirements on a Community initiative?

### 6.9.1 The impact of Nationality

The nationality requirement is constantly presented as the most prominent or visible pre-requisite for exercising public authority, as this appears to be the traditional privilege of national officers. Therefore it must be analysed carefully. From a strict legal point of

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<sup>232</sup> Decision (2004/55/EC) of the European Parliament and of the Council of 22 December 2003 appointing the independent supervisory body provided for in Article 286 of the EC Treaty.

<sup>233</sup> COM(2005) 475 final - Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

<sup>234</sup> COM(2004) 835 final – Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas

view, the conferment of executive powers to guest (= foreign) officers may appear as totally independent from the nationality (and from the language) requirement to become a civil servant of a specific country. The subject matter is different; the main goal of conferring executive powers to guest border guards is “European integration” and not becoming a civil servant of the Host State. In other words, it is not because a State links the exercise of powers to nationality (for its own appointed servants), that this State will not accept conferment of powers to servants of another State, as it is done in practice for the concrete needs of several European Union policies, such as the daily operation of the Schengen Area.

When guest border officers participate in joint operations and/or joint removal actions, they are not fulfilling the position of an officer in the other Member State: these missions do not change the employment status of the officer. Visiting officers are not filling positions in the Host State public services but will be performing public tasks on the territory of the Host State for a specific purpose and for a limited period of time.

However, as it was developed recently in an EIPA study, European integration is in fact very much tied up with the concept of public administration<sup>235</sup>: The European Community is not in a position to dictate the law governing individual civil services, but this does not mean that European integration will not have any effect on national civil services, which find themselves becoming increasingly influenced by the European integration process, albeit indirectly.<sup>236</sup>

Conferring executive powers to foreign officers in the domain of border control is conferring a part of the public authority that may be considered as “attached” to the career (the public statute) of a public servant.<sup>237</sup> A European approach regarding this point, when it is formulated theoretically (from a legal, rather than from a practical point of view) will not look homogeneous: turning to the structure and scope of the civil service in the Member States, positions are marked by diversity and by antagonism between traditional career systems and job-based systems, as represented in the EIPA<sup>238</sup> study:

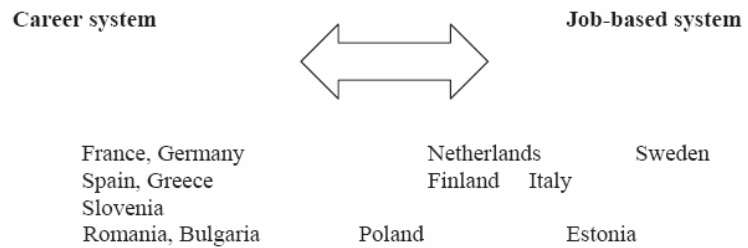
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<sup>235</sup> EIPA – “A New Space for Public Administrations and Services of General Interest in an enlarged Union” – Luxembourg 8 June 2005 – p.14.

<sup>236</sup> Kämmerer, J.A., Das deutsche Berufsbeamtentum im Gravitationsfeld des Europäischen Gemeinschaftsrechts, in: Die Verwaltung, no. 3/2004, p. 357; Demmke, C. and Haritz, M., Unterschiedliche Definitionen des Arbeitnehmerbegriffs im Gemeinschaftsrecht und die Auswirkungen auf den öffentlichen Dienst, Zeitschrift für europäische Rechtsstudien (ZEUS), published in 2004.

<sup>237</sup> The notion of public authority is linked to concepts such as “Hoheitsrechte” or “Hoheitliche Befugnisse” in German, “actes publiques” or “actes régaliens” in French.

<sup>238</sup> See also the following EIPA works:  
BOSSAERT (D.), DEMMKE (C.), NOMDEN (K.), POLET (R.), *La Fonction publique dans l'Europe des Quinze*, Maastricht, EIPA, 2001.



All Member States fall somewhere between these two extreme forms, with the Swedish, Dutch, British, Italian, Estonian and Finnish models bearing most resemblance to the traditional job based model, while France, Germany and Spain come under the career model category.

The inherited model is directly dependent on national tradition, on the definition of the State and of the role attributed to the State in its relationship with society, of what belongs in the “public domain”, its administrative culture and the configuration of its internal politics<sup>239</sup>. Striking examples of such “historical” impact are the systems that apply in Estonia, Malta, Cyprus, Romania and Slovenia.

The differences concerning the model generate inconsistency in Member States’ responses to the questions “What is a civil servant?” “What are the duties and powers of a civil servant?” “What is the exercise of public authority” and “Which job could be delegated or contracted with any other organisation, which may be a private one?”.

In the debate surrounding the limits marking the boundaries of the concept of “activities in public service” or “public utility”, it is generally admitted that the diplomatic service, the treasury department, the judiciary, the armed forces, the police and border control activities are part of the national royalties. One of the related consequences of such a conclusion is that Member States can restrict the accessibility of these posts to their nationals and prevent foreign civil servants from entering the national administration to exercise concerned powers.

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BOSSAERT (D.), DEMMKE (C.), *Civil Services in the Accession States. New Trends and the Impact of the Integration Process*, Maastricht, EIPA, 2003.

DEMMKE (C.), *Who is Civil Servant and Who is Not and Why*, Maastricht, EIPA, November 2004.

<sup>239</sup> See: BRAIBANT G., “Existe-t-il un modèle européen de la fonction publique? *Revue française d’administration publique*, no. 68, 1993 and

CASSESE S., “Towards a European Model of Public Administration” in: MERRYMAN, (J.H.), *Comparative and Private International Law*, Duncker & Humblot, Berlin, 1990.

This is compatible with the right to free movement of workers defined in Art 39 TEC, the Treaty, providing that this right might be limited on grounds of public policy, public security or public health and that it does not apply to employment in the public service.

Article 39 (4) does not define the concept of public service. Since the *Sotgiu v. Deutsche Bundespost* Judgement<sup>240</sup>, the European Court of Justice has rejected the description of the legal relationship between the worker and the public service as a criterion and adopted a functional view<sup>241 242</sup>. In *Lawrie-Blum v. Land Baden-Württemberg*<sup>243</sup> the Court stated that the term ‘worker’ in article 39(4) has a Community meaning and that it must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.<sup>244</sup> Public service tasks are those which involve direct or indirect participation in the exercise of powers conferred by public law. Examples hereof are the exercise of a power to constrain individuals according to the law or to execute missions related to the internal or external security of the State<sup>245</sup>.

The main criteria to determine what part of the national service falls within the public service criterion were put forward in the *Commission v. Belgium* Judgement<sup>246</sup>, limiting the “domestic law” principle: hindering European citizens from applying for a secretarial position in police or in a foreign affairs ministry would not satisfy the requirements of the ECJ with regard to Article 39 of the EC Treaty: the Court specified that it was necessary “*to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and equal treatment of nationals of all Member States is not be restricted by interpretations of the*

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<sup>240</sup> Case 152/73, ECR 153.

<sup>241</sup> Case 307/84, ECR 1725

<sup>242</sup> Case 66/85, ECR 2121.

<sup>243</sup> Case 66, 85, ECR 2121

<sup>244</sup> *Ibid.*

<sup>245</sup> In its Communication of 1988 on “Freedom of movement of workers and access to employment in the public service of the Member States” the European Commission defined the limits of the exception considering that the derogation of article 39 (4) EC covered specific functions of the state and similar bodies in the following categories: armed forces, police and other law enforcement bodies, the judiciary, tax authorities, the diplomatic corps, jobs in state ministries (restricted), regional authorities (very restricted), local authorities (very restricted), central banks (very restricted) and other public bodies where the duties of the post involve the exercise of state authority (such as the preparation, implementation and monitoring of legal acts, and the supervision of subordinate bodies). Some of these posts do not always fall within the scope of article 39 (4) (where mentioned restricted or very restricted) because not all imply the exercise of public authority and responsibility of the safeguarding the general interests of the State, for example administrative tasks, technical consultation, etc. These posts may therefore not be restricted to nationals of the host Member State<sup>245</sup>.

<sup>246</sup> Case 149/79, *Commission v. Belgium* (1980) ECR 3881.

*concept of public service which are based on domestic law alone and which would obstruct the application of Community rules”.*

In the *Commission v. Italy*<sup>247</sup> the Court stated that even if employment in the public service within the meaning of article 39(4) is involved, this can never justify discriminatory measures with regard to remuneration or other conditions of employment against workers from other Member States once they have been admitted to the post in question.<sup>248</sup>

A question was raised in relation to private sector posts which involve some exercise of public authority. In the *Commission vs. Italy*<sup>249</sup> the Court stated that private security guards do not form part of the public service and that therefore article 39 (4) is not applicable to them, whatever the duties of the employee.

Another attempt to progress towards a common understanding of the notion of public authority was formulated in the Commission’s Communication of 11 December 2002. It acknowledges<sup>250</sup> the specificity of “functions of the State and similar bodies such as the armed forces, the police and other forces of the maintenance of order”, although it stipulates that “not all posts in these fields imply the exercise of public authority: administrative tasks, technical consultation and maintenance cannot be restricted to nationals of the host Member State”.

If the traditional conception of “public authority” (in other words “sovereignty”) lies behind the legal and political resistance to ECJ case law relating to Article 39 (4), producing in many Member States a broad understanding of the posts covered by the derogation, at the same time the realities of co-operation are promoting mobility agreements set up by the Member States themselves (e.g. in the form of exchange programmes and temporary secondments). Cooperation already covers almost all concerned fields: police exchanges via Europol, personnel, technical and military exchanges related to security policy, and the setting up of joint operations and removals reveal a gap between the domestic applications of the derogatory provision in Article 39 (4) of the EC Treaty and the realities of co-operation<sup>251</sup>. The understanding that the competencies of a civil servant are necessarily linked to national

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<sup>247</sup> Case 225/85, ECR 2625

<sup>248</sup> Ibid.

<sup>249</sup> ECR 2001 I-4363

<sup>250</sup> COM (2002) 694 final

<sup>251</sup> In the same context, the practice of exchanging European affairs ministry staff between France and Germany and some other diplomatic exchange arrangements have been initiated in the Elysée Treaty of 1963.

citizenship is becoming less and less relevant<sup>252</sup>. Lastly and from a practical point of view, even if Member States have the right under article 39(4) TEC to reserve specific posts for their nationals, there is certainly no obligation to do so<sup>253</sup>.

## 6.9.2 The impact of the Sovereignty concept

We have seen that the Schengen “acquis” (in particular art 41, par. 1 & 2 of the implementation Convention regarding hot pursuit) has already provided a Community legal basis for conferring powers to foreign officers operating on other States’ soil. In the French example, the constitutional compatibility of such conferment was not examined regarding the nationality requirements, but regarding the State’s understanding of its sovereignty.

European countries are attached to their sovereignty and it is a basic principle that a European legal instrument (e.g. a framework decision of the Council) can not be transposed in national law as long as it touches upon some essential condition of the exercise of national sovereignty.

The French Conseil d’Etat has pronounced such advice in the matter of the European Arrest Warrant<sup>254</sup>, where a modification of the Constitution was found necessary. The sole reason why this modification (finally performed in March 2005)<sup>255</sup> was found necessary was not related to nationality (refusal of extradition of nationals), to asylum or to the definition of criminal offence: it was requested because the definition of “political offence” was reserved to the State Sovereignty and because – although extradition for a political reason was prohibited by the European Convention of 13 December 1957 – this protection was not granted similarly by the Treaty on European Union or (because of the lack of related case law makes it impossible to predict its decision) by the European Court of Justice.

The French Conseil d’Etat has provided more precision on the compatibility of recognising powers granted to foreign officers in

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<sup>252</sup> Demmke, C., Linke, U, “Who’s a national and who’s a European? Exercising public power and the legitimacy of Art. 39 4 EC in the 21st century”, *EIPASCOPE*, no. 2/2003.

<sup>253</sup> COM(2002) 694 final.

<sup>254</sup> Conseil D’Etat – general assembly – Advice 368282 of 26 September 2002 : « Une décision-cadre (du Conseil de l’Union Européenne) ne saurait, si elle comporte des dispositions contraires à la Constitution ou à des principes de valeur constitutionnelle, mettant en cause les droits et libertés constitutionnellement garantis ou portant atteinte aux **conditions essentielles d’exercice de la souveraineté nationale**, être transposée dans l’ordre interne q’après modification de la Constitution.

<sup>255</sup> French Constitution, Article 88-3 (3) “*Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty on European Union.*”

its advice related to Article 41 of the Schengen Implementation Convention. Art. 41 authorises Officers of one of the Contracting Parties who are pursuing in their country an individual caught in the act of committing or of participating in (a series of) offences, to continue pursuit in the territory of another Contracting Party without the latter's prior authorisation.

Conditions and limitations are provided: obligation to cease pursuit on request from local authorities, no right to apprehend the pursued person but possibility to detain the person pursued until the home officers could take him/her in charge, etc. The Conseil d'Etat notes<sup>256</sup> that “The motivation of the law (exposé des motifs) as well as parliament debates highlighted that “to avoid damaging national sovereignty or judicial guarantees, the powers, rights and obligations of foreign officers in charge of the pursuit were carefully defined”. The Conseil d'Etat also notes that the other French body in charge of constitutional compatibility (the “Conseil Constitutionnel”) has decided that hot pursuit as foreseen by art. 41 of the Schengen Implementation Convention could not be considered as a transfer of sovereignty, because of the above conditions and limitations.<sup>257</sup>

Without entering into a too explicit contradiction with the Conseil Constitutionnel, the Conseil d'Etat decided that – despite the limitations foreseen in the Schengen Implementation Convention - the fact of constraining and detaining a person (the “interpellation”) was an act of police belonging to the essentials of national sovereignty<sup>258</sup> and that a modification of the constitution was necessary.

This has been done, as already reported, with the French constitutional provision, introduced in March 2005 (Article 88-2), providing that “*the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed*”

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<sup>256</sup> Conseil D'Etat – general assembly – Advice 370452 of 25 November 2004.

<sup>257</sup> Conseil Constitutionnel (France) – Decision No 91-294 DC of 25 July 1991.

<sup>258</sup> Conseil D'Etat – general assembly – Advice 370452 of 25 November 2004 :

III « En application du principe de valeur constitutionnelle selon lequel la défense de l'ordre public et la protection des libertés relèvent des seules autorités nationales, un acte de police, dès lors qu'il implique l'usage de la contrainte et qu'il est susceptible de conduire à une privation de liberté, ressortit à l'exercice des conditions essentielles de la souveraineté nationale. Il ne peut donc, en principe, être exécuté que par une autorité publique française ou sous son contrôle...

L'acte d'interpellation intervenant dans le cadre d'une poursuite transfrontalière... est un acte de police qui implique l'usage de la contrainte et porte atteinte à la liberté individuelle. Il ne peut être accompli que par des services français ou sous leur contrôle.

La reconnaissance par la France aux agents étrangers... d'un droit d'interpellation sur le territoire français, ne saurait intervenir qu'après une révision de la Constitution permettant aux autorités françaises de consentir à un tel transfert de compétences ».



Therefore, the French constitutional barriers are now removed, as the new article 88-2 could apply as well in the case of transposition in the French legal order (by a secondary French law) of a European instrument concerning conferment of powers to foreign officers operating on the French territory for the purpose of border control.

However, the conditions set up by the Conseil d'Etat are to be considered at a broader level (the 25 Member States' sovereignty), in particular concerning the limitations and modalities of the conferment.

The variety of the control related tasks justifies the making of a distinction between the roles of prevention and protection (prevention, surveillance, operating technical devices and information bases, teaching, advising, maintenance) that could be put outside the strict exercise of public authority and the role of maintaining order or taking a decision imposing a direct constraint on persons, even if the distinction is not always clear-cut and transparent.

The delimitation of "public authority" or the French concept of "Pouvoirs régaliens" that should be reserved to domestic officials and could be delegated exclusively by them is definitely one of the most debated questions when applying Community law, and has required adaptations of national legal frameworks<sup>259</sup>..

Depending on the European construction and on other requirements resulting, for example, from economic (globalisation) or security (terrorist threats) realities, the scope of public authority is neither stable nor attached anymore to the national sphere: if the privilege of making money was at the heart of "national royalties" before the adoption of the euro, it is not the case anymore for the countries that have decided to exercise this power through the European Central Bank.

All Member States are in the middle of the process of transferring a specific part of their public authority at higher (e.g. European) or sometimes at lower (e.g. regional) levels, where it appears to be more efficient, and of keeping control on other parts where it looks more appropriate to act locally according to the subsidiarity principle.

Debates regarding the delimitation of Public Authority (often seen in U.K. as "Public Utility") occur not only between Member States (due to the various conceptions illustrated higher) but also within each Member State between the supporters of national sovereignty and the advocates of common action where that approach seems more efficient. Concerning several policies (e.g. foreign policy,

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<sup>259</sup> LEMOYNE DE FORGES (J.-M.), *L'adaptation de la fonction publique française au droit communautaire*, Dalloz, Paris 2003.

defence, immigration and border control) the current situation is both unclear and unsatisfactory. Starting from the same findings “*the European Union exercises a growing part of the States’ public authority: legislation, justice, defence, public order, money, taxes, relationships with external States and bodies*”,<sup>260</sup> the parties hesitate between a return to national traditions or a progression towards specific European trans-border public utility services<sup>261</sup>.

Explicitly or implicitly, all Member States reserve the exercise of executive powers to the State, but the vast majority of constitutions include exceptions to the rule. The principle of transferring powers to International Organisations and their bodies (mainly European institutions) is recognised everywhere, and the principle of conferring occasional powers to the representatives of other subjects of international law (e.g. officers of other Member States when applying Art. 41 of the Schengen Implementation Convention) is accepted by all Participating States. Austria, Portugal, Ireland, France Belgium, Czech Republic, Denmark, Germany, Greece, Hungary, Luxembourg, the Netherlands, Norway, Poland, Slovenia and Spain have all included a provision in their constitution regarding such conferment of powers, based on reciprocity and on the provisions of the Treaties. Agreement is sometimes subject to certain conditions (consent or special majority of the parliament, limited period of time etc.).

As we have seen, practical cooperation and substantial conferment of powers have been accepted in several domains<sup>262</sup>, and from a national point of view the border line for accepting such delegations is their “non-discretionary character” as it was debated at the French Senate when examining the extension of hot pursuit powers foreseen in the Schengen Area<sup>263</sup>.

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<sup>260</sup> Lefebvre, F. – L’Etat français: Entre dissolution et réforme – Institut Euro-92 – Avril 1998, p.7 : “l’Union Européenne, substituée aux Communautés antérieures, absorbe et dilue une part grandissante des missions régaliennes de l’Etat : législation, justice, défense, sécurité, ordre public, monnaie, impôts, relations avec les autres Etats souverains, mais sans cadre constitutionnel clair et cohérent, réellement commun aux Européens: en quelque sorte une Constitution européenne ».

<sup>261</sup> Working group « L’enjeu européen des services d’intérêt général » 2004 report – p.26 : « Dans les Services d’Intérêt Généraux (SIG) ayant vocation à être européens, on aura le contrôle de la circulation aux frontières de l’Europe, la maîtrise de l’immigration, le contrôle aérien, la sécurité maritime, ... Ces champs d’action de l’Europe requièrent une réglementation Européenne. ».

<sup>262</sup> See for example section 3.4.2 (Executive powers in host country) and the examples of cooperation in other areas (section 4.3)). It should furthermore be noted that art. 24 of the Prüm Treaty of 27 May 2005 allows each contracting party to confer sovereign powers on other Contracting Parties’ officers involved in joint operations.

<sup>263</sup> French Senate, Debate of 9 November 2005 on the constitutionality of the project of Council decision on the improvement of police cooperation between the Member States of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement - COM (2005) 317.

At the Benelux level, the 8 June 2004 extension of the Senningen agreement<sup>264</sup> has enlarged to the important parts of the territory of The Netherlands, Belgium and Luxembourg the right of intervention of police forces, which can now operate in the other participating countries on their own initiative. This precedent implies much more conferment of powers comparing what would be needed for the purpose of joint operations at external EU borders, and – although now in force – the project of bill implementing the agreement has been criticised regarding sovereignty by the Conseil d’Etat of Luxembourg, mainly because the concerned operation “on guest State initiative” implies a loss of control by the Host State.<sup>265</sup>

Based on such debates and on the motivations of the Conseil d’Etat decisions, we could conclude that – in the matter of border control as in other matters – the conferment of executive powers belonging to the State’s authority would be accepted by competent national constitutional judges<sup>266</sup> if specific conditions or modalities are clearly expressed in the European legal instrument:

- Conferment should stay under the control and the good will of the inviting State (the State initiates or accepts to be partner in a joint operation). Visiting officers should be known and accepted individually. The operation justifying the visit of guest officers with executive powers should not be imposed on the Host State and authorisation could be withdrawn at any time.  
This control must concern the operation itself (the joint operation being authorised by the Host State), and the fact that powers belonging to the national sovereignty (defined as implying the use of constraint of leading to a deprivation of liberty) are exercised “Under the control” of the Host State.
- The conferred powers should be limited in scope. The scope itself (the number of tasks and related power) is really dependant on political will to address practical needs, and is

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<sup>264</sup> « Traité en matière d’intervention policière transfrontalière », signed on 8 juin 2004, in Luxembourg.

<sup>265</sup> Conseil d’Etat – Luxembourg – Advise of 7 December 2004 – Doc Parl 5406 :

” Si le Conseil d’Etat peut comprendre le souci des auteurs du projet de loi de vouloir s’assurer le concours éventuel des forces de l’ordre de ses partenaires du Benelux pour la durée de cette Présidence (de l’EU), il n’en reste pas moins que le Traité continuera à sortir ses effets bien au-delà du 31 juillet 2005. N’aurait-on pas pu se limiter à un Traité à portée plus réduite, adapté aux circonstances, plutôt que de se lancer, à la hâte, dans une œuvre d’envergure qui n’est pas sans toucher de près aux fondements mêmes de la souveraineté nationale (intervention sur initiative propre)? Le Luxembourg ne s’engage-t-il pas nécessairement à plus ou moins bref délai à accorder à tous les Etats limitrophes les mêmes ouvertures que celles convenues actuellement avec la Belgique et les Pays-Bas?

<sup>266</sup> Conseil Constitutionnel in France, Conseil d’Etat / Raad van Staat in Belgium and Luxembourg, Supreme constitutional court or assembly in other States.

not restricted by legal barriers<sup>267</sup>, as long as the conferred powers are not higher than the powers conferred to national servants. The non-discretionary character is here linked to the precision of the definition (the list of tasks and corresponding powers) and to the attached legal certainty and transparency.

- The conferred powers could be limited by the Host State regarding the geographic area (the Host State could extend or limit this area, depending on the needs of joint operations).
- The conferred powers could be limited in time: for the purpose and for the duration of one or more joint operations (even if in practice, some operations are “permanent” as is the case for controls on both sides of the Chunnel).

Finally, from a European point of view, performing border control has broader implications than safeguarding the national interests and sovereignty of any single State: it concerns the whole Schengen Area and article 6 of the Schengen Implementation Convention refers to the obligation of each competent authority to take the interests of all contracting parties into account. Such an obligation justifies proportional actions (efficient joint operations, when needed) and related powers.

In such a context, the indirect impact of what we could call “Europeanisation through de facto co-operation” and the necessity of “Good Administration<sup>268</sup>” working according to the principles of “transparency”, “efficacy and efficiency” are determining.

An attempt to provide a more general legal basis to the common reality of the co-operation was proposed by the (new) Article III-185 (2) of the draft Constitutional Treaty, concerning the co-operation actions that would remain optional for the Member States.

*“The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitation of exchange of information and of civil servants as well as supporting training schemes. No*

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<sup>267</sup> From the Conseil d’Etat motivation in advise 370452, we could deduct that even “Police acts” implying the use of constraint and deprivation of liberty could be conferred to foreign officers, as long they operate “under the control” of the Host State authority.

<sup>268</sup> The concept of “Good Administration” was recognised by Article 41 of the Charter of Fundamental Rights annexed to the Treaty of Nice. It was proposed as a right to good administration by the Swedish government’s representative at the Convention, and subsequently incorporated into the draft Constitutional Treaty: Article III-398 stipulates that: “*In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration*”. See: STATSKONTORET, *Rules and Principles of Good Administration in the Member States of the European Union*, Stockholm, 6-7 December 2004.

*Member State shall be obliged to avail itself of such support. European laws shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.”*

This article – if and once in force - would be the recognition in the Treaty of a long-standing practice and a way to put some moderation – on the theoretical, more than on the operational level – to any attempt to place an unreasonable emphasis on the national sovereignty of administrations regarding the exercise of public authority and related powers.

# 7 Need for improvement

## 7.1 Section summary

Border guards operate more and more abroad in the framework of joint operations and joint removal actions. However, only Germany provides a framework to define the roles and powers of foreign officials in its national legal order. The limits to guest border guards' actions are due to the fact that they have no executive powers. In addition, the variable understandings of the practical application of their "advisory" role and the complex legal environment resulting from the multiple bilateral agreements are elements that call for an approximation of practices through a common legal basis.

This section consequently suggests scenarios to improve the situation.

The first scenario that can be considered aims at further developing the current situation mainly through a reinforcement of the awareness in the Member States of the importance of operational cross-border cooperation. Via a soft law approach, suggestions are made to:

- improve the exchange of information between countries;
- support a fast and lasting development of FRONTEX as centre of coordination and expertise;
- illustrate the added-value of guest border guards when the checked persons have, or declare, a relation with the home country of these border guards,
- illustrate the added-value of guest border guards to address crisis situations;
- adopt similar border control practices by promoting standard processes, respectful of the rights of the persons being checked.

The second scenario that is recommended, suggests the adoption of a Community legal instrument. This instrument would ensure that Member States have guidelines to approximate their legislations to enable the conferment of a minimum set of executive powers to guest officers from other Member States. Moreover, the instrument could address the rights and obligations of guest border guards and the different authorities involved. This would provide border guards with a clear view on their situation as guest officers when they participate in joint operations throughout the EU. These minimum powers would allow them to actively support host officers (in

surveillance, first, and second line checks) without exercising discretionary powers, because they would be working according to a harmonised framework and under the supervision of host officers.

The third scenario leads to the conferment of powers to Community officials, who could act alone or complementary to national and guest officers.

## 7.2 Need for a legal basis

There is a lack of a general legal basis to confer executive powers to foreign border guards in all national normative frameworks of the States studied, with the exception of Germany concerning a large number of tasks (as for the non-conferrable tasks, see the exceptions provided in section 5.2.1).

Some border control tasks are widely accepted or conferred. Even if they are not expressly allowed by a regulation, they are not legally prohibited either.

These tasks are:

- observe the area close to the border (without specific instruments) (Task 5.02) (Observing the area is closely linked to task 5.01a and b: make use of surveillance instruments)
- support control activities by physical presence during the control procedures (Task 6.03)
- give advice or support to officers (Task 8.11)

ID	Task	Authorised in x countries
8.11	Give advice or support to other officers	26
5.02	Observe the area close to the border (without specific instruments)	21
6.03	Support control activities by physical presence during the control procedures	21

**Table 20: Commonly conferred tasks during joint operations**

Although the above tasks are not prohibited, the remaining States specifically expressed the need for a legal basis even for these types of activities.

Concerning other tasks and related powers, the bilateral agreements usually provide for the legal basis for every type of involvement of guest officers. The analysis of these agreements has revealed a wide variety in the way they confer (or don't confer) executive powers to guest officers. Based on the analysis of the 70 possible tasks related to external EU border control and the corresponding executive

powers, the number of tasks that may be conferred to guest officers according to the current set of rules and agreements varies - depending on the country - between 2 and 60.

Such diversity has an impact on joint operations that are now taking place under the auspices of the FRONTEX agency, under Art 3 of the FRONTEX regulation. It makes the whole concept of joint operations legally uncertain (e.g. in the case of an accident, generating liabilities) and not transparent at all for observers (including the concerned travellers). The concrete example of access to information systems shows that practitioners tend to consult databases that they need for the purpose of their border control mission without the guarantee of an appropriate legal framework concerning, for example, the protection of data (see Section 5.5.6).

The complexity of the normative environment<sup>269</sup> is another argument for the bringing about of a legal basis for the conferment of executive powers on a European level.

### 7.3 Solidarity vs Subsidiarity

It is not easy to make a clear estimation of the added value<sup>270</sup> of having foreign officers exercising border control tasks on other Member States' territories, because the current practice provides them little more than an observer role.

However, if external borders are the responsibility of the State where they are located, there is an obvious need for homogeneous standards throughout the whole Schengen area. Indeed, the chain of external border crossing points can only be as strong as its weakest link, so that checks should definitely be carried out in a consistent manner at all external borders. If this points towards the need for common training and knowledge sharing of border guards at EU level, it does not clearly point towards the need for sending officers abroad, unless this is considered as a way to approximate practices among participating States in order to have common procedures applied in a common manner.

The border control practitioners that were interviewed generally consider that external borders can be better controlled at local level, by local officers knowing the national procedures, the local

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<sup>269</sup> An overview of agreements is provided in appendixes.

<sup>270</sup> Except in the case of experts sent in an advisory role (because of their knowledge of certain regions or languages, or their specific expertise in identifying certain types of forged documents), which is already done in practice and does not require any additional legal basis.



geography, and the neighbouring countries from which persons cross the border.

Without contest, most external border control will remain executed in the future by the forces of the country directly concerned. Joint operations are still exceptions that are decided and accepted by Member States when there is a need for building best practices, improving the chances of finding illegal immigration smugglers, or for the need of a specific environment (as, for example, the controls at Eurostar terminals).

However, in crisis situations, joint operations could demonstrate solidarity by allowing border guards from specific Member States to provide efficient support to their colleagues from other Schengen states. It can indeed not be contested that supporting border control by detaching border officers at the external borders of another State is a practical implementation of the concept of burden sharing brought forward by the Commission in its Communication<sup>271</sup> from 2002 and endorsed by the Council the same year in its “Plan of the management of the external borders of the European Union<sup>272</sup>”. It creates a win-win situation where the host country benefits from extra support and where the other Member States benefit from a better protection of the common free circulation area.

## 7.4 Recommendations

### 7.4.1 Objective

The main objective of these recommendations is to strike the best compromise possible between the exploitation of the full potential of guest officers detached to host countries in a spirit of solidarity while minimising the impact on the sovereignty and the legal systems of the Member States and lifting the barriers preventing a more active cross-border implication of these officers.

For progress to be effective and sustainable, it is important that one step is taken at a time. For this reason, the recommendations go from a scenario based on a status quo with some improvements of the current situation (scenario 1) to a more ambitious approach allowing guest officers to operate under the authority of a Host State at the external borders of the EU in the interest of the whole Community but on behalf of the home country (scenario 2), as presented in Table 21.

	Scenario 1	Scenario 2	Scenario 3
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<sup>271</sup> COM (2002) 233 final.

<sup>272</sup> Council Document 10019/02, 14 June 2002.

<b>Method</b>	Improving the existing	Approximating legislations conferring executive powers to guest officers	Conferring executive powers to Community officers
<b>Instrument</b>	Soft law	Directive	Regulation

**Table 21: Scenarios**

## 7.4.2 Methods

### 7.4.2.1 Scenario 1: Improving existing cooperation

#### 7.4.2.1.1 Overview

A first approach that can be adopted to reach this main objective is to reinforce the current cooperation that exists between the relevant states with a soft method. Through the consultation of the Member States, several existing elements of the current cooperation were presented as the heart of an integrated management of the external borders where progress could be made.

#### 1. Information

The first aspect that could be reinforced is the exchange of and access to information, which is in line with the draft Framework Decision on simplifying the exchange of information between LES of the Member States from November 2005, related to police cooperation<sup>273</sup>. This could imply various measures such as EU portals and directories of experts for practitioners to develop the awareness of border officers that they belong to a European Community in which they can find special support, skills and expertise. The model of the European Judicial Network (EJN) could be used in this context. Whereas the EJN is a network of contact points of the Member States and of the European Commission, aimed at identifying and bringing in contact those persons in the Member States who play a fundamental role in practice in the area of judicial cooperation in criminal matters, a European Border Control Network could perform the same task in the area of border control.

A reinforced exchange of and access to information could also be achieved by a stronger stimulation of the long-term presence of guest officers in focal point offices. Finally, when addressing the issue of accessing information, progress could be achieved and

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<sup>273</sup> 13986/3/05 REV 3.

legal obstacles could be overcome in providing access to the SIS/VIS to guest officers, based on a mutual recognition of their access rights in their home country and, provided they have the required security clearance, to the SIRENE offices.

## 2. FRONTEX

Instead of creating a new organisation, this network could be set up under the coordination of the FRONTEX agency. In this respect, the central role of the FRONTEX agency was frequently reported as the second aspect that should be reinforced. The agency should rapidly be developed into a Centre of Excellence centralising all the information on available resources and experts in the Member State and providing insightful threat analyses enabling the Member State to foresee a potential need for additional staff at their external borders.

## 3. Third-country checks

Most relevant states still need to be convinced of the added value that they would get from having guest officers exercising executive powers on their territory. There again, an intermediate step could demonstrate to them the actual benefits they could receive. Many countries have liaison officers in third countries carrying out pre-border checks<sup>274</sup>. These officers act as document advisors in these third countries and can contact the national authorities of the country of destination. Developing a European use of such officers who would carry out such border checks for any plane flying to the Schengen area, on behalf of all the Schengen states, would clearly reveal interesting efficiency gains while avoiding the sensitive presence of these foreign officers on the territory of other Schengen partner states. Such deployment, to act officially in pre-border checks, would obviously require the agreement of the third country concerned.

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<sup>274</sup> See interview guides, question 6.1.

### 7.4.2.1.2 Instrument for improving existing cooperation

The *Open Method of Coordination*<sup>275</sup> (OMC), mainly used as a new governance instrument in the area of employment and social affairs, could be applied to border control policy. Its mechanisms, based on guidelines, indicators and benchmarking could be applied with a view to sharing practices, contributing to the progressive convergence of national policies and strengthening cooperation between national services in charge of border control. The Commission would then propose the adoption of multi-annual guidelines implemented by the Member State through national action plans. After an evaluation of the implementation of the plans takes place in the Council, the Commission would make new legislative proposals wherever needed<sup>276</sup>.

The Commission could also, based on best practices reported in the framework of the Study, propose *model agreements* to the Member States so as to ensure some degree of approximation of practices between them.

## 7.4.2.2 Scenario 2 – Conferring powers to guest officers

### 7.4.2.2.1 Overview

Conferring executive powers on border officers, when they operate at the external borders of another Member State, through a Community legal instrument would contribute to an integrated management of the external borders and burden sharing brought about by a more efficient operational cooperation between national services, implying a more active participation of officers invited to operate in another Member State. It should provide, by mutual consent among the involved Member States, for the possibility of allowing certain tasks to be performed by guest officers. Such a conferment of powers should be clearly agreed upon and defined in scope, time and with respect to the geographic area (along a specifically indicated border line or at specific border crossing points<sup>277</sup>) to which it applies. Furthermore, it should remain under

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<sup>275</sup> The OMC was already suggested in the area of Justice and Home Affairs by the Commission in two Communications of July and November 2001 (COM(2001)387 and 710).

<sup>276</sup> See: DEHOUSSE (R.), dir., *L'Europe sans Bruxelles? Une analyse de la méthode ouverte de coordination*, Paris, L'Harmattan, 2004.

<sup>277</sup> Or specific flights in the context of joint removal actions.

the control and supervision<sup>278</sup> of the Member State in which the guest officers operate.

#### 7.4.2.2.2 Specific provisions

Based on state-of-the art agreements (such as the latest agreements in the area of police cooperation like the Prüm Convention or the Senningen agreement) and best practices established through the experience acquired by Member States in joint operations, such an instrument should foresee the following:

##### 7.4.2.2.2.1 Liability

Both civil and criminal liabilities are issues that have to be defined precisely so as to provide the necessary guarantees and control to the host Member States. An important baseline to guide their definition is the fact that the person being checked should be indifferent to the fact that he/she is being checked by a guest or a home officer.

With respect to civil liability, this implies that they should not face an extra burden when requesting reparation for any damage that was caused to them. This should clearly apply to third parties as well. The Host State in whose territory a damage was caused should therefore make good such damage under the conditions applicable to damage caused by its own officials. In order to guarantee the proper functioning of such a system, the guest officers would remain liable for any damage caused by them during their operations, in accordance with the law of the Host State. Finally, the State of origin of the guest officers shall reimburse the Host State in full any sums it has paid to the victims or persons entitled on their behalf.

With respect to criminal liability, guest officers should then clearly be regarded as officials of the Host State with respect to offences committed against them but also by them.<sup>279</sup>

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<sup>278</sup> Whether or not this implies a physical presence of a host officer to accompany his guest counterpart has been debated during interviews. It appears unclear whether efficiency (independent guest officers) or increased guarantees (provided by the presence of host officers) should prime. This should consequently be left at the appreciation of the Member States on an ad-hoc basis.

<sup>279</sup> Both the civil and criminal liability provisions have been used in several existing documents in the field of police and judicial cooperation in criminal matters, for example articles 42 and 43 of the Schengen Implementation Convention, articles 15 and 16 of the 2000 EU Convention on Mutual Assistance in Criminal Matters and articles 30 and 31 of the Prüm Convention.

#### 7.4.2.2.2.2 Safeguard clause

The host country should retain, at any time, the possibility to revoke the delegation of powers to guest officers under specific conditions.<sup>280</sup>

#### 7.4.2.2.2.3 Use of coercion or force

The use of coercion or force by guest officers would be strictly limited to legitimate defence<sup>281</sup>, unless explicitly allowed by the host authorities and under the responsibility of guest officers.

#### 7.4.2.2.2.4 Weapons and coercive instruments

A solution that might constitute the most far-reaching compromise is that guest officers would be allowed to import and carry their service weapons to the extent that the authorities of the host country are themselves armed for the border control activities similar to the ones that will be conducted by the guest officers. Moreover, they would have the right to import, carry and make use of coercive instruments and other equipment if these are allowed within the purpose requirements of the joint operation or joint removal operation.

#### 7.4.2.2.2.5 Uniform

As it is commonly foreseen in the framework of joint operations, guest officers could wear the uniforms of their home country provided that they can clearly show their participation in the joint operation<sup>282</sup>.

#### 7.4.2.2.2.6 Asylum

Given the issues that arose in the past with asylum seekers facing guest officers<sup>283</sup>, this situation should be clearly defined as well.

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<sup>280</sup> Besides this general safeguard clause, the instrument could foresee in a provision related to requirements for guest officers stipulated by the host State.(e.g. with respect to their experience, knowledge of the Community Code and proficiency in certain languages needed for the efficient realisation of the operation).

<sup>281</sup> As defined by each country in the Vade Mecum of cross-border police cooperation.

<sup>282</sup> This can imply both a distinctive sign as well as an assignment form shown on request.

<sup>283</sup> See the case of UK Immigration officers in Czech Republic not considering asylum requests for the UK while they were operating in Czech Republic, and related decision by the British House of Lords of 9 December 2004 . URL:  
[http://www.migrationwatchuk.org/frameset.asp?menu=researchpapers&page=briefingpapers/legal/The\\_ro\\_ma\\_case.asp](http://www.migrationwatchuk.org/frameset.asp?menu=researchpapers&page=briefingpapers/legal/The_ro_ma_case.asp)

Based on the concept that the nationality of the border guard should not have any impact on the travellers, asylum requests should apply to the country where the operation takes place. If these are made vis-à-vis a guest officer, they will be referred to and dealt with by the competent authorities of the host country.

#### 7.4.2.2.2.7 List of powers conferred to guest officers

Based on the results of this Study, the tasks and powers to be conferred would be:

- a. Perform **threat analyses and risk assessment**, coordinate the exchange of information and participate in the drafting of operational plans of activities carried out at the external borders in collaboration with the host officers
- b. Participate in **surveillance** activities and perform the following activities:
  - i. In the framework of technical surveillance activities, make use of surveillance instruments such as radars, heat detectors,... used in the host country;
  - ii. In the framework of static surveillance activities (commonly called road blocks), guest officers could autonomously make use of surveillance instruments from the host country and from their home country, provided these instruments that are officially (legally) accepted by the local authorities;
  - iii. In the framework of mobile surveillance, they could participate in joint patrols with host officers. Under the command and the full responsibility of the host officer, they would be allowed to intervene in cases of emergency when explicitly asked to do so.
- c. Participate in **second line** activities by performing technical checks without direct face to face contact with the person being checked:
  - i. Make use of detection devices to establish the authenticity of the documents
  - ii. Access their country of origin's national databases to which they have the right of access in their home country (if technically possible)

d. Reporting about the above activities.

In order to fully exploit the potential of guest officers, the proposed legal instrument could, furthermore, allow guest officers to perform **first line checks**, which implies that guest officers<sup>284</sup> would be entitled to:

- Request a vehicle entering or leaving the Schengen area to stop;
- Request documents from the persons willing to cross the border;
- Check the authenticity and validity of the documents;
- Access hit/no hit Community databases (through the host country interface);
- Stamp entry/exit documents.

These powers would have the following subsequent implications:

- In case a person does not obey the request of a guest officer on duty, the guest officer would immediately ask for support from the host officer supervising the shift. The guest officers would, in principle, not be allowed to conduct any coercive measure independently. Allowing the guest officer to apprehend a person could be considered in emergency situations or based on an order made by the supervising authority.
- Guest officers would not only have the right to access the relevant (both Community- as well as national) databases (supporting border control) accessed by their host counterparts, but should also be capable of doing so in practice. This has linguistic implications (understanding national interfaces) and might even have technical implications (possible use of different IT-infrastructure).
- In case of suspicion of an infraction (document forgery,...), a positive hit in a database or any other circumstance potentially leading to a second line check and a potential refusal of entry/exit, the guest officer would immediately transfer the case to local authorities via the host officer in charge of the supervision of the shift;
- In practice, a guest officer should be entitled to allow entry in/exit from the Schengen area, but would never make the final decision with respect to refusing entry or exit<sup>285</sup>.

Similarly, the legal instrument should allow guest officers to perform **Second line interviews**, which are the area where the added value of guest officers would be the most significant (for example, due to their superior knowledge of the language of the

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<sup>284</sup> Similarly to passport control officers in Sweden.

<sup>285</sup> This decision leads to a signed notification by competent authorities and can be appealed.



interviewee, or their knowledge of the country where the interviewee intends to go after being admitted inside the EU borders). Their interview report should be considered as a valid component of the administrative case (and possibly later the judicial case) and should therefore be taken into account for the final decision that would be made by the local authorities.

### 7.4.3 Scenario 3: Community guest officers

The third scenario uses the same approach as the second scenario. The content of its main legal instrument does not differ with respect to the types of executive powers that are conferred. The only difference with the second scenario is the creation of a complementary legal basis for the conferment of executive powers to Community officials, acting in the various Member States (for example, FRONTEX officials)..<sup>286</sup>

This scenario is not in contradiction with the second one, as the action of Community officials could be combined with the action of host and guest border guards (the latter operating according to scenario 2).

In addition to their specific administrative role in FRONTEX missions<sup>287</sup> the new legal basis would allow these officials to exercise the same executive powers that would be conferred to the guest officers of other Member States.

In addition or in complement, scenario 3 could reinforce the acquisition of common knowledge by the implementation of a common training framework based on requirements of the Common Core Curriculum (CCC) and, to some extent, by the improvement of language proficiency. A training of this nature could create a higher level of trust towards guest officers and an explicit recognition of their previous experience.

Comparing with scenario 2, an appropriate legal instrument would be requested at Community level. In addition, the legal instrument could lead Member States to approximate their legislation in order to confer powers to guest officers as it is foreseen in scenario 2 and could extend the delegation to such (FRONTEX) officials<sup>288</sup>.

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<sup>286</sup> Such officials have been put in charge of missions in other domains, e.g. at the OLAF anti-fraud office.

<sup>287</sup> e.g. the coordination of Joint operation where several Member states are involved.

<sup>288</sup> For missions defined by the Council Regulation 2007/2004, the principle of conferring executive powers is accepted (article 10): “*Exercise of executive powers by the Agency’s staff and the Member States’ experts acting on the territory of another Member State shall be subject to the national law of that Member State.*”

## 7.4.4 Pros and cons

### 7.4.4.1 Scenario 1

The first scenario presents the advantage of avoiding a new EC legal instrument, and to encourage a soft approximation of practices.

However, informing and raising awareness will not rapidly reduce the complexity of the current legal environment<sup>289</sup> and will not provide enough of a legal base and incentives to bring each Member State to confer minimal executive powers to guest officers.

Therefore, given the strong impulse provided by The Hague Programme and The Hague Action Plan as well as the support expressed by the European Parliament regretting the Council's lack of ambition and recommending the creation "in the medium term" of a Community-financed European corps of border guards<sup>290</sup>, this scenario would most likely not bring a fast, consistent and secure legal base for conferring executive powers.

### 7.4.4.2 Scenario 2

The EC instrument proposed in the second scenario offers the best compromise between flexibility and binding measures leading to efficient improvements. Flexibility is clearly needed given the various legal systems within the Participating States involved with respect to the presence and participation in operational activities of foreign officers. The study has not revealed strong sovereignty barriers for conferring such specific and well delimited powers, or requirements regarding nationality. However, regarding the modifications of their legislations, if needed, it is clearly more suitable to leave up to each Member State the choice of the method and the instrument to be used to foresee the bestowment of prerogatives to guest officers.

National legislations, although mandating the State nationality for officers exercising public power, authorise expressly (in fifteen states) or implicitly, provisions regarding the conferment of powers

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<sup>289</sup> The large variety of bi- and multilateral agreements and memorandi of understanding has been identified in the domain of border control.

<sup>290</sup> [http://www.europarl.eu.int/comparl/libe/elsj/zoom\\_in/09\\_en.htm](http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/09_en.htm), last update: 15 January 2005.

to external national or international organisations, which would be the case in the scenario.

The execution of several Community exclusive policies is already based on delegation of public authority, sometimes through specific bodies and servants (OLAF), and in the related matter of police collaboration on both sides of internal borders (matters belonging to the third pillar), delegation including large use of public force has been validated by competent constitutional councils.

While it is considered that no sovereign State would confer general and discretionary powers, on the contrary, conferment of powers is widely accepted for a limited period of time and a limited purpose, as it is the case in the present scenario: the missions (joint operations and removals) and the corresponding tasks and powers would be defined clearly in the Community instrument and would not be discretionary. The organisation of each joint operation is not discretionary either, because it is done at the initiative and with the prior agreement of all concerned participating States, possibly under coordination of the FRONTEX Agency.

With respect to the principle of proportionality, this scenario is the most appropriate way of actually achieving the result of granting powers of execution to guest officers on the territory of another State. Since the EU is evolving towards a common policy on management of external borders<sup>291</sup>, based on a common legal framework, an instrument to facilitate this cooperation would also be in accordance with the subsidiarity principle. Indeed, leaving the matter up to arrangements between Member States has proven to lead to a highly complex situation of numerous bilateral agreements decreasing the visibility for both citizens and practitioners.

One drawback of this approach is linked to the higher timeframe needed for the complete transposition in all Member States.

Depending on the potential reluctance (like e.g. in Denmark<sup>292</sup>) for conferring powers to foreign officers (appointed by other States), it is possible that some participating States would prefer to limit the conferment of executive powers foreseen in the EC instrument to Community officers.

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<sup>291</sup> Management plan for the external borders of the Member States of the European Union, adopted by the JHA Council on 13 June 2002.

<sup>292</sup> As explained in section 5.3, it can be easier within the legal framework of certain states, to allow for the conferment of executive powers to guest officers representing an international organisation or body.

### 7.4.4.3 Scenario 3

This scenario is compatible with scenario 2 presented above and should be considered to reinforce the efficiency of joint operations by conferring to Community officials the same executive powers as conferred to guest border guards from other Member States. It encounters no more barriers than scenario 2, as the principle of conferring powers to officers of international bodies and of the Community is admitted and has precedent applications in all Member States.

In the situation that these officers are required to operate in several Member States, this will require from them a higher level of competence, due to multiple languages and culture, and also due to the fact that they will be subject to the national law of each Member State where they operate (for example concerning data protection).

### 7.4.5 Approach

In order to implement these scenarios, the following steps could be undertaken. Since these three scenarios are complementary, representing an increasingly integrated approach, the timetable is common for all. Measures to be taken in order to realize the first scenario are presented in standard text, suggestions for the second scenario appear in *italic* whereas optional steps to be taken to achieve the third one are in **bold and italic**.

- The team of experts should rapidly be developed in order to use a resource where it needs to be. From today onwards, highly-qualified experts could be detached and operate on the basis of art 7 and 47 of the Schengen Convention, of bilateral agreements and of the FRONTEX regulation. Their current lack of executive powers would be compensated by their high expertise and possibly by the equipment they would bring with them. This would contribute to the exchange of expertise and to building a community spirit of border guards;
- Creating a network of border control contacts/centre of expertise within the FRONTEX agency;
- Standard templates of agreements could be proposed to the Member States, inspired from a best practice (e.g. in Luxembourg) in which signatories would check within a list the powers they would be willing to confer during a joint operation;
- In the short run, the Commission could support initiatives for long stays of guest officers in Focal Point Offices. Practitioners have stressed the importance of a long-lasting relationship to build the necessary trust between individuals and acquire sufficient knowledge of both the local practices

and the legal framework required for a more active participation on the territory of the host country;

- *Submit a proposition for a Community instrument (Directive) on minimum non-discretionary powers of guest border guards in their legislation;*
  
- **Table a proposal for a specific instrument (Regulation) concerning the possible role of Community (FRONTEX) officials.**

# 8 Conclusions

The questions formulated when starting our investigations have now received answers.

## **From a fragmented landscape...**

An important framework of legislation already exists: bi-lateral agreements, letters and practices, sometimes restricted and non-published, allow national border guards to collaborate with their colleagues in joint patrols, joint offices or other types of operations on each others' territory.

In interviews, most specialised practitioners expressed the opinion that such bi-lateral agreements were working well within the limited context, scope and area for which they have been done. Therefore, specialised officers do not always perceive an urgent need for a Community instrument. However, the examination of these laws and agreements has revealed a wide variety in the way they do or do not confer some executive powers to guest officers.

Based on the assessment of the 70 possible tasks related to external EU border control and the corresponding executive powers, the number of tasks that may be conferred to guest officers according to the current set of rules and agreements varies - depending on the country - between 2 and 60.

The European Union is confronted with organised trans-border criminality, international terrorism, and the growing pressure of migration – sometimes combined with smuggling and trafficking in human beings. At the same time, the enlargement of the Union has increased the length of the external borders and the burden of controlling these borders is not shared equally between all the Participating States' forces. The technical instruments used by border guards (equipment and information system) have become more complex, and new constraints (e.g. regarding data protection) require more attention and more knowledge. Considering that an increased number of national border control officers has to gain more practical experience in the implementation of our common legal and technical framework (the Schengen “acquis” and tools), we may expect a development of joint operations where guest officers can provide knowledge and best practice building, sharing a part of the burden related to border control.

At the external border of Europe, more joint operations can lead to a better answer to specific needs, or crisis situations and substantial savings in public money (e.g. by organising joint

removal actions). The FRONTEX Agency is expected to play a key role in organising future joint operations and in coordinating and assisting Member States' actions.

Within the Schengen framework, where performing border control remains the responsibility of the individual Schengen States, the policy of admitting foreigners into the common space of justice, freedom and security is already common to all Participating States: due to the general principle laid down in article 2(1) of the Schengen Implementing Convention abolishing checks at internal borders, it has become the responsibility of every Schengen State to perform border control actions on behalf of the other Schengen States.

The fact that there is no detailed agreement concerning a common set of powers conferred on border guards involved in joint operations and the extreme fragmentation of existing bi-lateral agreements undermines the global efficiency of these actions, as powers vary depending on both the location of the action and the nationality of each involved officer.

The current fragmentation also compromises the transparency of the system, which is difficult to understand even for specialists (let alone for travellers) especially in any case of liability arising in relation with the exercise of such border control powers.

There is, therefore, a need for the definition of minimum authorised executive powers for guest officers participating in joint operations, this being translated by each Participating State in its legislation.

Prior to proposing such a definition, it was necessary to assess the possible barriers and requirements resulting from the existing (constitutional, legal) framework in all participating States.

When national Constitutions generally impose the nationality condition for home officers exercising the public power prerogatives (State civil servants) they also authorise delegation of public authority to representatives of other States or of international institutions. The execution of several Community exclusive policies is already based on this principle, sometimes through specific bodies and servants (e.g. OLAF).

An examination of all participating States' Constitutions resulted in the conclusion that fifteen States expressly included a provision regarding the conferment of powers to international organisations. Several conditions are included in the fifteen constitutions but a legal basis or a treaty is always required. Since a legal basis could be transposed in national legislations based on a Community legal instrument, this requirement would be fulfilled.

A frequent concern of constitutional Courts is that a sovereign State should only confer powers to foreign national or international authorities, or even to a common set of non-national institutions (as those of the European Union) based on corresponding agreements or laws that must, themselves, be in conformity to the national Constitution. The need to keep this consistency between the Constitution, derivate laws and agreements has motivated several revisions of national Constitutions once powers were to be conferred for the application of a European decision (as it was the case for Schengen hot pursuit, for the European Arrest warrant, and for the free movement of persons<sup>293</sup>).

Another concern is that conferred powers, when belonging to public authority and sovereignty, should not be general and discretionary. This means that the conferment of powers should stay ultimately “under control” of the Host State (given to identified officers, for a limited period of time, for the limited purpose of a joint operation and within a limited area).

In Nations’ history, the power to control external borders belongs to national sovereignty: based on national laws, home forces decide which persons, goods and even information may enter and leave the State. By tradition however, border control was a space for international cooperation (for example to fight terrorism or detect the movement of criminals). In the European Schengen area, cooperation for controlling the external border is even more justified and necessary, based on a common legal framework and on the need to protect the free circulation of persons inside the area.

Admitted delegations, validated by competent constitutional councils, already include the use of public force, as this is the case in the field of police collaboration on both sides of internal borders (matters belonging to the third pillar): in the case of hot pursuit of criminals, for example, these powers are quite extensive.

With the exception of Germany concerning a panel of specific tasks, however, none of the relevant States has already included the option of conferring the full set of needed powers in its national legislation. Other States have shown their open attitude towards the inclusion of the conferment of powers in

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<sup>293</sup> A typical case is the French Constitution where a new article 88-2 was introduced in March 2005, providing that <in the framework of the European Community> “*the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed*” (meaning that specific French laws or agreements covering these matters may produce their effect in France without entering in contradiction with constitutional principles – mainly the provisions about sovereignty).



their national legislation by either openly discussing the matter, like France, or proving that they are open to discuss this option, like Austria, Portugal and Ireland.

We conclude this aspect of our study as follows: Constitutional requirements will not hinder the conferment of powers to guest border guards, for the needs of external EU border control, if the missions (joint operations and removals) and the corresponding tasks and powers are defined clearly in the proposed instrument. Conferment of powers, as also the organisation of missions, would stay “under control” or under the supervision of all concerned States, possibly under the coordination of the FRONTEX Agency.

## **Through an approximation of practices...**

How could we progress?

Improvements could be made before creating any new Community legal instrument, by improving specific operations, and the access to and exchange of information between Member States and by the intention of stakeholders (handbook for Border Guards, Passengers’ rights).

With the agreement of external Host States, common third country pre-border checks could be developed to improve efficiency of passengers control when flying to the Schengen area.

The FRONTEX agency has to be reinforced in its position of coordination Centre at the heart of operational border control mechanisms involving Member States.

This was formulated as scenario 1.

However, a soft approach will probably not be enough to reach the common objectives expressed in the Hague Programme: the success of joint operations requires more legal framework consistency regarding powers that would be mutually conferred to guest border guards. To allow such harmonisation or “approximation” (national legislations may not become identical, but at least close each other), a European instrument should provide guidelines.

This is formulated as scenario 2.

Without creating a dedicated corps of European border guards, the exercise of powers by our current national border guards during and for the purpose of authorised joint operations outside their national territory should then be defined based on common

principles, making easier the training and knowledge acquisition of a “Common Core Curriculum” by concerned officers.

A pre-requisite for the proposition of such an instrument is to determine which tasks could be delegated and which powers are needed for allowing guest officers to participate with efficiency to external border control activities, under the supervision of the visited Host State.

To establish that list, the interviews carried out with the 28 concerned States (practitioners and lawyers from the 25 Member State, Norway, Iceland and Switzerland) and the examination of best practices (the German system) helped us to identify what would be both needed and acceptable.

Concerning the Community legal instrument mentioned above, the directive would be the most appropriate way to allow each State to proceed according to its own specificity (e.g. concerning specific powers such as the right to wear a weapon).

The third scenario would establish a complementary legal basis for the conferment of executive powers to Community officials, acting in the various Member States (for example, FRONTEX officials).

This scenario would not be in contradiction with the second one, as the action of Community officials could be combined with the action of host and guest border guards (the latter operating according to scenario 2).

In addition or in complement, the implementation of a common training framework based on requirements of the Common Core Curriculum (CCC) could build a higher level of trust towards guest officers and facilitate cooperation.

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# 10 Annexes

## 10.1 CD-ROM

The first annex, presented in a CD-ROM, is divided in two complementary parts. On the one hand, detailed information concerning the situation of each country is provided. In this overview on a country per country basis, different elements are developed. Namely, the law enforcement services involved, the chain of prerogatives, the executive powers and the specific obstacles per country. On the other hand, the 28 different normative frameworks related to border control are provided according to the national laws as well as the main agreements made as a basis to confer executive powers.

## 10.2 Study framework and methodology

The Study was divided in four main phases: Framework Definition, Data Collection & Interviews, Analysis, Recommendations.

### 10.2.1 Framework Definition

In its first phase, the Study team defined the scope of the subject under investigation and focused on collecting available information, not only to ensure the development of a level-playing field of understanding of all participants, but also to avoid duplication of research that would already have been carried out (not only in the area of border control, but also in other fields involving the presence and exercise of certain prerogatives by public officials on the territory of other States).

This phase also covered the identification and establishment of a network of competent contacts in the twenty-eight involved States, each of the six involved consultants managing the relationship with +/- 5 Member States or Schengen partner States. The official presentation of the Study by the Commission during a meeting of the management board of the FRONTEX agency contributed to ensuring the support of all the Member States.

In parallel, a database was developed so as to ensure the centralisation of all relevant information for the team members. This allowed for higher efficiency when looking for contact details or background documents and paved the way for a later systematic comparative analysis of the data collected.

The major milestone resulting from this preliminary work was a thorough interview guide, based on the terms of reference of the Study and built in collaboration with both legal experts and practitioners aiming at ensuring the comparability and completeness of the information collected through the next phase. This guide, annexed to the Study, covers border control and removal actions.

### 10.2.2 Data Collection & Interviews

The visited practitioners and lawyers across the 28 States<sup>294</sup> responded positively to the team's requests for information.

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<sup>294</sup> whose details can be found in the list of interviewees per country provided in the annexed CD-ROM

A two-step approach was followed to gather all the necessary information.

First, the involved States were asked, through a short list of questions, to provide initial information regarding border control activities in their country (organisation, normative framework, experience with joint operations and joint removal actions). This first phase not only provided results enriching for the Study by themselves, but also served as an important source to refine the Interview Guide that had been designed during the previous phase.

Second, face-to-face interviews were organised with officials from the 28 involved States so as to discuss in detail with the competent national authorities the issue of conferring powers of execution to foreign officers. In this respect, the Interview Guide was sent a week before each meeting so as to allow its participants to circulate the questions among competent authorities and to prepare so as ensure that the actual face-to-face interviews could address the heart of the issue and go deep into every national specificity. When the input provided during the preliminary request for information allowed it, the interview guide was pre-filled. In order to cover all aspects involved by the presence of foreign officers, the interviews involved both legal experts and practitioners from the competent services. In total, more than 120 representatives from the services involved in border control in the 28 relevant States were interviewed during this phase. Special importance was granted to the specific powers of border officers, whether they are operating in their country or abroad. With respect to the answers provided, the fact that a task can be carried out by a foreign officer does not mean that there is a general legal basis allowing it, but that a specific legal basis is foreseen in at least one agreement with one specific country, thereby setting a precedent for a potential extension of this conferment to officers from other EU Member State.

Following the interviews, frequent contacts took place with the relevant States, either to validate the content of the interview guide or to request information that could not be provided during the interview (copies of legislation or agreements, precisions with respect to constitutional issues,...).

In parallel, three avenues were explored. First, some other areas of cooperation were analysed with a view to define best practices in other areas of cooperation, like the investigators sent by OLAF for operations in the Member States, or with respect to border control cooperation in other regions, such as the Integrated Border Enforcement Teams (IBETs) between the United States and Canada. Second, an analysis of case law from the European Court of Justice on the exception to the prohibition of discrimination of workers on the basis of nationality (Art 39(4) TEC) was carried out. This analysis aimed at refining the notion of “public authority”, progressively defined by the ECJ since the famous case

Commission vs. Belgium (Case 149/79). The objective of this activity was to determine objective characteristics of tasks involving the exercise of public authority, so as to determine the tasks not falling in this category that could be conferred to guest officers. Third, a request for experience in cross-border cooperation from practitioners was published in the magazine *Borderpol*. The objective of this insert was to collect experiences of practical cases from which the Study team could derive needs and best practices.

### 10.2.3 Analysis

The important amount of raw data collected then had to be translated into a coherent whole. Therefore, the structured information gathered during and subsequently to the interviews was entered into the database designed for that purpose.

The data entered on the 28 concerned States was then queried so as to draw comparative tables on the powers of the services involved in border control and the obstacles to conferring powers to guest officers. After comparing the different systems encountered and analysing existing agreements in the domain of border control, this phase aimed at determining a minimum set of tasks that could be carried out by border guards from other Member States.

In parallel with this bottom-up analysis based on national legislation, a top-down approach was adopted. It aimed at defining those tasks that could potentially be carried out by guest border guards by distinguishing executive powers falling under the range of police powers vs purely administrative powers, as defined in this report. Given the fact that there is no European standard definition of executive powers nor public authority, the legal experts on the study defined criteria (derived from case law on art. 39(4) TEC, Constitutional Councils' Decisions, national laws, or international conventions) that characterize public authority against which typical border control activities (checking documents, allowing exit/entry,...) were matched. This enabled to draw a more complete list of tasks that could be considered for attribution to foreign officers

Throughout this analysis process, the focus was mainly put on border control activities and less on removal operations. This is explained by the fact that the most relevant findings were in the former area, whereas the role of guest officers is already relatively precisely defined and limited in the Council Decision 2004/573/EC on joint removal flights.

For the sake of simplicity for the reader, the content of this report covers mainly comparative aspects, the exhaustive country-by-country information from which the analysis is derived being

available through the annexe on CD-Rom containing all the country by country information.

#### 10.2.4 Recommendations

Based on the results of the comparative analysis, the legal experts contributed to proposing possible recommendations. The suggestions were built from the results of the interviews, inspired from relevant agreements or expressed directly by the experts, while distinguishing between police activities and administrative tasks. To guarantee their acceptability and feasibility, the team, beyond mere legal aspects, kept the practical implications linked to a possible proposal for a new legal instrument into consideration.

## 10.3 Overview of main border control services per country

### 10.3.1 Police services

The countries where the border officers have the most extensive powers are the ones where police officers are in charge of border control. This can be easily explained since their police officers status confers them with the whole scope of police powers, not necessarily required in the field of border control. The powers of these police officers do not bring much information with respect to border guard tasks. After receiving an adequate training, these officers are detached in a border control unit while remaining normal police officers. Their prerogatives are roughly similar across countries. Some specific aspects:

- Under specific circumstances, border guards from the police are entitled to issue Visas at the border;
- Under certain provisions, the police may forbid the access to certain areas close to the border, except in Austria, Cyprus, Ireland, Italy and Norway<sup>295</sup>;
- Irish and Austrian<sup>296</sup> officers do not have to wear a uniform<sup>297</sup>;
- With respect to criminal investigation, powers can vary from country to country and sometimes cover thorough investigation procedures like in Denmark and Norway where prosecutors are members of the police force.

#### 10.3.1.1 Austria

The Border Service of the Federal Police is in charge of border checks and border surveillance activities on the whole border area. The Border Service of the Federal Police has the same prerogatives as the other members of the Federal Police but within 10 km of the Border. Its prerogatives are regulated by the Security Police Act 151/2004 (Art 2.5) and the Border Control Act 26/2004.

The Austrian Military currently performs Border Surveillance tasks at the green border and border patrol. For the year 2005 this was done at the border with Hungary and in some districts at the Slovakian border. On the basis of Art 79<sup>298</sup> of the Austrian Constitution, the army can be requested to provide assistance for the

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<sup>295</sup> This cannot be done either by the Portuguese Service of Foreigners and Borders, the Swiss border guard and the UK Immigration officers.

<sup>296</sup> Under certain circumstances and for certain types of tasks, the head of the unit may remove the obligation to wear a uniform.

<sup>297</sup> This is also the case for the Dutch Maréchaussée and the UK Immigration Service.

<sup>298</sup> This basis was confirmed by the Austrian Constitutional Court.

law enforcement at the border to ensure public safety and security. This request is prepared on a yearly basis by the law enforcement body responsible for Border Control (currently the Federal Police). In performing these duties they can pursue and stop suspects of illegal immigration, search them and arrest them for a short time. For further proceedings, the army officials have to contact the federal police and hand over the matter.

### 10.3.1.2 Belgium

According to art 21 of the Police Act of 5 August 1992, the Federal Police is the only law enforcement service having the competence to perform border control under the authority of the Federal Public Service (FPS). Depending on the geographical area, one of the following specialised branches is involved: the Maritime Police, Railroad Police, Road Police, Air Police or the Immigration section. The Federal Police performs border checks on persons. They are authorised to refuse access to the Belgian territory to people seeking entry, except if the person concerned is in the possession of a valid visa in which case the decision must be taken by the Border Inspection of the Immigration Service.

In practice, the Federal Police will present the case to the Border Inspection, except if the person concerned is travelling with a false or falsified travel document. If detention is necessary, for example if there are no return flights on the same day, the decision to detain is taken by the Border Inspection. This implies daily contacts between administrative and judicial authorities.

### 10.3.1.3 Cyprus

Under the Police Act 73(I)/2004 and more specifically in the Police provision N° 1/57, the Aliens and Immigration Unit controls the sea and air border crossing points.

The surveillance of the territorial waters is carried out by the Port and Marine Police under the Police Provision 2/6, whereas Provision 2/7 confers the surveillance of the air borders to the Police Airwing Section. A specific unit, the Police Security in the divisional headquarters is in charge of all security checks in accordance with the Police Act.



#### 10.3.1.4 Czech Republic

The Alien and Border Police has nation wide competence with regard to border control. It is in charge of checks at the green border and in international airports and patrol the border area for surveillance purposes. Its activities are described in Section 2 Act No. 283/1991 Col. on the Police of the Czech Republic. A specific aspect in the Czech Republic is that the Border Control Officers have no powers in criminal investigation. For the investigation of activities related to e.g. trafficking in human beings, the police include a special organised crime unit for illegal immigration.

§ 4 of the Act on the protection of State borders (Act No. 216/2002) provides the description of the prerogatives of Czech border guards. This includes: inspections of persons, luggage and means of transport, require a person to prove his/her identity, bring a person into custody or enter private property under certain conditions. Certain activities are limited to a distance up to 25 kilometres from the border when ensuring border protection such as inspection of transport, enter private property in pursuit.

#### 10.3.1.5 Denmark

The activities of the Aliens Department of the Police are regulated mainly by the Aliens Act 685/2003 and administrative regulations issued by the Police. This service is supported by the Danish Armed Forces, in charge of the surveillance of the Danish Coasts on a daily basis.

Part VII, mostly Art 38-40, of the Aliens Act describes the powers of the Police in the framework of border control activities (Control of entry, stay, and departure, etc. of aliens).

#### 10.3.1.6 France

The reference document for the French Border Police (PAF) is the Code on Entry and Stay of Aliens (CESEDA). The PAF shares the responsibility of controlling the border with the Customs. The PAF is responsible for the 41 most important border crossing points whereas the Customs are involved in border control in 139 less important border crossing points.

Surveillance is a responsibility that is split between the Navy (for sea borders), the Gendarmerie (for both land and sea borders) and the Air Force (for air borders).

### 10.3.1.7 Germany

The Bundespolizei has the main responsibility for border control, under §2 of the Bundespolizeigesetz (PolG). It is competent for both checks and surveillance on all types of borders.

However, the German legislation foresees interventions by other actors.

Customs, normally entitled with the control of goods, can in exceptional cases be entrusted to carry out the task of the Federal Police with respect to border control and border surveillance. The Bundespolizei-Zoll-Verordnung regulates cooperation and the transfer of necessary tasks. Section 66 of the PolG clarifies the Official Tasks of Custom Officers in the Areas of Responsibility of the Federal Border Police:

*“1) The Federal Ministry of the Interior, in agreement with the Federal Ministry of Finance, may entrust customs officers with the discharge of tasks relating to the police control of cross border traffic (Sect 2 (2) No 2) at individual border crossing points, if this facilitates the clearance of cross border passenger traffic.*

*2) Where customs officers discharge tasks in line with Paragraph 1 above, they shall have the same powers as Federal Border Police Officers. In this respect, they are subject to the supervisory control by the Federal Ministry of the Interior and the subordinate Federal Border Police authorities.”*

The local police of the Länder is responsible at checkpoints for traffic crossing the border with the Czech Republic and in the harbours of Bremen and Hamburg, under the supervision of the federal police.

Based on Art 63 of the PolG foreseeing the possibility to assign assistance roles, directors of little harbours in the Baltic region have the powers to carry out checks.

The general framework of the powers of the Federal Police is described in section 14 of the Federal Police Act. Later sections describe concrete executive powers. Section 22 of the Federal Police Act provides the legal basis for the right to interview, stop persons and request their ID. Furthermore this article states that, if requested to do so, the person shall be obliged to hand over any identity documents that he/she is carrying for inspection. Section 23 provides for the right to check documents and establishing a person's identity. Besides those powers, the federal police has the right to take a person into custody (section 39) and the right to search persons and objects (Section 43 and 44). The right to seize objects is laid down in section 47.

### 10.3.1.8 Greece

According to the Hellenic legislation, the Hellenic Police is the first body competent for border control, both for border checks and surveillance. The central service is the Alien's division of the Hellenic Police HQs, supervising amongst everything the enforcement of the 2910/2001 law. It can sometimes be assigned to Passport Control Services or general police duties.

Besides, the Hellenic Coast Guard has general policing tasks on ships, at sea and ports. It also carries out surveillance and control of sea borders, in close cooperation with the Hellenic Police and the Customs.

As far as the customs service is concerned, this last border control body is responsible for the protection of public health and society; the control of any kind of trafficking of goods (e.g. weapons, drugs, counterfeit products) and is also in charge of any other kind of fraud (e.g. illegal migration, protection of environment, intellectual property goods).

### 10.3.1.9 Iceland

The Police Force is in charge of border control, approximately 98% of which takes place at the international airport in Keflavik. There is no specific border police in Iceland. They operate under the Police Act n° 90 13th June 1996 (Chapter III Duties of the Police and the Execution of Police Functions Art 13 – 26). This Police Act can be considered as “traditional” with respect to the powers conferred on officers: Such officers must wear an authentication sign (Art 13(3)) and may use force in accordance with a proportionality principle (Art 14). In their mission to maintain public order, the officers are allowed to “intervene in the conduct of citizens” and may even concern with matters coming under other authorities if considered necessary to maintain or restore public order (Art 15). With respect to border control related activities, the police can arrest someone “*if he does not hold a permit to be in the country*” (Art 16(1).b) and make searches (Art 17).

With respect to surveillance activities, the Coast Guard patrols the shores.

### 10.3.1.10 Ireland

The Garda Síochána is the only service involved in border control (checks and surveillance) in Ireland. As opposed to many other police services, the Garda Síochána Act from 2005 clearly

stipulates that “*No member of the Garda Síochána in the course of his or her official duties may institute a prosecution except (...)*” in strict conditions clearly stated in Art 8 and under the command of a Public Prosecutor. A member of the Garda Síochána “*may arrest without warrant a person whom he or she reasonably suspects to have committed an offence under this [Immigration] Act [2004]*”.

An interesting precision made in the Garda Síochána Act and not directly related to border control, addresses “security officers”, defined as “*a person who for the time being is designated by the head of an authorised body (...) as a security officer for the purpose of guarding, patrolling or providing any other protective services in relation to specified premises and persons on those premises*”. With a view to transposing it to border control activities, it is interesting to see how the powers of such officers are described and limited in Section 131(4):

“(a) to search any person who is in or seeks entry to the specified premises in relation to which the officer is designated;  
 (b) to examine any article that is in or is being delivered to or brought into those premises;  
 (c) to exclude or remove from the premises any person who, without good cause—  
     (i) refuses to be searched, or  
     (ii) refuses to allow an article in his or her possession to be examined;  
 (d) to exclude or remove any person from the premises if it is necessary to do so—  
     (i) to protect a person or any property, or  
     (ii) to allow the business of the authorised body to proceed without interference or delay;  
 (e) to require any person who is in or seeks entry to the premises to identify himself or herself;  
 (f) to seize, in exercising powers under this section, any weapon other than one in the possession of a person with lawful authority;  
 (g) to seize any article that the officer has reason to believe is being unlawfully removed from the premises;  
 (h) to use reasonable force where necessary in exercising a power conferred under paragraph (c), (d), (f) or (g).”

### 10.3.1.11 Italy

Performing border control is, in principle, the task of the Border and Foreign Police Service. This service is responsible for the executive aspects related to the sea, air and land border security matters and whose powers are defined in The Ministerial Decree on organisation and duties of Border Police (16 March 1989).

The Carabinieri performs those tasks in certain areas where no local police office exists (small land border crossing points, small ports). The Minister of Interior, by way of letter, delegates border control duties on a yearly basis to the Carabinieri for certain areas. In that case they have the same competences as the border police.

Officers of the Guardia di Finanza also perform certain tasks in the domain of border control. This service is a special Italian Police Force directly under the authority of the Minister of Economy and Finance, is an integral part of the State Armed Forces as well as of the Law-enforcement agencies. The tasks of the Guardia di Finanza are laid down by the organisation law dated April 23rd 1959, no. 189. Maintaining public order and safety and politico-military defence of the borders is one of those tasks. In the domain of border control and the fight against illegal immigration, they are involved in surveillance of maritime border. With respect to land borders they perform border checks at certain border crossing points.

#### 10.3.1.12 Luxembourg

According to the 1972 law, the Airport Control Service (SCA) is the main law enforcement service involved in checking the people as well as being active in the air security and in ensuring the security within the airport grounds and buildings. Besides this main body, three others complete the border guard service.

Firstly, the Customs and Excises (art.4, Law on Customs cooperation 1977) check goods attend at the passenger terminal and at the cargo terminal. This body is not exactly performing border checks unless the authorities must apply the art.22 of Schengen agreement. Next to this second body, the Immigration Direction shares the decision power of detaining someone in jail under administrative procedure with the police for aliens and is involved in the organisation of removal actions (Art.9). Finally, the Police for aliens (PDE), which is part of the Judiciary Police (Police Corps Status Law, 1999), shares the decision power of placing someone in jail under administrative procedure with the immigration direction.

#### 10.3.1.13 Malta

As far as Malta is concerned, it is the Special Branch of the Malta Police Force which is the most responsible service concerning the border guard control. Border control activities are the responsibility of the Principal Immigration Officer. Police powers and duties are defined in the Criminal code, Chapter 9. In this respect they have the power of

- Stop persons and search information (sub-title 1)
- Road checks (sub-title 2)
- Entry, search and seizure under warrant or not (sub-title 3 & 4)

- Seizure and retention (sub-title 5)
- Arrest and detention (sub-title 6)

Border Control officers presently consist of police officers and civilian staff working for the Special Branch of the Malta Police Force. These are stationed at the Seaport and Airport and are responsible to ensure that proper checks are carried out upon arrival and departure of passengers. Other investigative duties are carried out by the Immigration section of the Special Branch.

Next to the Police, Armed forces are responsible for patrolling shores and for performing first line checks at sea.

#### 10.3.1.14 Norway

The Norwegian Police have the overall responsibility for border checks (Immigration Act, Chapter 1, §5) even if they are also working in collaboration with the Board Guard Company and the Coast Guard<sup>299</sup>. As stated in the Police Act, Police have among other duties, “the responsibility to provide protection against any threat to general security in the Community” (Police Act, section 2, §1). In order to accomplish their task, they can also arrest persons, carry out a search and make the use of short-term detention (section 8, 10).

The Board Guard Company has much more limited powers and only acts on behalf of the police (e.g. take somebody into custody until the police arrive). Finally, the Coast Guard is paying attention at Surveillance of the Blue Border and at the Maintenance of sovereignty through security border. In the near future, this body as well as the Customs might be granted some limited police border control powers in extreme cases (The future Immigration Act).

#### 10.3.1.15 Slovakia

The Police is the only service involved in border control. The Army, professionalized in 2002, could be used in exceptional cases after approval by the Government. The Police have complete powers concerning border control. Their powers are defined in the Chapter 3 of the Police Act (171 - 1993). Article 17 explains to which extent Police officers can request explanation from aliens. Article 18 gives the authority to the officer to demand proof of authority. Besides, Police also have authority to detain (art.19 & art.20) as well as to take fingerprints (art.21). Furthermore, Police can also take away weapons (art.22), stop and search conveyances (art.23), forbid entry into a designated place (art.27). Finally, officers can

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<sup>299</sup> See annexed CD-ROM for information on services acting as support of the main service.

also use explosive articles (art.30) and possess harmful substances and prohibited things (art. 31).

### 10.3.1.16 Slovenia

Article 3 of the State Border Act (2002) strictly identifies the purpose of the State border control. Namely, persons in charge of border control have to protect life and health of people; to prevent and detect criminal offences and misdemeanours, and detect and apprehend the perpetrators thereof; to prevent illegal migration; to ensure the safety of people, property and the environment; and to prevent and detect other threats to public safety and order.

Therefore, the State Border Control Act (art. 4, 5) defines the Police as the only law enforcement service as regards Border Control. Indeed they perform Border Checks on border crossing points and are in charge of the surveillance of the green and blue border. "Should the State border control tasks be conducted by another State agency, the employees of this State agency shall have, in addition to their powers, the powers of police officers required".

### 10.3.1.17 Spain

The prerogatives of border control are split between the Police and the Guardia Civil according to Art 12 of the Organic Law 2/86 and the Real Decree 1599/2004. Competences are split materially and territorially. The General Commissariat for Foreigners and Identification Documents is the main actor, Spanish officers getting their powers to control the entry and exit of Spanish citizens and foreigners and to control their documents from the Order from the Ministry of Interior 2103/2005 (Ch 1, Art 7) setting the mission of this branch of the police. Territorially, the police are in charge of the border crossing points and large cities (as defined by the government). The Guardia Civil (through the Jefatura Fiscal y de Fronteras) is in charge of the surveillance of the Spanish Coasts and airports (Art 8 of the Order of 29 October 2001) and is competent on the rest of the Spanish territory that is not covered by the Police (including the 12 nautical miles of territorial waters).

### 10.3.1.18 Sweden

As far as Sweden is concerned, it is also the Police which is the most responsible body for Border Control and has therefore a wide range of powers (Police Act, Section 10-29). With the particular aspect that civilian staff can be employed by individual police authorities (on a County basis). It is up to each County to define its level of delegation of tasks, in accordance with the rules defined in the Aliens Act and in the Police Act. In this respect, the status of

“passport control officers” has been created (Passport Ordinance). Still, the chapter 5, section 1, of the Aliens Act stipulates that it is the Police which perform the passport check. Section 2 gives the Police more powers as they are the one who proceed to body search and luggage investigation. Civilian staff is first and foremost employed for efficiency reasons.

In parallel of the work of the Police, the Coast Guards (Aliens Act; 1989:529; Chapter 5) are also responsible for:

- Surveillance of the open sea and coastal waters,
- border control
- sea traffic control
- customs control
- fishing control
- environmental surveillance
- ship security control
- coordination of maritime information for law enforcement surveillance

Next, through agreements between the Police and Customs, border control may be conducted by customs officers. Nevertheless they don't have any independent border control prerogatives unless they would be assigned by the Police. Finally, the Migration Board (Aliens Act; 1989; 529) needs also the approval of the Police in order to perform border checks.

### 10.3.2 Dedicated border guards

This very clearly contrasts with specialized border control services. In the framework of this Study, it is insightful to focus on what “strict” border guard activities mean in the Member State in order to draw a clear line on what could be transferred to guest border guards.

#### 10.3.2.1 Finland

In Finland, the recent Border Guard Act<sup>300</sup> entered into force in September 2005 gives a broader responsibility to the Border Guard with respect to criminal investigation, which was until now mainly done by the police, and broadens the competences of the border guard to the whole territory of Finland, and not just the border area: Art 3 states that “*The Border Guard performs surveillance functions separately provided for as well as measures to prevent and investigate crimes and to have charges brought for crimes in co-operation with other authorities.*”

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<sup>300</sup> Replacing the Frontier Guard Act from 1999.



*The Border Guard performs police and customs functions, search and rescue missions as well as participates in national defence”* whereas Art 4 specifies that *“The Border Guard shall operate where-ever this is well-founded with regard to maintaining order at the border or border security or to performing military national defence functions provided for the Border Guard as well as in the sea area and in the economic zone referred to in the Act on the Economic Zone of Finland (1058/2004). The Border Guard shall operate elsewhere only if this is necessary in order to perform its statutory function or to give executive assistance”*.

In addition to these crime prevention and criminal investigation prerogatives detailed in Art 40-42 of the Act, under special and emergency circumstances specified in Art 33 of the Border Guard Act, *“a border guard shall have the powers provided for a police officer in chapter 2 of the Police Act unless a commanding police officer or a field commander of the Police restricts them”*.

Combined with their intervention in Customs activities (Art 34), this Act turns the Finnish border guard into a very powerful tool to guarantee the protection of the Finnish borders.

### 10.3.2.2 Poland

The Border Guard Act from May 2005 suppressed limitations in exercise of the BG officers’ competences outside of the border zone. As in Finland, it developed the prerogatives of the Polish Border Guard with respect to counteraction and prosecution of the perpetrators of crimes/offences against common security (within the scope of the Act on Border Protection), as well as crimes/offences against air transport security, security control in the border crossings and in international transport. It has the broad mission to ensure public order within the area of a border crossing point and within the border zone, within the scope of the Border Guard’s competence.

### 10.3.2.3 Estonia

The Estonian Border Guard was reorganised in the 1990s based on the Finnish border guard model. In the case of Estonia, 2005 was a year where some prerogatives were taken away from the Border Guard. Indeed, until this year, this service had military missions (related to national defence activities). It is now outside the Defence forces, which will enable it to have specifically dedicated education and training and focus on its core activity: guarding the border. According to the government of the Republic’s regulations (State Gazette 1995, 37, 475), the Border Guard’s areas of activity are the territory of the parishes and the towns situated along the border, the sections of the border waters belonging to Estonia and the islands located in them, the economic zone and the territory of the airports

and ports, opened for international traffic independent of their location.

The Border Guard is also entitled to act on the whole State's territory in investigating criminal cases, processing administrative offences, performing criminal surveillance and prosecuting border violators, where the prosecution began from within the Border Guard's area of activity, stated in the Border Guard Act of 30 June 1994, Art 2-14.

#### 10.3.2.4 Latvia

The Latvian border guard is explicitly described as an administrative State authority. Already in Art 4 of the Border Guard Law, the importance of the cooperation with other authorities is stressed. Section 15 of the border guard Act states that the Latvian border guard is competent in the border area (as defined in the State Border Law) and can act outside these locations "*in cases when a search for persons violating the State border is being carried out*" (Section 15(2)). Like the Estonian border guard, it is an "investigatory institution in matters of illegal crossing of the State border(...)", investigating in accordance with the Criminal Procedure Code of Latvia .

#### 10.3.2.5 Lithuania

The Lithuanian border guard, unlike its Estonian counterpart, is still a full member of the national armed forces, involved in times of war in the defence of the State. Besides its main function to protect the border, this border guard has criminal investigation prerogatives (Art 6 of the Border Guard Act) and is regulated in a very similar manner as the Latvian one.

#### 10.3.2.6 Hungary

The Hungarian border guard's prerogatives are also numerous. Art 21 of the Border Guard Act describes the border guarding activities whereas art 22 describes the policing tasks of the border guard (like repelling the violent acts that endanger the border). In addition, the Hungarian border guard has certain prerogatives related to criminal offences detailed in the Law on Criminal Procedure (paragraph 36). Currently the Hungarian Border Guard is responsible for the control of entering and stay, and prevention of illegal stay, human smuggling, damaging of border mark and document forgery committed for travelling papers if the crime has been recognised by or the perpetration has been reported to the Border Guard. Any other crimes are forwarded to the competent authorities.

### 10.3.3 Other services

#### 10.3.3.1 Portugal

Three different bodies are responsible for border control: the Border and Aliens Service as the main service, the Republican National Guard and the Directorate-General of the Maritime Authority.

According to its organic law (Decree-Law 252/2000, of October 16), the (SEF) Border and Aliens Service is a national security service that reports to the Minister of Internal Administration.

In order to control the circulation of persons within borders, the period of stay and activity of aliens in national territory, the Border and Aliens Service powers can be summarized as (art.2):

- control of persons in border posts,
- surveillance and inspection of seaports and airports,
- maintenance of mobile controls,
- grant of visas in national territory,
- extension of the period of stay of aliens and residence authorisations, control of permanent residence of aliens in national territory,
- investigation of crimes of assisting illegal immigration and associated crimes,
- initiation of proceedings and making decisions in administrative procedures of expulsion and re-admission,
- initiation of proceedings to grant political asylum,
- co-ordination of co-operation between security forces and services in matters of the circulation of persons,
- control of aliens and investigation of the aforementioned crimes.

Besides this first border control service, the Republican National Guard (GNR) is a security force constituted by soldiers. The GNR's organic law confers the mission to this security force to co-operate with the SEF in the control of the entry and exit of persons. In addition to this mission, the Fiscal Brigade of the GNR is responsible for checking compliance with the legal requirements applicable to tax infringements. GNR has competence over the entire territory of Portugal (GNR's Organic Law).

Finally, and in accordance with Decree-Law no. 44/2002, of March 2, the Directorate-General of the Maritime Authority (DGAM) is responsible for the Maritime authority functions within the maritime area falling under DGAM's jurisdiction - in particular in matters of inspection, policing and the safety of shipping, persons and goods. They are exercised via the port authorities, integrated within DGAM's various maritime departments. Main role in border control is in surveillance of the sea borders.

### 10.3.3.2 Netherlands

In the Kingdom of the Netherlands, two services share the responsibility of Border control. The main differences regarding their competences are not linked to their actions but well to their territorial limits of powers.

On the one hand, the Royal Marechaussee is a military law enforcement service, responsible for Border Control on all airports and in all seaports, except in the Port of Rotterdam. They are also responsible for the execution of police powers near the Border Crossing Points when there is a relation with the entry and the exit of the territory (Law on Police, Art. 6 §1, 1993) (Law on Aliens, Art. 46, Art. 47, 2000).

On the other hand, according to the Law on Police (art.3, 1993) and the Aliens Act (art. 46 1 B, 2000), the Seaport Police is responsible for border control in the Port of Rotterdam, including Schiedam, Vlaardingen, Maassluis, Stellendam, the Europoort area and the Botlek area.

In the domain of border control, the powers of these two bodies are defined in the Law on Aliens (2000) within articles 49 up to 53. These articles explain how officers can make searches, they can ask for identity documents or even arrest someone unable to prove its identity.

### 10.3.3.3 Switzerland

Two types of services are involved in the Border Control procedure. As art.6 and art.7 of the new law on aliens described, this mission is in the hands of the cantonal police authorities on the one hand, and the Federal Border Guard Service on the other hand, the latter being presented as the main actor.

The Border Guard Service, attached to the federal Customs Administration belonging to the Federal Department of Finance, is involved in administrative control of people via all its land crossing points and its mobile team, also through checks in international trains in support of cantonal service. This service can also be in charge of fiscal tasks and be involved in police control (Aliens Act, New law on customs).

On the other side, the Cantonal Police is responsible for administrative control of people in international trains (Basel) and airports (Zürich and Geneva).

The various competences of respective services are further described in the new Aliens Act. Article 69 of the draft Aliens act formulates the competence of searching persons. Article 71 formulates the competence to forbid access to a certain area and articles 72-76 describes the right to apprehend persons under various circumstances.

### 10.3.3.4 The UK Immigration Service

The UK Immigration Service constitutes a very interesting case in itself. As opposed to all other responsible services, the Immigration Officers are not allowed to carry weapons<sup>301</sup>. They are the only ones that do not use coercive force to stop a person. Under Art 146 of the 1999 Immigration and Asylum Act, UK Immigration Officers are authorised if necessary to use reasonable force in exercising any powers under the 1971 Immigration Act or the 1990 Immigration and Asylum Act. However it's a matter of policy and practice that Immigration Service staff do not generally use force and do not for example intercept/restrain or prevent persons crossing the border.

All custodial/ escorting/detention activities are carried out by authorised Detainee Custody Officers<sup>302</sup> who deal with the physical control of persons identified as requiring detention or further (second line) investigation at the UK borders. Wherever persons attempt to evade immigration control by fleeing, standard operating practice in the UK is to call for police assistance where interceptions need to be made as police officers are properly trained for such a role. All Immigration Service staff are offered personal safety training, but this only provides defensive techniques in the event that they find themselves in confrontation situations. The Immigration Service Enforcement and Removals Directorate maintains specialist teams who are able to exercise arrest powers to apprehend immigration offenders within the UK, although these would not generally be applicable to border control operations.

Another specificity of Immigration Officers is that they do not have an official uniform, although they are issued with protective clothing featuring UK Immigration Service insignia which can be worn when necessary.

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<sup>301</sup> Maltese police officers do not normally carry weapons either (except those officers working in the Special Assignment Group).

<sup>302</sup> Once a decision has been taken by an Immigration Service officer either to detain a person or require their further (second line) examination under Schedule 2 paragraph 2(3), further security checks on those persons and their belongings are carried out by Detainee Custody Officers (DCOs). These are not border guards, but (private) contractors authorised to carry out their tasks under S154 of the Immigration and Asylum Act 1999. They have the power to exercise custodial, search and escorting functions as regards persons detained and in their care. These flow from powers under Schedules 11 and 13 of the Immigration and Asylum Act 1999 and also apply in detention centres and centres where persons may be held before their removal from the UK. They have a specialised role that follows from special training and skills in the areas of detention, welfare etc.

## 10.4 Border Control cooperation between the US and Canada<sup>303</sup>

### Context

U.S. and Canada share a 5051 kilometre-long land border. Trans-border cooperation between the various law enforcement services involved is therefore crucial to balance the economic interests with the interests of national security. Both countries share a common border and common objectives: to ensure that the border is open for business, but closed to crime.

No general legal provisions confer a permanent legal basis for joint operations taking place in Canada. There is a provision providing the legal basis for the Royal Canadian mounted police to name an individual as a *supernumerary constable*. This concept was originally created to provide assistance to Canadian authorities inside Indian reserves. With respect to accountability and liability, the Royal Canadian Mounted Police retains final responsibility for the actions taken. Furthermore, certain provisions in Canadian criminal code allow citizens to perform certain acts in self-defence and even detain someone.

A concrete case of foreign law enforcement services operating on Canadian territory is the presence of **V.I.P. escorts**. Typically these escorts obtain the status of 'supernumerary constables' and have exemption orders under the firearms act. Some issues have not been completely resolved yet however such as questions related to import and export of weapons and immigration issues (the ability to work in Canada). The accountability framework is not completely clear yet either.

Joint operations are already taking place in the maritime context where foreign police or custom officers can be present and assist during operations at the borders. Foreign officers do not have the powers to arrest persons however, or to seize goods. In the Canadian system, there is no legal obstacle to having foreign authorities interviewing a person as long as this person cooperates on a voluntary basis. In the criminal field, agreements on mutual legal assistance allow Canadian authorities to perform compulsory measures *on behalf of* foreign investigators.<sup>304</sup> Permission to have access to local (Canadian) databases can be granted for certain operations. In that case, a technician provides restricted access to certain zones. If ad-hoc information is needed, practical solutions are

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<sup>303</sup> The information provided in this section mainly comes from interviews carried out with Canadian officials in September 2005 and represents the situation of the IBETs programme at the time of these interviews.

<sup>304</sup> foreign Court can request Canadian Court to take compulsory testimonies.

applied and a phone call often suffices to foreign authorities since official Interpol information exchange request often takes too long.

Examples of joint operations are integrated Border Enforcement Teams (IBETs), the pre-clearance- and ship rider pilot projects.

### **IBET**

IBETS are multi-agency law enforcement teams that were originally developed in 1996 as an innovative method to address cross-border crimes along international land and marine borders between British Columbia and Washington State.

The main challenge was to ensure a harmonised approach to Canadian and United States efforts to target cross-border criminal activity.

The importance of IBETs has been heightened by the new reality of terrorism and the need to enhance border integrity. The model is built on the premise of partnership, and on sharing information more effectively.

The original core agencies from Canada and the U.S., which have a direct interest in IBETs are:

- Royal Canadian Mounted Police
- The Canada Border Services Agency
- U.S. Customs and Border Protection (CBP)
- U.S. Immigration and Customs Enforcement (ICE)
- U.S. Coast Guard

In 2005, a US officer from Texas was in Canada for a training course where he stopped a car since he was convinced that the driver was under the influence of marihuana. The individual was not and filed a complaint. This case has been settled out of Court.

There are no specific provisions on bestowing executive powers to foreign officers. IBETs are organised under a Memorandum of Understanding which allows for the necessary flexibility (some MOU's simply consist in a letter).

### **Pre-clearance projects**

A pre-clearance Act already exists in the domain of air borders: American Customs and Immigration Officers in Canadian airports pre-screen persons so no further screening takes place in the US. **Passengers have the right** to enter the pre-clearance area (no obligation and can leave this area at any time). U.S. Border Guards have no arrest authority, cannot carry weapons nor use coercive force. If a problem occurs, the Canadian authorities have to be alerted.

**Ship Rider Pilot Project:**

Ship Rider is a concept designed by the US Coast Guard (USCG) and endorsed by the RCMP (Royal Canadian Mounted Police). It represents an integrated approach to conducting joint maritime enforcement on the Great Lakes and St. Lawrence Seaway.

RCMP and USCG officers would receive peace officer status in each other's jurisdiction:

- ▶ USCG officers via RCMP Act;
- ▶ RCMP officers designated as Customs Officers;
- ▶ Status would provide for certain powers of arrest, search and seizure.

Operational Command authority is dictated by jurisdiction – the “foreign” officer only assists the officer of jurisdiction if/when requested. Command shifts according to the territory.

Personal duty weapons would be carried to address public and officer safety concerns.

- ▶ USCG/RCMP vessels would bear traditional markings – public would be notified in advance
- ▶ USCG and RCMP officers would report to Customs and Immigration via telephone
- ▶ Operations would be consistent with existing bi-national information-sharing practices
- ▶ Bi-national training will be conducted before the implementation of the pilot project
- ▶ A communications strategy and evaluation plan are part of the pilot project framework

The proposed Ship Rider pilot project raises a range of legal issues not contemplated under existing law. As a result, a certain level of risk occurs in the following areas:

1. Application of the Export and Import Permits Act (EIPA)
2. Customs and Immigration reporting requirements
3. Civil liability issues
4. Enforcement capacity of USCG officers



## 10.5 Glossary

This glossary was used in the framework of the interviews with the relevant States so as to ensure a common understanding of the subject under investigation.

<b>Border check</b>	See <a href="#">border control</a> .	Project Expert
<b>Border control</b>	<p>In the scope of this study, it means the activity carried out at a border – concerning persons, their means of transport and the objects in their possession – in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration.</p> <p>Border control consists of <a href="#">border checks</a> and <a href="#">border surveillance</a>.</p> <p>Border check means: the checks carried out at <a href="#">border crossing points</a>, to ensure that persons, their means of transport and the objects in their possession may be authorised to enter the territory of the <a href="#">relevant States</a> or authorised to leave it.</p> <p>Border surveillance means: the activity carried out at a border in response to an intention to cross or the act of crossing that border outside <a href="#">border crossing points</a> or at <a href="#">border crossing points</a> outside the fixed opening hours.</p>	Com2002
<b>Border crossing-point</b>	Any crossing-point authorised by the competent authorities for the crossing of <a href="#">external borders</a> .	Com2002
<b>Border guard</b>	<p>Public official deployed either at a land, maritime or air <a href="#">border crossing point</a> along the land or maritime <a href="#">external border</a> or in the immediate vicinity of the latter, who enjoys the prerogatives of public authority needed to exercise one or more of the following functions:</p> <ul style="list-style-type: none"> <li>- carry out <a href="#">checks</a> or <a href="#">surveillance</a> at <a href="#">external borders</a>;</li> <li>- take at the <a href="#">external border</a> the preventive or enforcement measures needed to secure compliance with Community regulations, the internal security of the common area of freedom of movement, law and order or national security;</li> <li>- conduct investigations into facts observed in the course of <a href="#">checks</a> or <a href="#">surveillance</a> at <a href="#">external borders</a>.</li> </ul>	Com2002
<b>Border surveillance</b>	See <a href="#">border control</a> .	Project Expert
<b>Competency</b>	All tasks a <a href="#">border guard</a> is able or allowed to execute. E.g. checking identity and travel documents; questioning foreign nationals about the purpose of their visit; boarding civilian ships or boats; notifying people that are admitted or refused; holding people to be handed to national services; escorting third country nationals to the country of return; performing necessary coercive force during joint removal operations; etc.	Unisys

<b>DEPA</b>	industry-approved code for a deportee who is escorted by authorised personnel during flight	Project Expert
<b>External Borders</b>	The <a href="#">relevant States</a> ' land and sea borders and their airports and sea ports, provided that they are not <a href="#">internal borders</a> .	SCH CONV
<b>Guest officers</b>	See <a href="#">Officer</a> .	Unisys
<b>Home country</b>	The country of origin of a <a href="#">guest officer</a> .	Unisys
<b>Home officers</b>	See <a href="#">Officer</a> .	Unisys
<b>Host country</b>	The country organising the <a href="#">JO</a> or the <a href="#">JRA</a> in its territory.	Unisys
<b>Internal Borders</b>	Common borders of the <a href="#">relevant States</a> , their airports for internal flights and their sea ports for regular ferry connections exclusively from or to other ports within the territories of the 28 <a href="#">relevant States</a> .	SCH CONV
<b>Joint Operation (JO)</b>	Control or surveillance operation organised by a <a href="#">host country</a> with the participation of another or several other <a href="#">relevant states</a> sending officers.	Unisys
<b>Joint Removal Action (JRA)</b>	Removal actions of illegally residing third country nationals organised by a <a href="#">host country</a> with the participation of another or several other <a href="#">relevant states</a> sending officers.	Unisys
<b>National services</b>	All the police, administrative or judicial services involved in border management: concretely operating at the <a href="#">external border</a> , inquiring, prosecuting, etc.	Unisys
<b>Officer</b>	Term used in general to indicate an agent rather than referring to a particular rank.  Guest officer: officer from another <a href="#">relevant state</a> operating in the <a href="#">host country</a> during a <a href="#">JO</a> or a <a href="#">JRA</a> .  Home officer: officer operating in their own country.	Unisys
<b>Prerogative</b>	The competencies accorded to a service as a whole according to the law enforcement services architecture (repartition / allocation of the roles / powers).	Unisys

**Relevant countries or relevant States**

- All member states of the EU: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, the United Kingdom;
- two States associated with the Schengen Area: Iceland, and Norway;
- and Switzerland

Unisys

## 10.6 Table of Acronyms

<b>ACRONYM</b>	<b>Description</b>
ABC	Air Border Centre
ANAD	Accompanied inadmissible person
BCP	Border Crossing Point
CCC	Common Core Curriculum
DEPA	DEported Person Accompanied
DPKO	Department of Peacekeeping Operations of the UN
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ESBC	Eastern Sea Borders Centre
FRONTEX	European Agency for the management of Operational Cooperation at the External Borders
IBET	Integrated Border Enforcement Team
IG	Interview Guide used for interviews with the relevant States
JIT	Joint Investigative Team
JO	Joint Operation in the domain of Border Control
JHA	Justice and Home Affairs
DG JLS	Directorate General Justice, Freedom and Security
JRA	Joint removal action in the domain of Border Control
LBC	Land Borders Centre
LES	Law Enforcement Service
MOU	Memorandum Of Understanding
MS	Member State
OMC	Open Method of Coordination
PBO	Study on the Powers of Border Officers
PMQP	Project Management Quality Plan of the Study on the Powers of Border Officers
SIS	Schengen Information System
TEC	Treaty establishing the European Community

THP	The Hague Programme
UCLOS	United Nations Convention of the Law of the Sea of 10 December 1982
UN	United Nations
US	United States
VIS	Visa Information System
WSBC	Western Sea Border Centre

## 10.7 Table on Public Authority Tasks

### Preparation and surveillance

		Interaction with traveller		Intrusive/Impact on personal freedom							Discretionary power	Act binding the State legally	
		use of language	no use of language	Processing of personal data	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons			deprivation of liberty
<b>1. Preparation of Border Control Activities</b>	<b>Perform threat analyses and risk assessment</b>			<b>X</b>									
<b>2.1 Technical Surveillance</b>	<b>Make use of surveillance instruments (radars, heat detectors, breathing detectors, etc.)</b>				<b>X</b>								
<b>2.2 Static Physical Surveillance</b>	<b>Observe the area close to the border (without specific instruments)</b>												
	<b>Stop a person trying to cross the border - Ask him to stop on a voluntary basis</b>	<b>X</b>				<b>X</b>							
	<b>Stop a person trying to cross the border - Force a person trying to cross the border to stop</b>	<b>X</b>				<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>			
	<b>Interview persons on their reasons for crossing external borders outside the authorised crossing points</b>	<b>X</b>		<b>X</b>	<b>X</b>								
	<b>Forbid access to an area close to the border</b>							<b>X</b>			<b>X</b>	<b>X</b>	
<b>2.3 Mobile</b>	<b>Patrol the area between BCP</b>												

		Interaction with traveller		Intrusive/Impact on personal freedom								Discretionary power	Act binding the State legally	
Physical surveillance	Engage in pursuit of and stop persons trying to cross the border								X	X		X		
	Intercept or monitor telecommunications				X								X	
	Access to property				X					X				
3.1 Pre-checks	Carry out pre-border checks in third countries (at gates, before entry in plane/boat...)	X	X	X	X	X								

First Line Checks

		Interaction with traveller		Intrusive/Impact on personal freedom							Discretionary power	Act binding the State legally	
		use of language	no use of language	Request information	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons			deprivation of liberty
3.2 First Line Checks (Documents)	Screen the persons crossing the border	X				X							
	Support control activities by physical presence during the control procedures		X										
	Ask for ID, VISA, travel documents	X		X									
	Give indications to persons (pedestrian, drivers, pilots, skippers) crossing the border	X				X							
	Stop a vehicle entering or leaving the free movement area		X			X		X					
	Stamp entry/exit document												X
	Decide whether to authorise entry/exit											X	X
3.3 First Line Checks (Database)	Consult the Schengen Information System			X	X								
	Consult a national (host country) Information System			X	X								
	Consult an Information System from home country			X	X								
	Notify the person willing to cross the border of admission or refusal of admission/exit	X											X



		Interaction with traveller		Intrusive/Impact on personal freedom								Discretionary power	Act binding the State legally	
	Make the decision to proceed to second line check activities				X	X						X	X	
4. Security checks	Perform a security check		X				X							

Second Line Checks

		Interaction with traveller		Intrusive/Impact on personal freedom							Discretionary power	Act binding the State legally	
		use of language	no use of language	Request information	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons			deprivation of liberty
5.1 Second line technical checks	Search a person for additional ID information		X		X		X						
	Take biometric data of persons		X		X	X	X						
	Examine objects (or luggage) that persons carry extensively for security reasons				X								
	Refer the matter to Customs authorities											X	
	Make use of detection devices to establish authenticity of documentation												
	Detection devices to detect dangerous or illegal goods and objects												
	Apprehend a person to be handed to national administration, police, customs or judicial authorities		X					X	X	X	X		
	Temporarily take possession of vehicles / dangerous objects and substances in order to ensure security at the border (preventive seizure)		X							X			

		Interaction with traveller		Intrusive/Impact on personal freedom							Discretionary power	Act binding the State legally	
		use of language	no use of language	Request information	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons			deprivation of liberty
5.2 Second Line Administrative Investigations	Contact other authorities to control authenticity of documents (Consulate, SIRENE,...)			X	X								
	Interviewing persons about their ID	X		X	X								
	Interviewing persons about their financial situation (return ticket, income)	X		X	X								
	Interviewing persons about goods they carry	X		X	X								
	Interviewing persons about their itinerary and the purpose of their visit in the common free movement area	X		X	X								
	Consult additional databases for investigation purpose (not simple hit/no hit)			X	X								

Third line Checks

		Interaction with traveller		Intrusive/Impact on personal freedom								Discretionary power	Act binding the State legally
		use of language	no use of language	Request information	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons	deprivation of liberty		
6.1 Third Line Administrative Procedure	Initiate Asylum procedure												X
	Refer the matter to an Immigration Officer (who assumes responsibility)												X
	Accompany inadmissible person (to detention centre or for removal when necessary)		X						X				
	Specify a fixed fine	X				X							X
6.2 Third Line Criminal Investigation	Initiate pre-trial investigation of criminal cases			X	X							X	X
	Initiate procedure for judicial seizure of objects/ vehicles											X	X
	Transfer the pre-trial investigation to the pre-trial investigation authority				X								X
	Take the decision on whether or not to place the matter before a prosecutor or a judge				X							X	X

		Interaction with traveller		Intrusive/Impact on personal freedom							Discretionary power	Act binding the State legally	
		use of language	no use of language	Request information	Impact on privacy	requesting action from traveller	Acts having an impact on physical integrity	Use of force	use of coercive measures	Use of arms and weapons			deprivation of liberty
7. Other Rights and Obligations	Right to import a service weapon from the home country									X			
	Right to carry a service weapon									X			
	Right to make use of an individual service weapon									X			
	Right to write official reports				X								X
	Right to issue VISAs, Residence Permits, Work Permits, EU Laissez Passer		X									X	X
	Free access to data bases				X								
	Use of force: self defence						X	X		X			
	Use of force: coercive measures						X	X	X	X			
	Wearing uniforms/Signs												
	operational advice												
	technical advice (e.g. advice on use of surveillance instruments)												
	technical support (e.g. use of surveillance instruments)												
	Logistical support (e.g. patrol vehicles, helicopters)												

		Interaction with traveller		Intrusive/Impact on personal freedom								Discretionary power	Act binding the State legally
	Exchange of information				X								
	Perform Command and Control activities (make decisions, give orders)											X	X

## 10.8 Overview of agreements

Legend for the categories	
Agreement allowing checks on foreign territory (in trains,...)	CA
Joint Patrols	JP
Agreements containing provisions related to art. 40/41 of the Schengen Convention	40/41
Joint Offices	JO
Other area of cooperation	Ot

Treaty Agreement EU Instrument	Category	Date	Number of Parties	AT austria	BE belgium	CY cyprus	CZ czech Rep.	DE germany	DK denmark	EE estonia	ES Spain	FI finland	FR france	EL greece	HU hungary	IE ireland	IT italy	LT lithuania	LU luxembourg	LV latvia	MT malta	NL netherlands (the)	PL poland	PT portugal	SE sweden	SI slovenia	SK slovakia	UK united kingdom (the)	CH switzerland	IS iceland	NO norway	other countries
<b>Number of agreements</b>				14	15	1	7	17	8	7	5	22	17	9	6	3	6	6	13	6	0	8	7	3	13	10	6	5	5	8	12	16
Benelux Convention (Senningen I)		1996	3		x														x			x										
Benelux Convention (Senningen II)	40/41, JO, JP, Ot	2004	3		x														x			x										
Benelux Treaty		1958	3		x														x			x										
Schengen I (Agreement) implemented		1985	15	X	x			x			x	x	x	x		x	x		x			x		x	x				x	x		
Schengen II (Convention) implemented	40/41, Ot	1990	15	X	x			x			x	x	x	x		x	x		x			x		x	x				x	x		
Prüm Convention	40/41, JO, JP, Ot	2005	8	x	x			x			x	x	x						x			x										
Baltic Sea Region Border Control Cooperation		1997	8					x	x	x		x						x		x					x						x	

Treaty Agreement EU Instrument	Category	Date	Number of Parties	AT austria	BE belgium	CY cyprus	CZ czech Rep.	DE germany	DK denmark	EE estonia	ES Spain	FI finland	FR france	EL grecece	HU hungary	IE ireland	IT italy	LT lithuania	LU luxembourg	LV latvia	MT malta	NL netherlands (the)	PL poland	PT portugal	SE sweden	SI slovenia	SK slovakia	UK united kingdom (the)	CH switzerland	IS iceland	NO norway	other countries
Nordic Passport Control Agreement		1958	5						x			x													x				x	x		
Nordic - Updated agreement on police cooperation		2003	5						x			x													x				x	x		
Nordic - Agreement on Police, Customs and Drugs		1983	5						x			x													x				x	x		
Bilateral Agreement on police cooperation	40/41, JP,JO	2003	2	x																						x						
Agreement on police cooperation:	40/41, JP,JO	2004	2	x											x																	
Agreement on checks in rail, road and water traffic	CA	1991	3	x			x																				x					
Agreement establishing common border check points and performing border control in rail traffic	CA	2004	2	x																							x					
Bilateral Agreement on police cooperation	40/41, JP	2004	2	x																							x					
Border Control Agreement (common State borders)	-	1992	2				x																				x					
Border Control Agreement (facilitated border checks)	CA	1999	2				x																				x					
Police Cooperation Agreement	-	-	2							x															x							
Border Control Agreement (with Russia)	-	-	3							x		x																				x
Border Control Agreement	-	-	3							x								x		x												
Cooperation Protocol with border authorities	-	-	2									x													x							
Cooperation Protocol with border authorities	-	-	2									x																				x



Treaty Agreement EU Instrument	Category	Date	Number of Parties	AT austria	BE belgium	CY cyprus	CZ czech Rep.	DE germany	DK denmark	EE estonia	ES Spain	FI finland	FR france	EL greece	HU hungary	IE ireland	IT italy	LT lithuania	LU luxembourg	LV latvia	MT malta	NL netherlands (the)	PL poland	PT portugal	SE sweden	SI slovenia	SK slovakia	UK united kingdom (the)	CH switzerland	IS iceland	NO norway	other countries
Border Control Agreement	-	-	2							x		x																				
Border Control Agreement	-	-	2									x								x												
Border Control Agreement	-	2002	2									x						x														
Cooperation Protocol with border authorities	-	-	2									x											x									
Cooperation Protocol with border authorities	-	-	2									x			x																	
Tripartite cooperation in the Gulf of Finland (with Russia)	-	1994	3							x		x																				x
Tripartite protocol (with Russia)	-	-	3									x																		x	x	
Border regulation agreement (with Russia)	-	1960	2									x																				x
Crime prevention agreement (with Russia)	-	-	2									x																				x
Agreement on juxtaposed control	CA	-	2		x								x																			
Agreement on juxtaposed control	CA	1979	2					x					x																			
Agreement on juxtaposed control	CA	1997	2										x				x															
Agreement on juxtaposed control	CA	-	2										x					x														
Agreement on juxtaposed control	CA	1987	2										x																x			
Touquet Treaty	CA	2003	2										x															x				
Sangatte Protocol	JO, CA, 40/41	1991	2										x															x				
Sangatte Protocol (additional protocol)	-	2001	2										x															x				
Customs Convention with	Ot	1963	2										x																			x

Treaty Agreement EU Instrument	Category	Date	Number of Parties	AT austria	BE belgium	CY cyprus	CZ czech Rep.	DE germany	DK denmark	EE estonia	ES Spain	FI finland	FR france	EL greece	HU hungary	IE ireland	IT italy	LT lithuania	LU luxembourg	LV latvia	MT malta	NL netherlands (the)	PL poland	PT portugal	SE sweden	SI slovenia	SK slovakia	UK united kingdom (the)	CH switzerland	IS iceland	NO norway	other countries	
Monaco																																	
Neighbourhood Convention with Monaco	Ot	1963	2										x																			x	
Agreement (police & customs)	40/41, JO	1997	2					x					x																				
Police Cooperation Agreement	40/41, JO	1996	2					x											x														
Police and customs cooperation agreement	40/41	-	2	x				x																									
Police Cooperation Agreement	-	-	2											x			x																
Police Cooperation Agreement	-	-	3			x								x																			x
Police Cooperation Agreement	-	-	2											x	x																		
Police Cooperation Agreement	-	-	2											x							x												
Police Cooperation Agreement	-	-	2											x									x										
Police Cooperation Agreement	-	-	2											x													x						
Senningen Agreement	JO, 40/41, Ot	1996	3		x														x			x											
Treaty on cross-border police intervention	40/41	2004	3		x														x			x											
Agreement on police and customs cooperation	-	2000	2		x			x																									
Frontier controls and policing and co-operation in criminal justice in respect of rail traffic (Channel tunnel)	CA, 40/41	1997	4		x								x			x												x					
Bilateral agreement on	Ot	2002	2		x														x														

Treaty Agreement EU Instrument	Category	Date	Number of Parties	AT austria	BE belgium	CY cyprus	CZ czech Rep.	DE germany	DK denmark	EE estonia	ES Spain	FI finland	FR france	EL greece	HU hungary	IE ireland	IT italy	LT lithuania	LU luxembourg	LV latvia	MT malta	NL netherlands (the)	PL poland	PT portugal	SE sweden	SI slovenia	SK slovakia	UK united kingdom (the)	CH switzerland	IS iceland	NO norway	other countries	
air support																																	
Transborder police cooperation	JO, 40/41	1996	2		x														x														
cross-border cooperation in the police and legal fields	40/41, JO,JP, Ot	1999	2					x																					x				
trans-border cooperation of security and customs	40/41, JO,Ot	1999	3	x																									x			x	
Police cooperation office	JO	2003	3		x			x											x														
Agreement (police & border)	41,JP, JO	2000	2				x	x																									
Agreement on police cooperation	-	2004	2				x																				x						
Agreement on police cooperation	40/41	2002	2					x	x																								
Nordic workgroup for certification of experts	-	2001	5						x			x													x				x	x			
Cooperation for Police, Customs and Drugs cooperation	-	1984	5						x			x													x				x	x			
Police cooperation in the Oresund region	-	2000	2						x																x								
Border Control Agreement (joint border checks)	CA	1994	2							x										x													
Agreement on the creation of Joint Office	JO, 40/41	1997	2								x													x									
Agreement on police cooperation	40/41, JO	2003	2								x		x																				
Agreement on land and maritime border check	-	-	2	x											x																		
border control of land, railway and water traffic	CA	-	2												x																		x
Border control of the scheduled ferry Norraena	CA	2003	2																										x			x	



other countries		
NO norway		
IS iceland		
CH switzerland	x	
UK united kingdom (the)		
SK slovakia		
SI slovenia		
SE sweden		
PT portugal		
PL poland		
NL netherlands (the)		
MT malta		
LV latvia		
LU luxembourg		
LT lithuania		
IT italy		
IE ireland		
HU hungary		
EL greece		
FR france		
FI finland		
ES Spain		
EE estonia		
DK denmark		
DE germany	x	x
CZ czech Rep.		x
CY cyprus		
BE belgium		
AT austria		
Number of Parties	2	2
Date	-	-
Category	CA	CA
Treaty Agreement EU instrument	Agreement on facilitation of border control	Agreement on facilitation of border control