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Securing Schengen External Border Analysis

Diplomová práce

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### **Statutory Declaration**

I declare that I have developed and written the enclosed Master's Thesis 'Securing Schengen External Border Analysis' completely by myself and have declared all the used sources.

### **Čestné prohlášení**

Prohlašuji, že jsem diplomovou práci na téma 'Securing Schengen External Broder Analysis' vypracoval/a samostatně a citoval/a jsem všechny použité zdroje.

In Olomouc, November 30<sup>th</sup>, 2018 / V Olomouci dne 30. listopadu 2018

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Kristina Hrbková

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*“Live as if you were to die tomorrow. Learn as if you were to live forever.”*  
— Mahatma Gandhi

*“Education is the most powerful weapon which you can use to change the world.”*  
— Nelson Mandela

*“Intelligence plus character - that is the goal of true education.”*  
— Martin Luther King Jr.

*Dedicated to my mother*

*who always supported me in learning unconditionally*

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## **LIST OF ABBREVIATIONS**

AFSJ	Area of Freedom Security and Justice
CBC	Cross-Border Cooperation
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
CMR	Central Mediterranean Route
CSDP	Common Security and Defence Policy
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
EBCGA	European Border and Coast Guard Agency
EEAS	European External Action Service
EMR	Eastern Mediterranean Route
EU	European Union
Europol	European Union Agency for Law Enforcement Cooperation
EMSC	European Migrant Smuggling Centre
ENP	European Neighbourhood Policy
Frontex	Frontières extérieures, referring to the Frontex Agency
IBM	Integrated Border Management
ISF	Internal Security Fund
NATO	North Atlantic Treaty Organization
PESCO	Permanent Structured Cooperation
SBC	Schengen Border Code
SIS	Schengen Information System



TEU	Treaty on European Union
TFEU	Treaty on functioning of the European Union
UN	United Nations
Union	European Union
VIS	Visa Information System
WBR	Western Balkan Route

## INTRODUCTION

The migration/refugee crisis 2015 brought the topic of management of the external border to the top of the agenda. First, the migration/refugee crisis have brought along new challenges, second, it has revealed dysfunctionalities and remedies in the management of the external border. The EU Member States as well as the European Parliament, defining political goals from the perspective of intergovernmental level and supranational level have agreed upon, the European Union needs a functioning management of the external borders were security as well as human rights, responsibility as well as solidarity among the Member States should be ensured.

Today, the Union is facing several questions at once. First, the Union is seeking for a new ‘big European narrative’ for further development of European cooperation. The first original ‘big narrative’ of peace among the European states seem to be a matter-of-course, the second ‘big European narrative’ seen in the Single market, works. Second, the philosophical approaches ‘*ever closer Union*’ and ‘*united in diversity*’ and their mutual influence have got under review. Third, the European Commission represented a white paper with 5 scenarios on future of the European Union by 2025, opening a debate on further models of European cooperation. Fourth, the Union is still more confronted with the outer worlds, which arises the question, what the role of the Union in the global world should be. All these narratives impact the political reading and regulatory reading of the European cooperation.

The migration/refugee crisis of 2015 revealed new challenges and dysfunctionalities of the external border management. The EU Member States have found a common goal, to avoid similar events in the future. A consensus was found in a need to secure the European external border. There is a shift towards securitization of the external border management, which is emphasized by ones, and criticized by others.

The management of the external border is not a new policy; however, it is a subject of a new policy, strategic and conceptual development. There is a debate how to set up the policy between the supranational centre and decentralized national structures to be well functioning and deliver a common goal – well managed external border safeguarding the fundamental values and principles of the European Union, which has however not only the regulatory, but also the political dimension.

The aim of the thesis is to provide a better understanding what the external border is, what its management consist of, the structure and character of the existing external border management, the process of its development, and finally offer a new perspective on the new

European governance and how to understand the relationship between the Union and the Member States, which is projected on the further policy development concerning the management of the Schengen external border.

The thesis is divided into five chapters. The first chapter provides an insight what the external border represents. The first chapter provides a descriptive analysis on subject matter and reviews legal regimes of its governance. Providing an introductory but complex review is legitimate as the topic of external border is being frequently discussed. Reviewing legal regimes is important for understanding what regulates and governs the external border. The second chapter aims to capture the policy of the external border management. The migration/refugee crisis has markedly strengthened the nexus between the internal dimension and the external dimension of the external border management. Capturing both, internal and external dimension of the external border management as an interconnected policy represents an innovative approach to the research and policy development. The third chapter reviews the external border management via an optics of scale-type approach where supranationalism and intergovernmentalism represent opposing edges. However, this optics does not seem to be sufficient to capture today's integration process, therefore, the Chapter 4 provides a complementary conceptual approach to interrelation between supranational and intergovernmentalism.

**Research Question 1:** What the external border management consist of and what is the role of the Member States and the European Union through optics of intergovernmental and supranational paradigms?

**Research Question 2:** How the EBCG Regulation 2016/1624 changed the character of the external border management and what are the implications?

**Hypothesis 1:** The EBCG Regulation has strengthened the supranational elements in the external border management but it does not exceed the central role of the Member States.

**Hypothesis 2:** The supranationalism-intergovernmentalism complementary theory can be confirmed via EBCG Regulation in context of seeking better regulation from the administrative perspective, while the competitive scale-type approach can be seen in the political optic.

The fifth chapter reflects the finding related to the new readings of the EU governance into the external border management. The subsequent conclusion reviews the findings, provides a proposal of a new model of understanding the interrelation between supranationalism and intergovernmentalism in European integration process, and proposes a further research.

The methodology is based on exploration, descriptive analysis, content analysis, comparative analysis, synthesis, and induction. The whole thesis focuses on the post-Lisbon time period and works within the limits of the Lisbon Treaty.

Concerning the literature review, as suggested, both, the topic and an attempt of its capture are rather new. There is a substantial classic literature covering the EU paradigms intergovernmentalism and supranationalism. However, the thesis is built on the work of Adriaan Schout<sup>1</sup> and Sarah Wolff<sup>2</sup> *'The 'Paradox of Lisbon': Supranationalism-Intergovernmentalism as an administrative concept'* from 2012 and on the recent work of Vivian A. Schmidt<sup>3</sup> re-thinking EU governance with concepts of new intergovernmentalism and new supranationalism. As external border management has gained an attention with the recent migration/refugee crisis of 2015, bringing new academic articles, policy briefs and policy papers along. The topic is also reflected in the literature, mostly by the scholars dealing with migration law, asylum law and humanitarian law, or by the experts focusing on security studies.<sup>4</sup> However, as the topic is immensely complex and still under an intensive development, we can still claim there is a large space to explore the topic from various angles. This thesis aims to bring a new angle, focusing on the good governance in perspective of intergovernmentalism and supranationalism, and on the nexus between the internal and external dimension of the external border management. A thematically closest work is an article *'Has Europeanization Silenced Criticism On Intergovernmental External Border Cooperation?'*<sup>5</sup> published in 2010 before the topic became so frequent object of political and legal discussion. The topic of external border management is being covered by Jorrit Rijpma, Associate Professor of European Law at the Europa Institute of Leiden Law School holding Jean Monnet Chair on

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<sup>1</sup> Netherlands Institute of International Relations Clingendael, Department of EU Studies, Hague, The Netherlands.

<sup>2</sup> Queen Mary University of London, School of Politics and International Relations, Director of Centre for European Research.

<sup>3</sup> Jean Monnet Professor of European Integration, Professor of International Relations in the Frederick S. Pardee School of Global Studies and Professor of Political Science at Boston University.

<sup>4</sup> With global attention payed to terrorism, security studies have gained on popularity in last years. That trend influenced also the topic of securitization of migration, movement of persons, identity management and border management and the current discourse.

<sup>5</sup> OOSTEROM-STAPLES, Helen. Has Europeanization silenced criticism on intergovernmental external border cooperation. In GUILD, Elspeth and MINDERHOUD, Paul (eds.), *The first decade of EU migration and asylum law*. Leiden, Boston: Brill, Martinus Nijhoff Publishers, 2011, p. 93-126.

Security and Mobility in Europe (MOSE).<sup>6</sup> The research of this thesis Professor Philippe De Bruycker is also taken into consideration<sup>7</sup>. Attention should be also paid to the extensive work of Professor Steve Peers from the University of Essex, and Herbert Rosenfeldt, Research Assistant at the University of Passau, where I had an opportunity to spend an academic year during my university studies.<sup>8</sup> Another piece, which should not be omitted, is a contribution of Maité Fernandez from 2016 dealing with the division of competencies and responsibilities between the supranational and national level of the external border management.<sup>9</sup> I have also had an opportunity to use a recent academic research of Radko Hokovsky and Michal Koukal, whom I work with on the agenda of justice and home affairs policies.

The reasoning of the choice of the topic is both, objective and subjective. First, the external border management represents a new overlap of several policy areas, which nexus has been becoming stronger and represents a new, challenging topic for the European integration, European governance and policy development. Second, the external border management opens a door towards two fundamental phenomena – overspill of the internal European integration to the outer world. In my opinion, this perspective is relevant for the Faculty of Law of the Palacky University, bringing a new, innovative approaches into the European studies. Not only it offers combination of the European studies and European law, but also European law and public international law. The thesis aims to cover both innovative perspectives. First, the concept European Studies without knowing a unique legal system of the European Union and its interconnection with the international law and constitutional law leads to gaps and loopholes between the legal and political spheres of governance. Additionally, in my view the European integration process might be driven in context of the globalized world. The role of the Union in the international system, as well as consolidation of the relations between the Union and its Member State in the state-centric international system, is a core challenge for the further development of the European Union.

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<sup>6</sup> An overview of Rijpma's publications is available at <<https://www.universiteitleiden.nl/en/staffmembers/jorrit-rijpma/publications#tab-3>>.

<sup>7</sup> De Bruycker holds a Jean Monnet Chair for European Law on Immigration & Asylum and associated to several institutions such as Science Po or Université Libre de Bruxelles.

<sup>8</sup> See EU Law Analysis providing expert insights into EU law developments, edited by Professor Steve Peers. Available at: <<http://eulawanalysis.blogspot.com/>>.

<sup>9</sup> FERNANDEZ, Maité. *The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts*. In MORENA-LAX, Violleta and PASTAVRIDIS, Efthymios (ed.). *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*. International Refugee Law Series, Volume: 7, 2016, pp. 381-407.

The subjective reason for the choice of the topic is based on three long-term internships in the Justice and Home Affairs policies at the Council and the European Parliament. The theoretical and knowledge and practical experience brought me to question of seeking a good policy making and European governance focused on delivery. In my opinion, relations between an expert academia providing a broader view on theory and practice, and the expert and political policy-makers, should not be understood as two different worlds. On contrary, their interactions should be intensified. That approach seems to be not only successful but also popular in Western countries, such as for instance the United Kingdom, where academia is actively involved in public debate and even policy shaping. Thus, the thesis tries to bring an innovative approach covering both, capturing a policy development with a theory on one hand, and providing a theoretical approach towards policy-making on the other hand to better understand the drivers, consequences and interplay in the integration process in context of further policy development.

## 1. SUBJECT MATTER AND LEGAL CHARACTER OF THE EXTERNAL BORDER

As the ‘external border’ and development of its management<sup>10</sup> are the object of the research, it is necessary to understand the border itself as a subject-matter and its legal character from the very beginning of research.

### 1.1. Regulatory framework

A border is one of the constitutional attributes of a *state* (as well as the Member States of the Union), representing its geographic boundaries where a *state* applies its internal sovereignty. The border of a state is primarily defined by the international customary law, public international law<sup>11</sup> and national constitutional law.

As the European Union is a *sui generis* ‘third-generation’<sup>12</sup> entity developed on the basis of the state-centric international system, any legislation of the European Union concerning the borders is derived from these two approaches. The current primary European Law mentions the external border in the Treaty of the European Union (TEU) in Article 3 and Article 21, Treaty on the Functioning of the European Union (TFEU) in Articles 67 and 77, additionally in the Protocol No 22 and the Protocol No 23.

The border management falls under so-called *Schengen acquis*, a set of legislation founded on the international Schengen Agreement of 1985, since the Amsterdam Treaty of 1999 integrated to the *acquis communautaire*, or since the Lisbon Treaty of 2009 into the Law of the European Union.

### 1.2. Subject matter

To understand the subject matter of the external border management, the public international law, constitutional law, as well as European law recognize following types of borders:

- **Land border**
- **Sea border** - maritime boundaries delimit the maritime zones. The 1982 United Nations Convention on the Law of the Sea defined a territorial sea, where a

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<sup>10</sup> Based on introduction of the new European Border and Coast Guard Agency (EBCGA).

<sup>11</sup> Within the public international law, borders are delimited by treaties or bilateral agreements of the neighbouring states (national delimitations), by the law of the sea (maritime delimitations, generally laid out in the United Nations Convention on the Law of the Sea, 1982), and international norms of territorial sovereignty. Airspace borders are derived from the national and mar. In general, air space corresponds to the country’s territory limits and the maritime definition of territorial waters as being 12 nautical miles (22.2 km) out from a nation’s coastline, but particular legal modifications may occur.

<sup>12</sup> In general debate on international relations, we can talk about national states as a first generation entities, international organisation as a second-generation entities and the European Union as a third-generation entity.

coastal state applies its jurisdiction and sovereignty, at most 12 nautical miles (22.2 km) from the baseline of a coastal state.

- **Air border** – copies the land and sea territory of a state, defining a horizontal delimitation air territory of a state.

For the purposes of the thesis, the research focuses only on the land border and sea border. Besides the term ‘*border*’, border studies also recognize the term ‘*boundary*’. A term boundary usually refers to a line which divides the territory or maritime space of two states, while the ‘border’ represents a more complex entity which has been crossed in order to enter a state. Although a boundary and a border may coincide, the border usually represents a more complex infrastructure of immigration checkpoints, customs facilities, fences and patrols of several zones whose primary function is the regulation of movement of people and goods, while the boundary represents a line of definition.<sup>13</sup>

Geographic boundaries of the European Union are based on the geographic boundaries of its Member States defined by the constitutional law and public international law, the TFEU recognizes such legal regime and it has left the competence over in the hand of the Member States- or reversely – the Member States did not award the Union to have competence in border delimitations (principle of conferral and *Kompetenz-Kompetenz*).<sup>14</sup>

Two main territory regimes of the European Union are relevant for the research on border management. First, it is the territory of the Union *per se*, created by the territory of its all Member State. The territory of the Union is defined by the territory of its Member States where the Union is awarded, based on the Treaties, to perform sovereignty and jurisdiction to a defined extent. The second regime is the so-called Schengen Area, defined by Schengen *acquis*. Since 1985, the European Communities, later succeeded by the European Union, have been developing a geographic area where the internal borders among the participating Member States and EFTA countries (Iceland, Lichtenstein, Norway, Switzerland) were reciprocally abandoned, while the Member States constituting the external border of the Schengen Area maintained responsibly for their geographic part of the external border. Since then, the compensatory mechanisms have been developed to keep the Schengen Area functioning but not jeopardizing the mutual trust among the mutually interdependent Member States.

These two regimes are not identical. Thus, when talking about the external border, it is relevant to realize where the external border lies. The United Kingdom has opted-out of

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<sup>13</sup> PRATT, Martin. Defining International Boundaries: Concept, Aims and Approaches. In OSCE. *Applied Issues in International Land Boundary Delimitation / Demarcation Practices*. Vilnius, Lithuania, OSCE 2011, pp 8 – 11.

<sup>14</sup> Art. 77(4) TFEU.



application the Schengen *acquis* in the matters of the absence of internal borders, visa policy and external borders. Ireland motivated to preserve smooth functioning of the Common Travel Area with the United Kingdom, followed the opt-out of the participation in the Schengen Area. Bulgaria, Romania, and Croatia, the three newest Member States are obliged to apply the Schengen *acquis* and thus are recognized as the Schengen Member States where only internal border checks have not been lifted yet.<sup>15</sup>

The term ‘external border’ is explicitly mentioned in TEU, TFEU, Protocol No 22 and Protocol No 23, however, the definition is absent in the primary EU legislation and is left to the secondary European law. The definition of an external border is elaborated in the Regulation (EU) 2016/399 known as Schengen Border Code (SBC)<sup>16</sup>. According to the Art. 2 of the Regulation, “‘external borders’ means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders“. All related secondary legislation documents only refer to this definition provided in the Art. 2 SBC.<sup>17</sup> The provided definition in the SBC is based on a negative delimitation from the internal border. Therefore, the legal services of the European institutions have been asked to clarify the term with respect to the Member State not yet fully participating in the Schengen Area - i.e. Bulgaria, Croatian, Cyprus and Romania - in context of the development of the new legislation on external border management.<sup>18</sup> The Council’s Legal Service provided a clarification, that the term ‘external border’ means that border with the third country or the country outside the Schengen Area *not applying the Schengen acquis*. According to the Council’s Legal Service, the border where the border controls have been reintroduced or where the border controls have not been lifted yet (but the States apply Schengen *acquis*) does not constitute an external border.<sup>19</sup> The Council Legal Service has

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<sup>15</sup> Comp. Opinion of the Council’s Legal Service No. 13491/16, Interinstitutional Files 2016/0105 (COD) and 2016/0106 (COD).

<sup>16</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1–52.

<sup>17</sup> Comp. Art. 2(1) of the EBCG Regulation (EU) 2016/1624, Art. 2 of the Regulation (EU) 2017/2226 establishing an Entry/Exit System (EES), or Art. 3 of the Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) (COM(2016) 731 final) which is under the ordinary legislative procedure 2016/0357(COD).

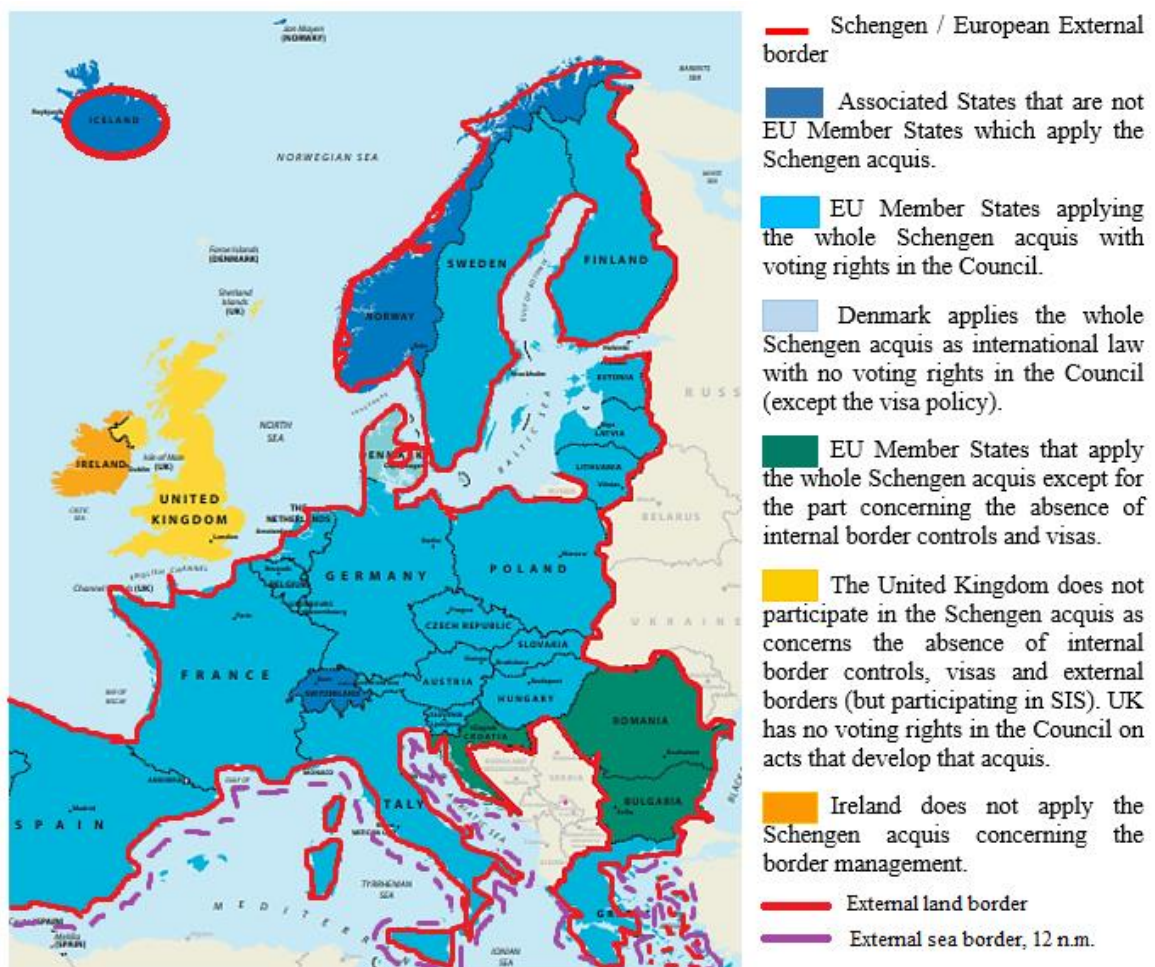
<sup>18</sup> For instance, the Regulation (EU) 2017/2226 on Entry/Exist System (EES) was established to register entry and exit data when crossing ‘the external borders of the Member States’, however, the EES applies at the external border *as well as* at the border between the Member State A fully applying the Schengen *acquis* (e.g. Slovenia) and Member State B not yet fully applying the Schengen *acquis* while the relation of term ‘external border’ and ‘the border where controls have not been yet lifted’ is not clarified.

Such an amendment should be adopted as the Regulation 2019/399 has been opened (with further amending legislation on EBCG or on ETIAS).

<sup>19</sup> Preparatory and Formal Meeting of the JHA Counsellors, WP Frontiers, 20 February 2018, Opinion of the Council’s Legal Service No. 13491/16, Interinstitutional Files 2016/0105 (COD) and 2016/0106 (COD).

concluded that „in accordance with Article 1 of Protocol 19 on the Schengen acquis and their respective Accession Acts, Bulgaria, Croatia, Cyprus and Romania are already members of the Schengen area”. As the external border is defined in SBC, falling into the Schengen acquis, and the Council’s Legal Service provided a clarification when external border constitutes as well as confirmed these four EU Member States to be part of the Schengen Area, it may be reasonably concluded that the external border is composed by the constituent external border of the EU Member States and the associated States *applying* the Schengen acquis. Thus, it is legitimate to speak of ‘*Schengen external border*’. The external border is visualized bellow.

**Figure 1: Geographic depiction of the external land border:<sup>20</sup>**



<sup>20</sup> Elaborated from and updated version of leaflet Council. The Schengen Area. © European Union, 2018, doi 10.2860/2503.

## 2. STRUCTURE OF MANAGEMENT OF THE EXTERNAL BORDER

In general, there is a lack of conceptual understanding what the management of the external border involves. Very few policy documents explain what the term ‘integrated border management’ precisely entails and no clear definition capturing a complex structure of the management of the external border has been provided yet. The thesis aims to offer a comprehensive capture of the external border management, taking into account latest developments in response to the migration/refugee crisis at the thesis aims to contribute to understanding management of the external border in a holistic way under the latest debate. The innovative element provided by the thesis is taking into consideration, that the recent migration/refugee crisis has definitely strengthened nexus between the internal and external dimension of the external border management. Therefore, the thesis emphasizes the reinforced nexus of JHA policies, CFSP and CDSP as well as other external policies and international cooperation.

There are several complementary perspectives to answer the question, what the external border management consists of and how its structure looks like. I have defined five complementary perspectives aiming to capture the external border management system from the legal and executive perspective. The first one covers the legal regimes, with respect to the fact, that the external border management occurs *off* the European territory, as well as *in* the European territory. The external border management is a subject of public international law, European law and the national law. All the regimes are very complex, however, in a very simplified way it is possible to talk about a three-level system, when the ratified international conventions are legally binding for the EU Member States and the EU is obliged with a strict observance, EU law is binding for the Member States and has a direct effect, and national laws, which may use a discretion and implementation leeway.

In the external dimension, both, the European Union and the Member States simultaneously enjoy the international legal subjectivity. While the Member States are bound by the ratified international conventions, the Union claims allegiance towards international law.<sup>21</sup> As the external border management is a shared competence between the Union and the Member States, the following principles apply:

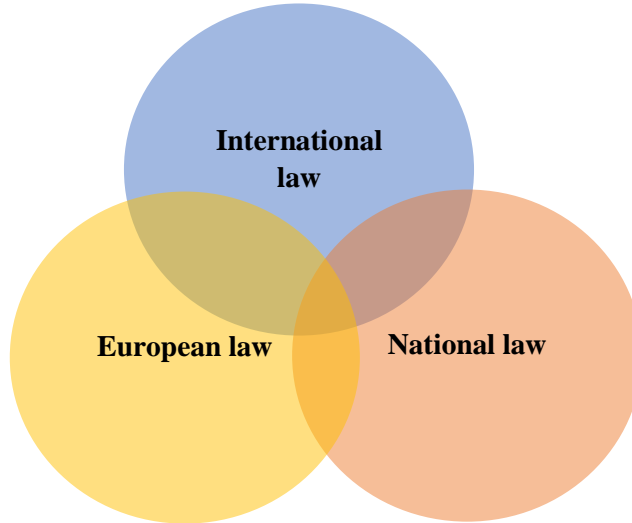
- Mixed agreements in the external relations,
- The principle of loyalty,
- A pre-emption and supremacy principle of the EU law in the shared competence.

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<sup>21</sup> Art. 3(5) TEU.

- In police cooperation and judicial matters, the Member States are allowed to conclude their own parallel international agreements, if they comply European law.<sup>22</sup>

Figure 2: The legal dimension of the external border management



The system of three legal regimes ruling the external border management can be demonstrated in the following table:

Table 1: Legal regimes and examples of their application

<b>Legal Regime</b>	<b>Example of legislation</b>
<b>International Law</b>	Law of the Sea, Humanitarian Law.
<b>European Law</b>	Visa Code (Regulation 810/2009), Schengen Border Code (Regulation 399/2016), European Border and Coast Guard (Regulation 2016/1624)
<b>National Law</b>	National law transposing directives and national law; Executive acts. Parallel, loyal international agreements.

<sup>22</sup> Comp. Declaration No. 36 on Article 218 annexed to the final act of the intergovernmental conference which adopted the Lisbon Treaty signed on 13 December 2007. *Declaration on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice: The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three in so far as such agreements comply with Union law.*

The second perspective is derived from the *geographic zones* where the external border management occurs. In other words, it is possible to describe different phases of external border management according to the zones where they take place. The following table attempts to contribute to the current debate by providing a holistic picture what the management of the external border consists of, where it occurs and how the Union and the Member States are involved in:

**Table 2: Structure of external border management according to geographic zones:**

<b>GEOGRAPHIC ZONE</b>	<b>POLICY (MEASURES, INSTRUMENTS)</b>	<b>ROLES OF THE EU AND THE MEMBER STATES</b>
<b>Operations in the third countries</b>	Visa policy	<b>Member States</b> (EU Visa Code) as implementer via consulates and embassies)
	Resettlement ('legal paths to the EU to seek an international protection')	<b>Member States</b> (national resettlements programs, sometimes fulfilling EU pledges consensually agreed upon by the Council, 'a voluntary basis') <sup>23</sup>
	CFSP / CDSP Military operation <sup>24</sup>	<b>Member States</b> (Intergovernmental cooperation, the principle of loyalty, EEAS coordination).
	CFSP / CDSP External policy, Civil operations	<b>EU and the Member States</b> (parallel, principle of loyalty, EEAS umbrella role in civil missions) <sup>25</sup>
	Readmission and repatriation	<b>EU is overtaking the return and readmission agenda from the Member States</b> (new Frontex – EBCGA, EU readmission agreements replacing the bilateral readmission agreements)
<b>Operations in the high seas and territorial waters</b>	CFSP / CDSP Naval operations <sup>26</sup> Civil Operations	<b>Member States</b> (Intergovernmental cooperation, the principle of loyalty, the Italian Code of Conduct).
	CFSP / CDSP Naval operations Military Operations <sup>27</sup>	<b>Member States</b> (Intergovernmental cooperation, the principle of loyalty).

<sup>23</sup> Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection. Brussels, 22 July 2015 (OR. en) 11130/15 ASIM 62 RELEX 633.

<sup>24</sup> The EU military operations against the networks of smugglers in Libya - Draft Crisis Management Concept for a possible CSDP operation to disrupt human smuggling networks in the Southern Central Mediterranean of 30 April 2015. (Restricted / Classified policy).

<sup>25</sup> EUCAP Sahel Niger civil operation. EUBAM Libya, a civil operation established in May 2013 under the Common Security and Defence Policy (CSDP).

<sup>26</sup> Operation Triton, Operation Poseidon, Operation Sophia (EU NAVFOR MED).

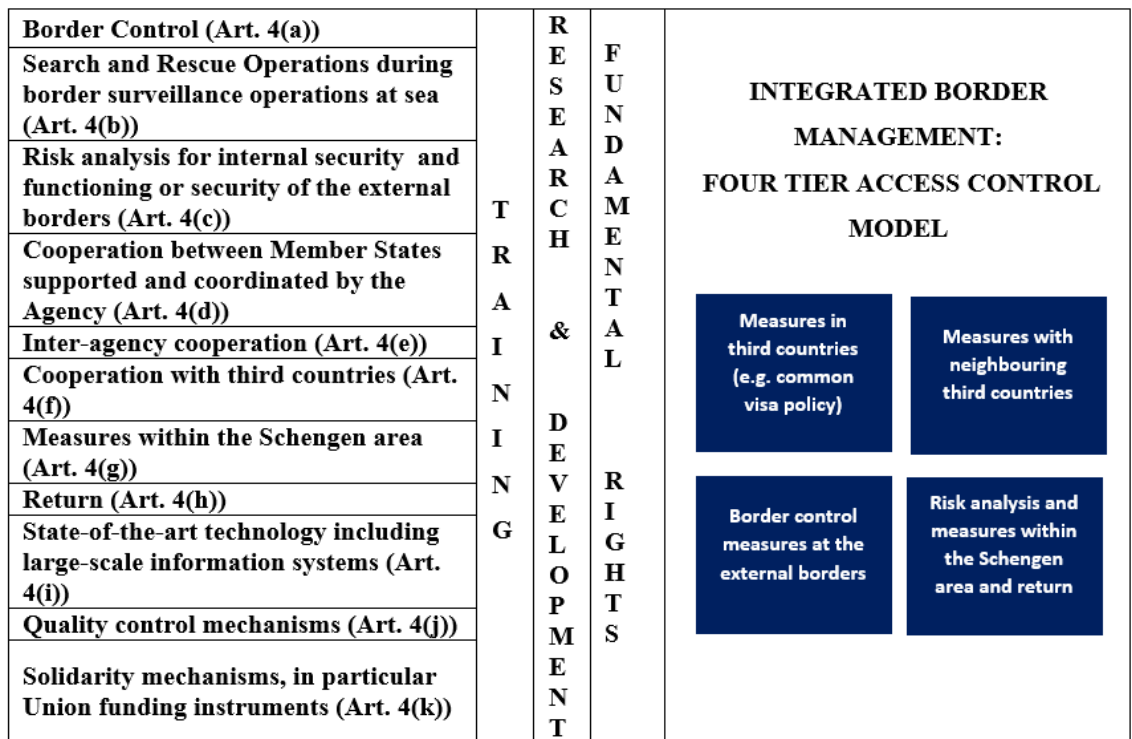
<sup>27</sup> Military phase of the Operation Sophia on boarding and seizing on the high seas vessels suspected of being used for human smuggling and trafficking.

<b>Operations in the neighbouring countries</b>	Cooperation on border management	<b>EU and the Member States</b> Cross-border cooperation, European Neighbourhood Policy, accession interactions.
<b>Operations at the external border</b>	Border Patrols check	<b>EU Legislation + supervision</b> (Schengen Border Code) <b>Member States</b> (national border patrols)  Frontex support only upon a request submitted by the Member State concerned or on the basis of international bilateral (police) cooperation.
	Registration and Data management	<b>Member States</b>  The EU rolled-out the emergency hotspot approach in Italy and Greece during the migration/refugee crisis of 2015, however, the hotspot pilot is not assessed positively, and it did not become a partial model for further external border management policy development. Databases interoperability based on intergovernmental cooperation (information provided by the Member States, EU can gain access to consulting).
	Responsibility determination (Dublin system)	<b>EU and the Member States</b> (EU legally binding legislation – Dublin Regulation 604/2013 <sup>28</sup> , but intergovernmental implementation by the Member States. Furthermore, a Member State may derogate the Dublin principle and take the responsibility over on the basis of the discretionary clauses defined in Rec. 17, Art. 17 of the 604/2013 Dublin Regulation).
<b>Operation in the Member States</b>	Asylum procedure	<b>Member States</b> (EU legislation via asylum directives on minimum standards, grants the Member State, national judicial systems)
	Return	<b>European Union</b> (Frontex organising joint flights)

<sup>28</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. OJ L 180, 29.6.2013, p. 31–59.

Third, the external border management is also a part of the so-called Integrated Border Management (IBM). The Commission’s Communication of 2002<sup>29</sup> defined the ‘management of external borders’ as activities carried out by public authorities of the Member States in order to (1) carry out checks and surveillance at external borders, (2) gather, analyse and exchange any specific intelligence or general information enabling the border guard to analyse the risk to EU internal security, (3) analyse and propose response threats to border and internal security, and (4) anticipate capacity needs on staff and equipment at the external borders.<sup>30</sup> The IBM has been recently extended by the Search and Rescue (SAR) operations.<sup>31</sup>

**Figure 3: Structure of the Integrated Border Management.**<sup>32</sup>



<sup>29</sup> European Commission. *Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union'*. Brussels, 7.5.2002 COM(2002) 233 final.

<sup>30</sup> Ibid, p. 26.

<sup>31</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 189, 27.6.2014, p. 93–107.

<sup>32</sup> Elaborated from the Regulation 2016/1624 on EBCG, Recital Art. 4; Meeting of the Expert Group "Management of the External Borders" Brussels 19-20. June 2017 on European Integrated Border Management Strategy.

The fourth perspective on the external border management is derived from the Schengen acquis. European documents work with the term ‘*The Schengen external borders acquis*’, composed of five elements:<sup>33</sup>

- the Schengen Border Code (herein further as SBC)
- Internal Security Fund: Borders and Visa (for the budgetary period 2014 – 2020)
- Centralised databases: the Schengen Information System (SIS), the Visa Information System (VIS), and Eurodac<sup>34</sup>
- the Facilitators Package designed to prevent and penalise unauthorised entry, transit and residence<sup>35</sup>
- the European Border and Coast Guard Agency (herein further as EBCGA), the new Frontex Agency.

However, this concept only describes the management at the border itself, but the lessons learned from the migration/refugee crisis have proved the need to perceive border management in a wider context. Hokovský recognizes two mingled sets of the management of the external border – the first set is the Schengen acquis consisted of the original Schengen Agreement and all subsequent implementing rules, instruments and procedures applied to the Schengen Area; the second set is *the Schengen Border Security System*, which involves all rules, instruments and procedures related to (external) border security of the European Union, including policies and instruments in the third countries, but in which not all the parts of the Schengen acquis are involved.<sup>36</sup>

Fifth, it is also possible to capture the external border management system through optics of specific policy areas. These policy areas have been already suggested in the above-mentioned perspectives describing the structure of the external border management according to the geographic zones. However, this division takes more into account the specificities of the identified policy areas, which mutually overlap and interact. Not only the Justice and Home Affairs (herein further as JHA) policies under the Area of Freedom, Security and Justice (herein further as AFSJ), the Common Foreign and Security Policy (herein further as CFSP)

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<sup>33</sup> BUX, Udo. Fact sheet – *Management of the External Borders*. European Parliament, 2018.

<sup>34</sup> The European fingerprint database for identifying asylum seekers and ensuring the proper implementation of the Dublin Regulation (Regulation (EU) 603/2013).

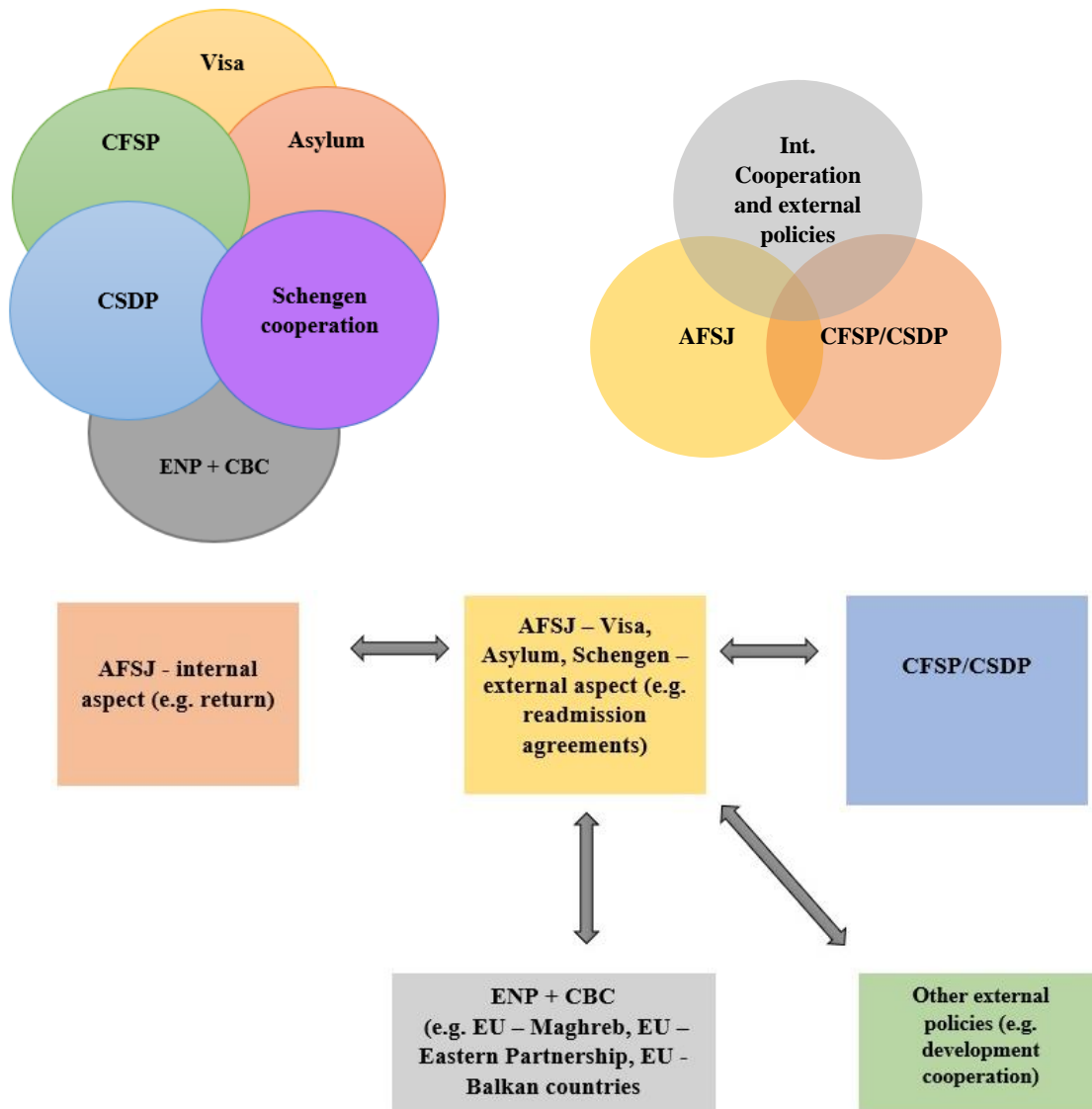
<sup>35</sup> Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA.

<sup>36</sup> HOKOVSKÝ, Radko. *Border Security of the Schengen Area from the Perspective of the Public Goods Theory*. Prague, 2016. 179 s. Dissertation – Doctoral Thesis (Ph.D.) Charles University in Prague, Faculty of Social Science, Institute of Political Studies. Department of International Relations. Supervisor: doc. PhDr. Běla Plechanová, CSc. Pp. 54 – 55.



and the Common Defence and Security Policy (herein further as CDSP) should be taken into account in the external border management<sup>37</sup>. Moreover, also the European Neighbourhood Policy (herein further as ENP) and Cross-Border Cooperation (herein further as CBC) and other external policies and forms of international cooperation should be also recognized within the framework of the external border management.<sup>38</sup>

**Figure 4: Policy areas involved in the external border management and their nexus:**



<sup>37</sup> Comp. TARDY, Thierry. *Operation Sophia Tackling the refugee crisis with military means*. © EU Institute for Security Studies, 2015. ISBN 978-92-9198-286-8, ISSN 2315-1110, doi: 10.2815/1141.

<sup>38</sup> Comp. EEAS. European Neighbourhood Policy (ENP). [online]. Last update 2016-12-21. Available at: < [https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp\\_en](https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en)>.

Comp. European Commission. *JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Migration on the Central Mediterranean route Managing flows, saving lives*. Brussels, 25.1.2017, JOIN/2017/04 final.

From the above-mentioned five perspectives on external border management, we can conclude that the external border management is a policy involving measures *off* the European territory, as well as *in* the European territory, therefore is subject of international, European and national law. The policies governing external border management can be divided into three, overlapping and interacting policy areas, JHA/AFSJ policies, CFSP/CDSP, and other external policies and international cooperation. More specifically, the involved policies under the AFSJ are visa policy, asylum policy (including the return policy), and Schengen cooperation, all having internal and external aspects, followed by CFSP, CDSP, and other external policies including CBC and ENP.

A similar, affirmative reading provided the Regulation (EU) 2016/1624 on European Border and Coast Guard<sup>39</sup> (herein further as EBCG Regulation), a new pivotal regulation concerning the border management, summarizing that the *‘European integrated border management, based on the four-tier access control model, comprises measures in third countries, such as under the common visa policy, measures with neighbouring third countries, border control measures at the external borders, risk analysis and measures within the Schengen area and return’*.<sup>40</sup> The link to CFSP/CDSP in the missing here due to policy and legal structural division, however, the nexus exist.

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<sup>39</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, *OJ L 251, 16.9.2016, p. 1–76*.

<sup>40</sup> Recital 3 of EBCG Regulation 2016/1624.

### 3. INTERGOVERNMENTAL CHARACTER OF THE EXTERNAL BORDER MANAGEMENT - COMPETITIVE PRISM

#### 3.1. Theory of Antagonistic Dichotomy between Intergovernmentalism and Supranationalism

Through optics of a philosophical narrative, the European integration initiatives have adopted the approach ‘*ever closer union*’ introduced by the Treaty of Rome of 1957, which was overtaken by all the successive Treaties including the Lisbon Treaty. The ‘*ever closer union*’ approach spurs development of deepening and widening cooperative initiatives. On the other hand, this approach is being challenged by national tendencies, which have recently been witnessed a rise of nationalism in the context of the United Kingdom’s departure from the Union or national disputes over the responsibility distribution in the context of the migration/refugee crisis of 2015 and relocation mechanism. The newer motto ‘*united in diversity*’ adopted by the Union in 2002 tries to reflect these tensions and get around the antagonism. This attempts to consolidate the approach the European integration suggest rather an antagonistic dichotomy between supranationalism and intergovernmentalism, where one reading is preferred at the expense of the other. Schout and Wolff have identified in their work the theorists proposing the supranational reading, (e.g. Haas, Sandholtz and Sweet, MacGowan, Hooghe and Marks, Dougan), and the authors arguing that EU member states are still in control of the integration process (e.g. Putnam, Milward, Koenig-Archibugi, Moravcsik, and Tosiek).<sup>41</sup>

Schout and Wolff critically assess that the perennial debate in the European integration literature revolves around whether the EU is becoming more intergovernmental or more supranational,<sup>42</sup> which suggest that the intergovernmentalism and supranationalism are opposite ends of a scale.<sup>43</sup>

Schout and Wolff argue, there is a widespread tendency in integration theories to view the interrelation of intergovernmentalism and supranationalism on a scale of two extremes where the various policies could be localised variously.<sup>44</sup> Despite differences in emphasis, most of the theories reviews would agree with supranational and intergovernmental cooperation being linked on a scale, which would suggest that a move towards one end means less of the

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<sup>41</sup> SCHOUT, Adriaan and WOLFF, Sarah. The “Paradox of Lisbon” Supranationalism-Intergovernmentalism as an administrative concept’. In LARSEN, Finn (ed). *The Lisbon Treaty: Institutional Choices and Implementation*. Ashgate, 2012, p. 328, pp. 21 – 39, p. 26.

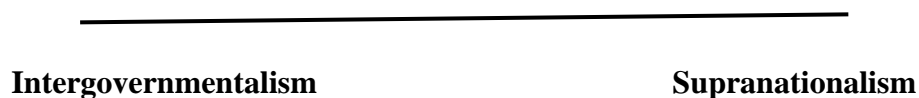
<sup>42</sup> SCHOUT and WOLFF, *The “Paradox of Lisbon...”* p. 21.

<sup>43</sup> *Ibid*, p. 22.

<sup>44</sup> *Ibid*, p. 28.

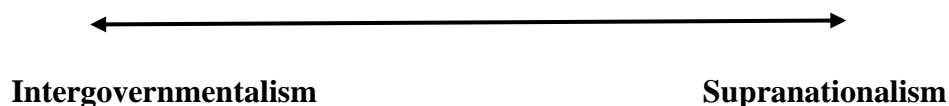
other.<sup>45</sup> If there is an assumption more supranationalism means less intergovernmentalism, it could be projected on a scale with opposing extremes.

**Figure 5: A scale-type approach with two opposing extremes:**



Schout and Wolff critically assesses, this reading neglects the relationship between these two ends of the scale. The Lisbon Treaty was interpreted as bringing the EU closer to becoming a 'union' and a step towards further supranationalism.<sup>46</sup> By dissolving the three-pillar structure, extending co-decision and introducing the ordinary legislative procedure providing the European Parliament greater influence and powers (JHA policies), reinforcement of supranational elements and even introduction of the some new supranational elements (e.g. High Representative of CFSP), it seems the Lisbon Treaty leads towards the 'ever closer', supranational Union. On the other hand, the Lisbon Treaty brought into the standard institutional framework of the Union the intergovernmental European Council, whose significance seems to be growing. Thus, it seems that the intergovernmental and supranational elements work as checks and balances and the interrelation is antagonistic.

**Figure 6: A scale-type approach with two opposing extremes with an antagonistic interrelation:**



<sup>45</sup> Ibid, p. 28

<sup>46</sup> Ibid, p. 24.

Via the prism of antagonistic dichotomy between the supranationalism and intergovernmentalism, the European governance is based on competitive interactions, bargaining and check and balances between the centre (Brussels) and the supranational elements on one side and the national capitals and intergovernmentalism on the other side. The European integration and the policy development would be then understood to be a result of the Commission ambitions to drive the European integration towards the ‘*ever closer Union*’ and the Member States defending their national interests. In this chapter, we will explore the state of play of the external border management based on the interrelation between supranationalism and intergovernmentalism as two, centrifugal, antagonistic forces of opposing directions on a scale where is the trade-off between them.

**Figure 7: Antagonistic interrelation between the intergovernmentalist and supranationalist agents:**



A second perspective identified by Schout and Wolff via the prism of the dichotomy interrelation between intergovernmental and supranationalism is the 1-10 rating scale approach.

<sup>48</sup> This approach would capture the starting point and incremental spill-over integration moving a Member State as a starting point through the European cooperation based on purely international, state-centric cooperation, moving upwards towards supranational Union via Europeanization process.

<sup>47</sup> The European Parliament.

<sup>48</sup> SCHOUT and WOLFF, *The Paradox...*, p. 16.

**Figure 8: A rating-scale interrelation between intergovernmentalism and supranationalism and the Europeanization process:**



### 3.2. The dominance of intergovernmentalism in AFSJ via competitive optics

Border management has been developed under the third pillar of the Maastricht three-pillar temple. With the Amsterdam Treaty of 1999, the Schengen *acquis*, so far developed out of the structures of the European communities, was incorporated to *acquis communautaire*, the first pillar of the Maastricht temple. The Lisbon treaty has replaced the three-pillar structure of the Union with new classification of the competencies divided between the Union and the Member States, named from the perspective of competences of the Union - *exclusive* competences (Art. 3 TFEU), *and non-exclusive competences categorized as shared* (Art. 4 TFEU), supportive and coordinative and supplementary (Art. 6 TFEU), and purely coordinative (Art. 5 TFEU). Furthermore, it collected the JHA policies from the three-pillar structure and created the umbrella system of AFSJ, classifying the AFSJ as a shared competence between the Union and the Member States. AFSJ covers the visa policy, asylum policy, and Schengen *acquis*, police cooperation and judicial cooperation. Under the Lisbon Treaty, the AFSJ policies are subject of the ordinary legislative procedure (co-decision of the Council and the European Parliament).<sup>49</sup>

<sup>49</sup> Except the justice in criminal matters and operational police cooperation.

A shared competence divides the tasks between the Union and the Member States. However, the Art. 2(2) TFEU awards the Union has a potential supremacy here, with respect to the fact that once the EU has adopted an act, the Member States lose their competence.<sup>50</sup> This rule is called as a principle of *occupied fields*.<sup>51</sup> Therefore, the shared competencies are understood as competitive, which corresponds to the antagonistic interrelation drawn up with the Figure 6. However, the principle of *occupied fields* is limited. First, the shared competence covers only those elements covered by the adopted legal act, and second, it does not exclude the Member States to evolve their parallel international cooperation under the former third pillar of justice and police cooperation.<sup>52</sup> That limitation is very characteristic for the AFSJ, as the external border management is very based on the *police cooperation* and there is a strong role of the national courts in the context of the migration and asylum policy. This doctrine is crucial to reflect the potential of the Member States and their structures as, first, the external border management mostly lies in the *police operations*, second, the *judicial system* is involved.<sup>53</sup> The European Commission, awarded by the legislative initiative in AFSJ, has a potential here to make decisive steps on further development of the policies. Therefore, the Commission is labelled as a “motor” of the European integration.

Although the Lisbon Treaty provided the Union a superior position, the role of the Union seems to lie in harmonization of national laws, setting up minimum standards and evaluations of their implementation. Characteristic principles for AFSJ are solidarity and between the Member States, coordination and cooperation between police and judicial and other competence authorities and mutual recognition of judgements (Art. 67 TFEU). According to Giumelli, „*intergovernmental system rely on the assumption that states can decide to cooperate in their interests, but they can also decide not to cooperate if it is not in their own interests and, therefore, act independently*”.<sup>54</sup> This chapter explains via methods of analysis and synthesis the intergovernmental character of the JHA. A rather general insight into the policies governing the external border management is provided, aiming first to explain the role of the policies in the management of the external borders, and second, to explore the role of the Union and the role of the Member States via prism of (1) management regulating the external border crossings of

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<sup>50</sup> SCHÜTZE, Robert and TRIDIMAS, Taki et coll. *Oxford Principles of the European Law*. Volume 1: The European Union Legal Order. First edition. Oxford University Press, 2018. © The several contributors 2018, p.p. 1 440, p.198.

<sup>51</sup> SVOBODA, Pavel. *Úvod do evropského práva*, 5. Vydání. Praha : C.H. Beck, 2013, p. 50.

<sup>52</sup> SVOBODA, *Úvod do evropského práva*, p. 50.

<sup>53</sup> For instance, the refused asylum applicants have a right of appeal and judicial review.

<sup>54</sup> GIUMELLI, Francesco. Beyond Intergovernmentalism: The Europeanization of Restrictive Measures? *Journal of Contemporary European Research*, Volume 9, Issue 3 (2013), pp. 390-405.

people, (2) a scale-type antagonistic approach towards interrelation between intergovernmentalism and supranationalism, (3) to see a potential and limits of the Union for further development of these policies provided by Treaties, which will be reviewed later.

### 3.2.1. Visa policy

The role of the visa policy in external border management is the prevention of illegal migration and facilitation of rightful crossing the Schengen external border. Visas represent external control measure of entry. The second function of the visa policy is to be used as a tool to assert European interests (e.g. visa liberalization, visa facilitation, visa waiver agreements).<sup>55</sup> Visa policy have both, European level and national level. The European level is connected to the umbrella legislation represented by the Visa Code of 2009<sup>56</sup> regulating the rules, procedures and conditions for issuing visas for short stays, so-called Schengen (tourists) visa for 90 days in 180 days, as well as provisions on visa issued for humanitarian reasons (informally humanitarian visa). The national level regulates other types of visas (e.g. long-term visas) and thus the entry.<sup>57</sup> The Member States also ensure the implementing infrastructures, as the Member State of entry is responsible for issuing the visa itself.

The Member States follow the common provisions applied to the third country and its third-country nationals who were not exempt from visa obligation laid in the Visa Code, nevertheless, they have a large space to decide whether the visa will be issued or not. According to Koukal, despite an introduction of appeal procedure against refusal to issue a Schengen visa, there is no objective right on a visa, there is only a right of fair procedure, and decision on issuing visa does not require judicial review.<sup>58</sup> Thus, the practice lies within the hand of the national consulates, leaving the Member State a considerable leeway on that part of the external border management covered by the visa policy.<sup>59</sup> This also concerns the role of the consulates and embassies in issuing the humanitarian visa, which is potentially a political and security matter of high sensitivity.<sup>60</sup>

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<sup>55</sup> KOUKAL, Michal. *Společná vízová politika EU a právo na odvolání proti zamítnutí žádosti o vízum. (Common EU Visa Policy and the Right of Appeal against a Visa Refusal)*. Praha, 2017, 220 s. Dissertation Thesis (Ph.D.) Charles University in Prague, Faculty of Law, Department of European Law. Supervisor: doc. Dr. iur. Harald Christian Scheu, Mag. phil., Ph.D., p. 6 – 7.

<sup>56</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15.9.2009, p. 1–58.

<sup>57</sup> KOUKAL, *Společná vízová politika EU...* p. 46.

<sup>58</sup> There are also cases when Member States uses visas in wrongful way – e.g. Malta selling the Schengen visas.

<sup>59</sup> Comp. KOUKAL, Michal. *Společná vízová politika EU...* p. 196.

<sup>60</sup> Comp. KOUKAL, Michal. *Společná vízová politika EU...* p. 56.



There is no existing European implementing infrastructure on visa, only the centralized Visa Information System (VIS), a database for exchange of data *between* the Member States on short-stay visa, where the Member States input the data on visa applications and on visas issued, refused, annulled, revoked or extended.<sup>61</sup> Europol may *request* enter VIS for the purposes of the prevention, detection and investigation of serious criminal offences. Furthermore, consulates and embassies are perceived to be an exclusive *national* territory (as based on classic international law and international relations), where the European jurisdiction applies.<sup>62</sup> An additional interesting observation is that neither Visa Code nor VIS Regulation mention the adjective ‘European’ when referring about the common Visa policy.

### 3.2.2. Asylum policy

The Common European Asylum System (CEAS) is based on directives setting up minimum standards. In the context of the migration/refugee crisis, the European Commission presented a set of proposals to reform CEAS with the aim to deepen its harmonization<sup>63</sup>, however, granting asylum *per se* is still being interpreted as an exclusive right of a *State*, complying international law which *the State* is bound by.<sup>64</sup> The decision to grant an asylum (or other form of international protection), as well as decision on returns are made by national administrative and judicial organs with respect to the principle of judicial subsidiarity. Furthermore, there is a lack of EU case law, CJEU role remains limited and CJEU rather draws ‘red’ lines.<sup>65</sup> The intergovernmental character of the Schengen cooperation on the external border management, including the intergovernmental interdependence, might be also found in the asylum system, specifically in the Dublin system dealing with the responsibility of the

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<sup>61</sup> Comp. REGULATION (EC) No 767/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation). OJ L 218/60, 13.8.2008.

<sup>62</sup> On the intergovernmental cooperation is also based the consular cooperation, the Europeanization element here is the European citizenship (non-discriminatory clause).

<sup>63</sup> Comp. A European Commission’s fact-sheet on Common European Asylum System available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet\\_the\\_common\\_european\\_asylum\\_system\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf)>. European Commission’s fact-sheet on Asylum procedures: reforming the Common European Asylum System available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet\\_asylum\\_procedures\\_reforming\\_the\\_common\\_european\\_asylum\\_system\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_asylum_procedures_reforming_the_common_european_asylum_system_en.pdf)>.

<sup>64</sup> Geneva Convention of 1951 and Protocol of 1967.

<sup>65</sup> Comp. DE BRUYCKER, Phillipe and LABAYLE, Henri. *The Influence of EJC and ECtHR case law on asylum and immigration*. Study PE 462.438, Policy Department C, European Parliament. © European Union, 2012. ISBN 978-92-823-4930-4, doi: 10.2861/4021.

Member State of the first entry.<sup>66</sup> Another state-centric, national character is the possibility to derogate the Dublin principle, and take the responsibility over on the basis of the discretionary clauses.<sup>67</sup> A European Agency dealing with asylum policy is European Asylum Support Office, known as EASO, established in 2010<sup>68</sup>, the aim of the Agency is „*to strengthen cooperation between the Member States in this area and assist them in coping with crisis situations*”.<sup>69</sup> The EASO conducts monitoring, coordinates emergency aid to the Member States and provides expertise, support and assistance on a temporary basis.<sup>70</sup> The support provided by EASO is fully dependent on the *request* made by the Member State concerned.<sup>71</sup>

### 3.2.3. Schengen cooperation

The Schengen cooperation is based on the abolition of checks at the internal borders and transfer of the border control activities of the Schengen state constituting the external border. The pivotal legislation is the Schengen Border Code (SBC)<sup>72</sup>, setting out the rules on the border control of persons crossing EU external borders and on the temporary reintroduction of border control at internal borders. Due to the fundamental dependency on the behaviour of the Member States of entry, the European Union introduced the Schengen evaluation mechanism conducted by a supranational Standing Committee that the Schengen *acquis* is properly applied (comitology).<sup>73</sup> Furthermore, similarly to the Visa policy, there is a centralized information database on information exchange on Schengen cooperation – Schengen Information System of the second generation – SIS II.<sup>74</sup> Another supranational supportive mechanism is the border fund – for the current Multiannual Financial Framework called Internal Security Fund – Borders

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<sup>66</sup> Dublin Regulation 604/2013, Art. 13(1) and 14. The first entry is one of the strongest determinants of the responsibility of the Member States and thus have a strong relevance putting the Member State fully responsible for management of its external border.

<sup>67</sup> Rec. 17, Art. 17 of the 604/2013 Dublin Regulation.

<sup>68</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, p. 11–28.

<sup>69</sup> EUR-Lex. European Asylum Support Office. [online]. Last updated: 22.07.2014 [cit. 2018-10-11]. Available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0022>>.

<sup>70</sup> Ibid.

<sup>71</sup> Rec. 15, Art. 10 of the EASO Regulation (EU) No 439/2010.

<sup>72</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1–52.

<sup>73</sup> COUNCIL REGULATION (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen. OJ L 295, 6.11.2013, p. 27–37.

<sup>74</sup> Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L 381, 28.12.2006, p. 4–23.

and Visas – enabling financial allocations to support mostly the Member States bearing the responsibility. However, the responsibility itself lies on the Member States. It is the national border guard who is responsible for the border checks.<sup>75</sup> SBC with subsequent amendments<sup>76</sup> sets out the standard procedures on entry and exit of the EU and third-country nationals, there is some leeway for the national structures to determine the security risk and to make a final decision on entry, or even upon the relaxation of the border checks at the external border<sup>77</sup>. Art. 6(1) of the SBC Regulation defines an exhaustive list of conditions what the person intending to cross the border shall fulfil to be enabled to enter the Schengen Area. The entry of the third-country national can be denied by the national border guard when one of the conditions laid out in Art. 6(1) of SBC Regulation is not met. The national border guards has two strong tools to decide upon the entry. First, it is the internal security clause having its legal basis in Art. 72 of TFEU and Art. 6(1)(e) of SBC Regulation which might be applied by the Member States (if reasonable and justified). A second tool is the national review of an appeal under the national law. Although persons refused entry - for instance on the basis of internal security clause - have a right to appeal, appeals are conducted in accordance with national law and lodging such an appeal does not have a suspensive effect on a decision to refuse entry.<sup>78</sup> In general, there must be a reasonable ground and justification to use the internal security clause, however, that clause was a strong argument for the Member States to deny entry of people coming in the migratory flows in 2015 and 2016 and subsequently travelling around the Schengen Area within secondary movements. In result, despite some criticism<sup>79</sup> it represented a strong tool for temporary reintroduction of internal border checks during the crisis. The Union might conduct some ex-post corrective procedures within evaluations, however, the final decision is in hands of the Member States.

Concerning the Schengen cooperation, two executive European agencies are relevant. First, it is the Frontex Agency, second, Europol via its newly established European Migrant

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<sup>75</sup> Chapter II of the SBC Regulation (EU) 2016/399.

<sup>76</sup> Entry / Exit System Regulation - Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 *OJ L 327, 9.12.2017, p. 20–82*.

<sup>77</sup> Art. 9(2) of the SBC Regulation (EU) 2016/399.

<sup>78</sup> Art. 14(3) of the SBC Regulation (EU) 2016/399.

<sup>79</sup> Comp. GUILD, Elsbeth et col. *Internal border controls in the Schengen area: is Schengen crisis-proof?* Study PE 571 356 for the LIBE Committee, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs - Civil Liberties, Justice and Home Affairs. © European Parliament, 2016, p. 124.

Smuggling Centre (EMSC).<sup>80</sup> Even the new Frontex Agency of 2016<sup>81</sup> gained a stronger role in the external border management, the intergovernmental character and the primary responsibility of the Member States for the management of their sections of the external border was not abandoned.<sup>82</sup> Although e.g. operational planning provided by the Frontex Agency impacts the overall design of EU borders management's strategic priorities, the Meroni doctrine applies here.<sup>83</sup> The Meroni non-delegation doctrine forbids Agencies' empowerment with discretionary powers. In other words, the EU Member States have delegated powers to the EU level, however, such powers cannot be delegated to an EU agency without an explicit decision, even though Treaties provide legal base.<sup>84</sup> Moreover, if powers are delegated, they cannot be 'discretionary' to such an extent that the 'wide margin of discretion' might enable the execution of an *actual* policy.<sup>85</sup> Such a delegation causing discretionary policy execution would mean an illegal transfer of responsibility - it is the delegator, not the delegate, making the policy choices.<sup>86</sup> In result, most Agencies exercise only a supportive role.<sup>87</sup> Despite the mandate of the Agency was reinforced, despite importance executive role of the executive director, and despite qualified majority voting in the Agency's management board, the internal system of the Frontex Agency is based on cooperative check and balances, where a Member State concerned is awarded a "last break" through a conditionality of request or consent.<sup>88</sup> A strong intergovernmental element is an tool of parallel bi- or multilateral police operational cooperation, within the EU under the special legislative procedure, with the third, usually neighbouring countries under the international regime.

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<sup>80</sup> Comp. *Europol*. European Migrant Smuggling Centre – EMSC. [online]. © 2018 Europol [cit. 2018-12-11]. Available at < <https://www.europol.europa.eu/about-europol/european-migrant-smuggling-centre-emsc>>.

<sup>81</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC *OJ L 251, 16.9.2016, p. 1–76*. (Hereinafter as EBCG Regulation 2016/1624).

<sup>82</sup> Art. 5(1) of the EBCG Regulation 2016/1624.

<sup>83</sup> Case 9/56 Meroni and Co. Industrie Metallurgiche SpA v High Authority [1958] ECR 133.

<sup>84</sup> PELKMNAS, Jacques and SIMONCINI, Marta. *Mellowing Meroni: How ESMA can help build the single market*. © CEPS 2014, pp. 6, p. 1 – 2.

<sup>85</sup> *Ibid*, p. 2.

<sup>86</sup> *Ibid*.

<sup>87</sup> FERNANDEZ, Maïté. The EU External Borders Policy and Frontex Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts, p. 392. In MORENO-LAX, Violeta. PASTAVRIDIS, Efthymios. *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach - Integrating Maritime Security with Human Rights*. International Refugee Law Series, Volume 7. © Koninklijke Brill nv, Leiden, The Netherlands 2017. p. 448p, p. 381 – 407, p. 392.

<sup>88</sup> Rec. 24 of the EBCG Regulation 2016/1624.

Oosterom-Staples characterizes the management of the external border before the border itself (visa policy<sup>89</sup>) and at the border (entry checks) as intergovernmental where national states have strong discretionary powers, adding that the intergovernmental character is not free of criticism on transparency, openness in decision making, lack of remedies or judicial control.<sup>90</sup>

We can conclude that the character of the external border management from the perspective of AFSJ as a shared competence is from the scale-type approach rather an intergovernmental policy. The active role of the Union on the external border management is normative, its executive role is limited to the supportive and coordinative character. There is a space left for the national legislation, the executive part external borders policy remains within national competence, depending on national structures. This set-up provides discretions to the Member States where control and remedies from the level of the Union limited.

### 3.3. Intergovernmental regime of the CFSP and CSDP and other external policies

As suggested in previous Chapter 2, the external border management has been, in context of the migration/refugee crisis of 2015, recently recognized as subject of the CFSP and newly CSDP. In general, CFSP and CSDP are regulated by a special intergovernmental regime defined in Title V of TEU, specifically Chapter 2. Most importantly, the Commission has no initiative power, the legislative procedure and jurisdiction of CJEU are excluded, and any deciding voting is subject of unanimity or constructive abstention. The cooperation shall be based on the development of mutual political solidarity among Member States. Both, the European Union and the Member States should act with respect to principle of sincere cooperation and principle of loyalty.<sup>91</sup> Once Council's decision approved by unanimity, not only the participating Member State, i.e. voting in favour, '*shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area,*<sup>92</sup> but also the abstaining Member State is bound by that principle.<sup>93</sup> but a Some scholars read this obligation "*as a duty for the Member*

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<sup>89</sup> Visa policy is applied at national consulates or embassies of the Member States while there is no role of European external action service in issuing visas.

<sup>90</sup> OOSTEROM-STAPLES, Helene. *Has Europeanization Silenced Criticism On Intergovernmental External Border Cooperation?* In: GUILD, Elspeth and MINDERHOUD, Paul. *The First Decade of EU Migration and Asylum Law*, Brill | Nijhoff, 2012, p. 97.

<sup>91</sup> Art. 4(3) TEU.

<sup>92</sup> Art. 24(3) TEU.

<sup>93</sup> Comp. BLOCKMANS, Steven. *Differentiation in CFSP: Potential and Limits*. In (ed.), *Differentiated Integration in the EU. From the Inside Looking Out*. Brussels, Centre for European Policy Studies (CEPS), 2014, pp. 46-56, p. 49.

*States to keep silent, unless told to speak by the EU institutions*".<sup>94</sup> The rationale of the of this principle is essentially to protect the interests of the Union rather than interests of the Member States. On the other hand, it is the Member States who carry the responsibility under the public international law.<sup>95</sup> To conclude, any empowerment of the Union is a matter of strong intergovernmentalist cooperation dependent on unanimity. The determining independent variability here is the intergovernmental cooperation providing the Union a mandate, while the Union is an actor dependent on the unanimous empowerment. However, once the Union gets a mandate, all the Member States, actively supporting or constructively abstaining, are bound by the principle of loyalty. A role of the High Representative is to coordinate the work of all Commissioners in charge of external relations portfolios. The EU's External Action Service (EEAS) operates 141 Delegations and Offices around the world, implementing the development aid priorities.<sup>96</sup> The Union *per se* is engaged in international system and its organisations, for instance, it has a status of a permanent observer at the UN General Assembly and regularly consults NATO. The Member States operates via their classic international relationships, such as bilateral diplomacy or through their engagements in the international organisations.

### **3.4. Dual regime in international cooperation with a dominance of the Member State**

The external border management is a very challenging topic as it is not only a subject of the European law but also a subject of public international law (e.g. law of treaties, Geneva convention of 1951 and Protocol of 1967). In comparison to the classic border management principles developed under the Schengen *acquis*, focusing on internal, European, structures, legal system and compensatory measures among the Member States of the EU<sup>97</sup>, the external border management interconnect the European law and public international law which is

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<sup>94</sup> Comp. DELGADO CASTELEIRO, Andrés and LARIK, Joris. The Duty to Remain Silent: Limitless loyalty in EU external relations? *European Law Review*, 2011, 36, 4, pp. 524-541, p. 540.

Comp. VAN VOOREN, Bart and WESSEL, Ramses A. *EU External Relations Law: Text, Cases And Materials*. Cambridge University Press, 2014, pp. 570, p. 206.

<sup>95</sup> VAN ELSUWEGE, Peter. *The duty of sincere cooperation (Art. 4 (3) TEU) and its implications for the national interest of EU Member States in the field of external relations*. Forthcoming in: VARJU, Marton (ed.), *Between compliance and particularism: Member State interests and European Union law* (Springer, 2018), peer reviewed, 2015, p. 17.

<sup>96</sup> *European Commission*. International Cooperation and Development. [online]. Last update: 2018-11-16 [cit. 2018-11-16]. Available at <[https://ec.europa.eu/europeaid/relations-eeas-eu-institutions-and-member-states\\_en](https://ec.europa.eu/europeaid/relations-eeas-eu-institutions-and-member-states_en)>.

<sup>97</sup> The non-EU Member States were rather in a reliant position and if interested to join the Schengen system, they were obliged to apply the EU developed Schengen *acquis*.

traditionally based on the state-centric Westphalia system and where the position of the European Union remains to be secondary.

Despite the EU has its international subjectivity, it is only derived by the subjectivity of its Member States, depending on principle of conferral. Today, we can talk about a system of dual legal personality and international subjectivity, characterized by (1) a parallelism, where both, the EU and the Member State can conclude international agreements, become a member of international organizations; join international conventions; (2) a *sui generis* internal distribution of competences between the Union and its Member States; (3) ability to perform that subjectivity in term of executive power. A parallel shared competence is for instance development cooperation and humanitarian aid (Art. 4 para. 4 TFEU), where both, the Union and the Member States can cooperate with third countries parallelly. Furthermore, in justice and police cooperation, The Member States may conclude their own international operations under the JHA (e.g. police operations).

The European Union has overtaken a particular policy of the external border management in the context of international cooperation - negotiating and concluding the readmission agreements. The objective of this step is to use the negotiation power *un-block* and replace the bilateral agreements. This function falls under the external cooperation but it is also a matter of the return policy under the AFSJ. This Union's new competence corresponds to the enhanced activities of the new Frontex agency (EBCGA) in the return policy. Nevertheless, some countries are not in favour the Union to overtake this policy as they prefer their specific ties to the third country of transit or origin. The most demonstrative example is Spain, which is the frontline state of the first entry, and which prefers its bilateral return/readmission system having set up with Morocco. Under the current higher migratory pressure Spain is facing in 2018, it has reactivated its national programmes (developed under the high migration pressures in 2006) under its bilateral cooperation and its national policies on management of its external border also in context of Art. 72 TFEU.<sup>98</sup> The migration/refugee crisis also emphasized the significance of the Member States, their sovereignty and strong status in the international community. This may be demonstrated on four examples related to the external dimension of the external border management. First, both, the leaders of the Member State attend the strategic international summit in EU28/27 format, as for instance Valletta Summit on Migration.<sup>99</sup>

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<sup>98</sup> Commentary of Ms Pavla Novotna, Head of Asylum and Migration Unit, Ministry of Interior of the Czech Republic provided on panel debate 'European borders' organized by TOPAZ, Wilfried Martnes Centre for European Studies and Konrad Adenauer Stiftung on 25 October 2018 in Prague, Czech Republic.

<sup>99</sup> E.g. The Valletta Summit on Migration of 2015. The participants from the EU side were the heads of state and government of EU member states as well as representative of the European Council (President Donald Tusk), the

Second, the crucial political agreement between EU and Turkey on management of migration flows and EU's external border was reached by Chancellor Angela Merkel, not Federica Mogherini. Third, Italy has used its own tools on cooperation with Libya to manage its external border by reactivation of the 2008 Italian-Libyan friendship treaty. Forth, the Member States did not reach a common position at the EU level on the Global Migration Compact and the Union did not represent the un-block position at the UN level.

### **3.5. Intergovernmental infrastructure and public goods: national taxation**

The external border management is dependent on the infrastructure of the Member States in various policies and various geographic stages of the external border management. National embassies and consulates cover the external border management in the third countries via implementation of the common visa policy. National police and border guards covers the phase at the sea and land border and the Schengen cooperation, national administrative and judicial systems covering the asylum policy within the state responsible for the asylum application. As Moravcsik reminds, the EU has no police, no army, no significant intelligence capacity and in his view, there is no realistic prospect of obtaining any of these.<sup>100</sup> The infrastructure handling the external border management is subject of the public goods. This is interconnected with the taxation policy where taxes provide resources to run public institutions executing the common goal (policy) agreed upon. The power to tax is in the hands of the Member States. The Union has only a limited, coordinative power, there is also non-existence of the ordinary legislative procedure and if voting at the Eu level, only unanimity applies.<sup>101</sup> Seen in numbers, the Union has its disposal budget of fees of 1 per cent GDP (1,1 % GDP suggested in the upcoming multiannual financial framework 2021 – 2027) provided by its Member States, however, the rest of national 99 % budgetary product is governed by the Member States.

### **3.6. Potentials and Limits: Legal Exploration**

Through the dichotomy prism, it is possible to explore the potential of the Union (through the Commission) to pull the European integration process towards supranationalism

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European Parliament (President Martin Schulz), the European Commission (President Jean-Claude Juncker) and External Action Service (High Representative Federica Mogherini), (European Asylum Support Office represented by the Secretary General Jeppe Tranholm-Mikkelsen).

<sup>100</sup> MORAVCSIK, Andrew. The European constitutional compromise and the neofunctionalist legacy. *Journal of European Public Policy*, Vol. 12, Issue 2, 2005, pp. 349 — 386, p. 367.

<sup>101</sup> Art. 110 – 113 TFEU.



as well as the current breaks and safeguards under the Treaties. The tools for intergovernmental cooperation will be explored as well.

### **3.6.1. Potential and limits in AFSJ as a shared competence**

The AFSJ is a shared competence where the Union have a supremacy based on the doctrine ‘*where the Union adopts an act, the Member States lose their competence*’. According to Svoboda, competitive competencies are thus potentially exclusive for the Union.<sup>102</sup> We also know that the European Commission is awarded by legislative initiative in this field, outlined but also limited by Treaties, navigated through guidelines provided by the European Council as well as by principle of proportionality and subsidiarity. However, these usually provide a wide interpretation and the role of the supranational Commission in the inter-institutional check and balances system is understood to promote closer European integration, where the Commission usually have higher ambitions which are subsequently corrected by the Council under the legislative procedure.<sup>103</sup> In other words, the Treaties (TEU and TFEU), as well as subsequent framework guidelines of the European Council provides the European Commission a space to shape further policy development. Under the prism of a scale competitive, antagonistic approach of the interrelation between intergovernmentalism and supranationalism, it might be assumed the Commission will pull the European integration towards supranationalism.

Reviewing potential and limits under the Treaties, Art. 3(2) TEU awards the Union to ensure AFSJ - “*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers...*”. Art. 77(1) awards the *Union* to develop the policy governing the external border management under the AFSJ, Art. 77(2)(b),(d) says it shall be done so under the ordinary legislative procedure, where the qualified majority and co-decision of the European Parliament apply. Similarly, the Art. 78 TFEU awards the Union to develop a common policy on asylum and Art. 79 TFEU a common immigration policy, Art. 78(3) awards the Union to conclude readmission agreements with third countries. We have observed that the EU has already used its potential within a shared competence from the normative perspective as it has adopted set up of rules governing the crossing of the external border, such as for instance Visa Code, Schengen Border Code, SIS II Regulation or Entry-Exit system. Moreover, on the basis of Art. 4(3) TEU and Art. 291 TFEU it seems that the EU primary law stipulates that European institutions have a potential to be also involved in the executive part of the external borders

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<sup>102</sup> SVOBODA (2013). *Úvod do evropského práva...* p. 50.

<sup>103</sup> As we focus here on the supranational and intergovernmental approach, we will exclude the European Parliament where the relations of the MEP towards the Union and towards their domestic states vary.

management, in other words, in control<sup>104</sup> and implementation of these policies. Art. 74 TFEU awards the Council with the ability to ‘adopt measures to ensure administrative cooperation’ between the Member States and the Commission.<sup>105</sup> Finally, we already know, that the Union has already entered the area of operational implementation via Frontex Agency, uses comitology (Schengen Evaluation Mechanism) builds the centralized information systems such as VIS or SIS where the EU Agencies such as Europol and Frontex are gradually gaining greater access.<sup>106</sup> Concerning the limits, the TEU explicitly calls for ensuring the free movement of persons with *appropriate measures* with respect with respect to external border controls, asylum, immigration. The interesting point is the reference to the term ‘*appropriate measures*’, which is not specified any closer. Title V of the TFEU calls repeatedly for *efficiency* (Art. 77, Art 79 TFEU). In general, the Commission conduct impact assessment and reviews feasibility, sustainability and budgetary and administrative burdens.<sup>107</sup> Another limit can be found in the principle of *subsidiarity and proportionality*. Art. 5 of the Protocol No 2 demands justification if/that a Union objective can be better achieved at Union level based on review of qualitative and quantitative indicators and assessment of the proposal's financial impact and financial and administrative burden. Another limit is the internal security clause laid down in Art. 72, according to which the Member States are left in charge of ‘*the maintenance of law and order and the safeguarding of internal security*’ in the AFSJ. Peers’ interpretation is, that the EU can establish rules on border controls and regulate how Member States’ authorities implement them, however, they do not allow the Union to replace Member States’ powers of law enforcement and control, or require Member States to carry out a particular operation.<sup>108</sup> I agree with the analysis and conclusion provided by Fernandez, that synthesis of refereed articles “*it appears that the EU could go quite far in the process of europeanizing executive powers at external borders*”<sup>109</sup>, however, as the Peers argues, not to replace them. If we review the extent, it seems the Commission did not use its full potential to Europeanize the JHA policies provided by the Lisbon Treaty. Similar observation provide Bickerton, Hodson and Pueter, concluding from

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<sup>104</sup> Comitology.

<sup>105</sup> FERNANDEZ, *The EU External Borders Policy...*, p. 389.

<sup>106</sup> European Commission. The Schengen information System. Fact-sheet issued on 21 December 2016. [online]. [cit. 2018-11-11]. Available at: <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/fact-sheets/docs/20161221/sis\\_factsheet\\_21122016\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/fact-sheets/docs/20161221/sis_factsheet_21122016_en.pdf)>.

<sup>107</sup> Comp. SCHOUT and WOLFF, *The Paradox...*,p. 19.

<sup>108</sup> Peers reads the Article as the EU can establish rules on border controls and regulate how Member States’ authorities implement them, however, Treaties do not allow the Union to replace Member States’ powers of coercion or control, or require Member States to carry out a particular operation. Comp. PEERS, Steve. The Reform of Frontex: Saving Schengen at Refugees’ Expense? [online 2015-12-16]. [cit. 2018-11-11]. Available at: <<http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>>.

<sup>109</sup> FERNANDEZ, *The EU External Borders Policy...*, p. 389.

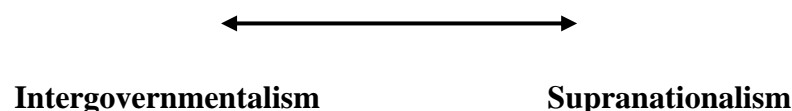
their research on new intergovernmentalism, where they tested a hypothesis, that ‘supranational institutions are not hard-wired to seek ever-closer union’. They have concluded, that “*the preferences of supranational institutions themselves may not be as hard-wired towards supranationalism as was generally assumed by many EU scholars... [...] Instead, such institutions act strategically: when faced with a favourable environment for entrepreneurialism they may well take advantage of it, but, in a more hostile environment, they avoid putting forward proposals that stand little chance of success*”.<sup>110</sup>

### 3.6.2. Potential and limits in CFSP/CSDP

As the CFS/CSDP is intergovernmental policy under a special regime, in which neither Commission has any legislative power nor the CJEU has any jurisdiction, the potential under the current Treaties to enforce supranationalism from the legal perspective lies in on the basis of the passerelle clause laid down in Art. 31(3) TEU, the European Council may unanimously agree to authorise the Council to act by qualified majority voting on civilian CFSP missions. Other, rather informal ways might be found in better definition of the Union’s mandate, in the enforcement of the loyalty principle, and in formalization of enhanced and permanent cooperation, such PESCO under Protocol No. 10 to the Treaties (similar logic could apply to JHA).

### 3.7. Conclusion of Chapter 3

In the third chapter we have analysed a division of roles between the Union and the Member States on the following dichotomy of supranationalism and intergovernmentalism understood as opposing ends of one scale working on bargaining and trade-off:



We can conclude that the external border management is composed of three levels of cooperation (1) level of AFSJ, (2) CFSP/CSDP and (3) other international cooperation. Via prism of this dichotomy, all of the policies have an intergovernmental character. First, AFSJ, the role of the European Union is normative, however, the position of the Member States is

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<sup>110</sup> BICKERTON, Christopher J., HODSON, Dermont, PUETTER, Uwe. The New Intergovernmentalism: European Integration in the Post-Maastricht Era. *Journal of Common Market Studies (JCMS)*, 2015, Volume 53. Number 4., pp. 703–722, p. 712 – 713.

dominant via execution, leeway for discretionary and only limited remedies by the supranational level. The interference of the Union is dependent on request and consent of the Member State concerned. It is the Member State who has a final decision and who can decide to cooperate if recognizes their interests, but who can also decide not to cooperate if it is not in its own interests and, therefore, act independently. Second, the CFSP/CSDP, the role of the Union is coordinative as the CFSP/CSDP is ruled by a special intergovernmental system. Third, the management of the external borders is also based on intergovernmental governance as in the dual legal subjectivity the Union has a lower legitimacy than the Member States due to the state-centric character of the international system. Finally, the current management of the external borders is dependent on national infrastructures financed through the taxation and budgetary allocations, another strongly intergovernmental policy. The Commission has a potential provided by Treaties to further supranationalize the policy as well as develop its executive power within the AFSJ policies, however, there are limits and followed principles such as feasibility, subsidiarity, efficiency, resulting in the Union did not so. It also seems to be a matter of political demand why the Commission did not use its potential before.

However, it seems the competitive antagonistic approach does not sufficiently covers the interrelation between the centre and the Member States. We can ask, why the Commission did not use that potential, if the interrelation would be only competitive. One explanation could be seen the Commission used its initiative, but the States blew it down in its agenda and in the legislative procedure, the second could be, the Commission decided not to do so, until conditions, such as situational context and for further policy development demand, would be more favourable.<sup>111</sup>

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<sup>111</sup> The dynamics between the purposeful choice (rather political produced by the European Council or the Council) and the neofunctionalist spill-over (rather administrative produced by the Commission) could be seen in the interplay.

#### 4. RE-THINKING INTERRELATION BETWEEN SUPRANATIONALISM AND INTERGOVERNMENTALISM - COMPLEMENTARY PRISM

In the previous chapter, we have explored the external border management via a prism of antagonistic, competitive scale-type dichotomy between the supranationalism and intergovernmentalism. However, some scholars (e.g. Schout, Wolff, Schmidt) consider that approach to be obsolete. Schout and Wolff ponder over an inverse interrelation between the supranationalism and intergovernmentalism, interacting with each other in a complementary way with the common aim to find a better regulation.

##### 4.1. Theory of supranationalism-intergovernmentalism

Schout and Wolff suggest in their work *'The 'Paradox of Lisbon': Supranationalism-Intergovernmentalism as an administrative concept'* a new conceptual complementary approach towards the interrelation between the intergovernmentalism and supranationalism, speaking of supranationalism-intergovernmentalism. Schout and Wolff argue that, in general, European integration theories find consensus in scale-type conceptions and trade off to describe the balance between the two theories, nevertheless, the theories have remained weak on specifying the relation between the two extremes.<sup>112</sup> Pollack considers the traditional competitive dialogue to be dialogue of deaf when intergovernmental rationalist dismiss neo-functional constructivists and vice versa.<sup>113</sup> According to Pollack, although the dialogue has witnessed some progress and adjudications on basis of empirical studies over time, the literature on European integration has not produced any consensus on the likely future direction of the integration process.<sup>114</sup>

Schout and Wolff suggest that rather than interpreting the relationship between intergovernmentalism and supranationalism as a scale, it may be understood as a concept instead. They suggest interpreting centralization and decentralization not as opposites but as *interdependent*.<sup>115</sup> In their view, it is time to speak of 'supranationalism-intergovernmentalism'.<sup>116</sup> Although they do not deny the scale approach, they promote to

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<sup>112</sup> Ibid, p. 15.

<sup>113</sup> POLLAK, Mark A. Theorizing EU policy-making, In POLLACK, Mark A., WALLACE, Hellen, YOUNG, Alasdair (eds). *Policy making in the European union*, 7<sup>th</sup> edition, Oxford: Oxford University Press, 2015. ISBN 978-0-19-968967-05. Pp. 664, p. 25.

<sup>114</sup> Ibid.

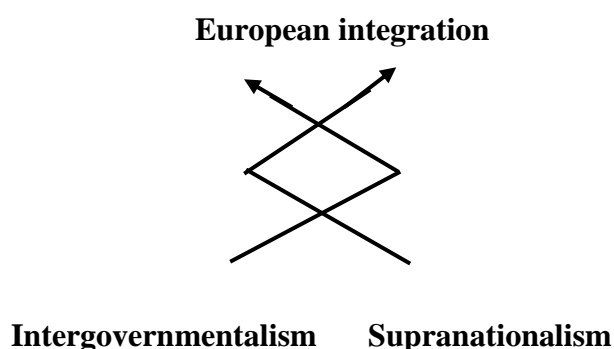
<sup>115</sup> Ibid, p. 16.

<sup>116</sup> Ibid, p. 17.

consider the two paradigm as closely interconnected and mutually reinforcing.<sup>117</sup> They suggest to approach the European integration process from a concept perspective where the development does not lead to one of the extremes on the scale but rather consider how governments and EU institutions are interconnected, leaving the tension between supranationalism and intergovernmentalism behind, where one cannot exist without the other.<sup>118</sup> Similarly in a view of Schmidt, supranationalism and intergovernmentalism are in the analytical research dissected as distinct phenomena, empirically, however, supranationalism and intergovernmentalism seem to be intertwined and complementary.<sup>119</sup> Howorth, focusing on cooperative interrelation between supranationalism and intergovernmentalism in CSDP, emphasizes the importance of intensity of mutual interactions during the negotiation process on policy shaping and decision making.<sup>120</sup> Schout and Wolff argue that horizontal objectives providing a better regulation can only be achieved if the Member States and the Union institutions operate together. In context of the external border management, I would emphasize here the importance of the ‘*horizontal objective*’, and ‘*seeking a better regulation*’.

One of the problems, why the performance of the better regulation agenda has remained underdeveloped Schout and Wolff see in being treated as either a supranational or a national endeavour without studying the interdependence between the two. Schout and Wolff do not deny a scale-approach, admitting, a competitive approach occurs at some stages, but the interplay between intergovernmental elements and supranational elements should better be understood as complementary and corrective, not as competitive trade-off.<sup>121</sup>

**Figure 9: Interdependent interrelation between intergovernmentalism and supranationalism**



<sup>117</sup> Ibid.

<sup>118</sup> Ibid, p. 17 – 18.

<sup>119</sup> SCHMIDT, Vivien A. The New EU Governance: New Intergovernmentalism, New Supranationalism, and New Parliamentarism. In *IAI Working Papers, Issue 16/11*. Istituto Affari Internazionali, Rome 2016, p 6.

<sup>120</sup> Comp. HOWORT, Jolyon. *Decision-making in Security and Defence Policy. Towards Supranational Intergovernmentalism?* KFG Working Paper Series, No. 25, March 2011, Kolleg-Forschergruppe (KFG) “The Transformative Power of Europe“ Freie Universität Berlin.

<sup>121</sup> SCHOUT and WOLFF, *The Paradox...*p. 25.

As apparent from the title of their work, Schout and Wolff review how the EU and national *administrations* are involved in the different phases of the policy cycle and at their *administrative* capacities in the supranational – intergovernmental dialogue. He focuses on “a better regulation” approach, reminding an integrated impact assessment comprising of variety of objectives such as (1) subsidiarity and proportionality (2) empirical proof for policies (3) sustainability (4) minimal administrative burden, the Commission as an exclusive legislative initiator is supposed under the justification obligation to follow.<sup>122</sup> Based on their arguments, we can conclude that a better regulation can only succeed if the Member States and the EU institutions are able to match *administrative* (i.e. executive) capacities in cooperative way and operate together throughout the various stages of the policy processes to meet this objective of better regulation.<sup>123</sup> Thus, for instance the principle of subsidiarity and proportionality as an intergovernmental element should not be understood as defence of the Member States but rather as part of the embedded nature of the EU policy system , a corrective mechanism for a better regulation.<sup>124</sup>

Schout and Wolff draw up a practical perspective which we will attempt to project in the policy of the external border management. First, from the political perspective, they argue the Commission can only take better regulation objectives seriously, if it is sure the Member State and the Parliament will focus on them during the negotiations in Council and the Parliament.<sup>125</sup> This emphasizes the importance of *political demand* – the greater the objective is, the firmer the demand should be. Before the migration/refugee crisis, despite the Commission, had explored possible scenarios<sup>126</sup>, there was no particular interest for further policy development concerning the external border management. However, the crisis activated such demand.<sup>127</sup> This corresponds to the finding in Chapter 3 and explains, why the Commission did not use its potential before – the demand was missing. On the other hand, the supranational level and national level interact in a competitive way in the first stage of policy development,

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<sup>122</sup> SCHOUT and WOLFF, *The Paradox*, p. 32-34.

<sup>123</sup> Comp. SCHOUT and WOLFF, *The Paradox*... p. 35.

<sup>124</sup> Ibid.

<sup>125</sup> SCHOUT and WOLFF, *The Paradox*... p. 36-37.

<sup>126</sup> Comp. COJANU, Gabriela et col. *Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union – ESBG*. Unasis, Final Report Version 3.00 16 June 2014.

<sup>126</sup> Comp. RIJPM, Jorrit. *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?* Study PE 556.934. Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs - Civil Liberties, Justice and Home Affairs. © European Parliament 2016, p. 40.

<sup>127</sup> NIEMANN, Arne and SPEYER, Johanna. *A Neofunctionalist Perspective on the 'European Refugee Crisis': The Case of the European Border and Coast Guard*. In: Journal of Common Market Studies (JCMS) January 2018, 56 1, p23-p43, 21p.

which is, however, subsequently followed by matching, which leads to generating a best found consolidated way regulation.<sup>128</sup> I would, again, emphasize three elements we should follow: (1) horizontal objective, (2) seeking a better regulation, (3) Schout and Wolff focus on administrative level, however, the political one cannot be ignored.

#### **4.2. Case Study: Analysis of EBCG Regulation 2016/1624**

The EBCG Regulation 2016/1624, a pivotal regulation on management of the external borders adopted in response to the migration/refugee crisis, have brought along an interesting phenomenon. Via analysis of the EBCG Regulation 2016/1624, a theory of complementary interrelation between supranationalism and intergovernmentalism will be tested.

##### **4.2.1. Situational context, political demand and competitive impulse**

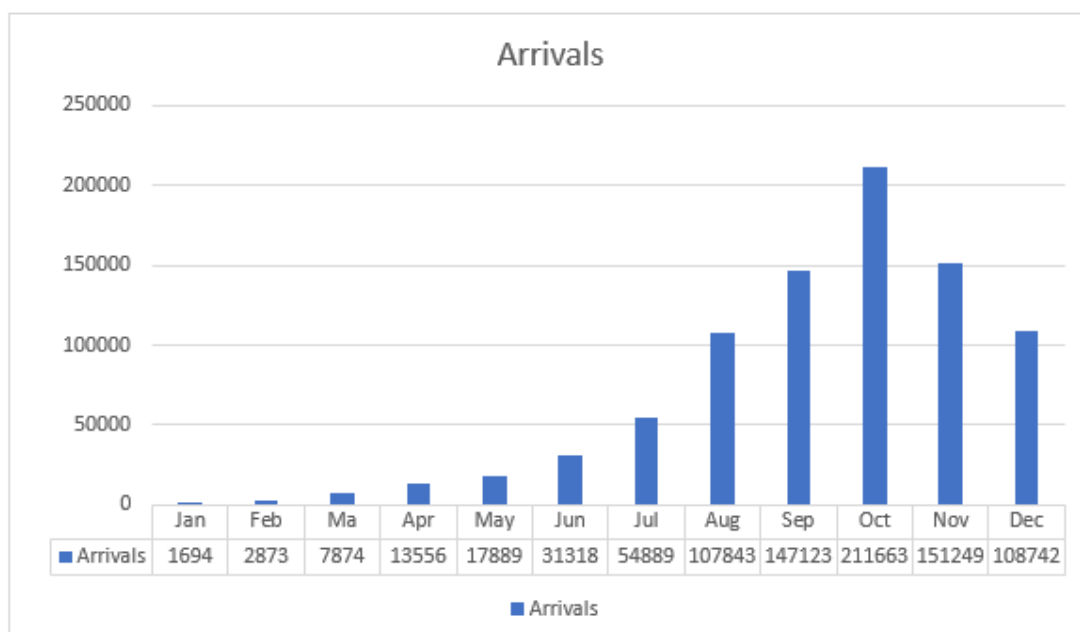
In 2015, Europe experienced an unprecedented mixed migration flow coming mainly via the Central Mediterranean Route (CMR) and the Eastern Mediterranean Route (EMR). We will focus on the EMR and Western Balkan Route (WBR) via Turkey, Greece and Balkan countries, where management of the external border management and the migration/refugee flow challenged the system of the European Union. Approximately 885,000 third country nationals reached Greece irregularly in 2015, where the enormous numbers peaked in the second half year.

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<sup>128</sup> SCHOUT and WOLFF, *The Paradox...* p. 33.



**Figure 10: Development of the mixed migration irregular flow to Greece in 2015<sup>129</sup>:**



Despite a jump rise and a strong pressure of high numbers of arrivals to Greece in late summer of 2015, the Greek government requested the Frontex assistance and triggered Rapid Border Intervention Team (RABIT) mechanism at the beginning of December 2015<sup>130</sup>, after 4 months of facing, unsuccessfully, hardly manageable amount of irregular arrivals. Greece represented a weaker component facing to several challenges at once. First, Greece was weakened by the financial crisis and subsequent pressures for extensive structural reforms, which were unpopular and hardly sustainable, weakening the Greek leadership. Second, the Greek islands lie very close to Turkey, and the disputes on the sea border between those two countries persist, which complicates a dialog over territory, jurisdiction, (shared) responsibility, and operative cooperation. Third, Greece had long-standing problems with its border and asylum policies which did not remedy. For instance, Dublin system was not applied due to CJEU and ECtHR judgements of 2010 and 2011 contesting the Greek asylum system.<sup>131</sup> The persistent problems, Greek vacillation to apply existing rules, that all under the objective

<sup>129</sup> Based on UNHCR Data from Refugees/Migrants Emergency Response. Mediterranean: Greece. [online]. ©2018 UNHCR. Date of data collection: 2016-04-21. Available from: <<http://data.unhcr.org/mediterranean/country.php?id=83>>, and the Joint Communication on Migration on the Central Mediterranean route Managing flows, saving lives, JOIN/2017/04 final.

<sup>130</sup> Comp. European Commission. *Refugee Crisis: Greece activates EU Civil protection mechanism, agrees Frontex operation at border with former Yugoslav Republic of Macedonia and triggers RABIT mechanism*. Press Release IP/15/6249. [online]. Last update: 2015-12-03. Available at: <[http://europa.eu/rapid/press-release\\_IP-15-6249\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6249_en.htm)>.

<sup>131</sup> ECtHR judgement *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09 and CJEE judgement in *N.S.* case (C-411/10).

pressures *political* tensions and mistrust. Moreover, some Member States<sup>132</sup> temporarily reintroduced the internal border checks, however, this mechanism was not triggered fully in accordance to existing law and the law was crooked by political demand. In a view of the collective of experts on JHA, the Member States' justifications for the reintroduction of internal borders controls under the mechanisms laid down in the Schengen Border Code were inadequate.<sup>133</sup>

The European Commission assessed that the migration crisis demonstrated existing structures at Union and Member State level as inadequate to address the challenges arising from such a large influx.<sup>134</sup> Facing *political* tensions, a debate to exclude Greece from the Schengen Area<sup>135</sup> and temporary reintroduction of controls at internal borders<sup>136</sup>, and administrative deficiencies the migration/refugee crisis revealed, the European Commission introduced a proposal of the new European Border and Coast Guard (herein further as EBCG Proposal)<sup>137</sup> on which legal basis *the Commission* would become empowered to adopt a decision via an implementing act on Frontex intervention in the Member State concerned, without a need to be dependent on the formal request of the Member State.<sup>138</sup> It is worth introducing the Art. 18 of the EBCG Proposal:

*“Where a Member State does not take the necessary corrective measures in accordance with a decision of the Management Board referred to in Article 12(6) or in the event of disproportionate migratory pressure at the external border, rendering the control of the external borders ineffective to such an extent that it risks putting in jeopardy the functioning of the Schengen area, the Commission, after consulting the Agency, may adopt a decision by means of an implementing act, identifying the measures to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of*

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<sup>132</sup> Austria, Denmark, Germany, Norway and Sweden.

<sup>133</sup> GUILD, Elsbeth et col. *Internal border controls* p. 41.

<sup>134</sup> Explanatory memorandum of the Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007, and Decision 2005/267/EC.

<sup>135</sup> Comp. EURACTIV. Greece could be kicked out of Schengen. [online 2015-12-03]. Available at: <<https://www.euractiv.com/section/justice-home-affairs/news/greece-told-it-could-be-kicked-out-of-schengen/>>.

<sup>136</sup> BACZYNSKA, Gabriela and KÖRKERMEIER, Tom (2016). Greece threatened with expulsion from Schengen over migration crisis. [online 2016-01-25]. Available at: <<https://www.reuters.com/article/us-europe-migrants-ministers/greece-threatened-with-expulsion-from-schengen-over-migration-crisis-idUSKCN0V315L>>

<sup>137</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007, and Decision 2005/267/EC (herein further as EBCG Proposal).

<sup>138</sup> Art. 18 of the EBCG Proposal.

*those measures. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 79(2).”*

Generally speaking, the political reactions of the national parliaments (the political level) to Article 18 were critical or even dismissive.<sup>139</sup>

Based on explorative and comparative analysis of the consolidated Frontex Regulation 2007/2004, i.e. including the subsequent amendments, the EBCG Proposal and the adopted EBCG Regulation 2016/1624, the thesis explores two aspects of the policy development of the external border management. First, how the new EBCG Regulation developed the management of the external border, on the scale intergovernmentalism – supranationalism, second, if the theory supranationalism-intergovernmentalism towards better regulation can be confirmed.

The research question and the tested hypotheses are following:

**Research Question 2:** How the EBCG Regulation 2016/1624 changed the character of the external border management and what are the implications?

**Hypothesis 1:** The EBCG Regulation has strengthened the supranational elements in the external border management but it does not exceed the central role of the Member States.

**Hypothesis 2:** The supranationalism-intergovernmentalism complementary theory can be confirmed via EBCG Regulation in context of seeking better regulation from the administrative perspective, while the competitive scale-type approach can be seen in the political optic.

**Activating Political Demand** – the integrated border management was a subject of policy development explorations before<sup>140</sup>, the migration/refugee crisis, however, revealed dysfunctionalities and activated a firm political demand. Avoiding the situation of 2015 was the common objective agreed upon.

**Purpose** - Frontex Regulation 2007/2004 seeks an efficient implementation of the common rules through *increased coordination of the operational cooperation between the*

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<sup>139</sup> Comp. ANNEX 1.

<sup>140</sup> COJANU, Gabriela et col. *Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union – ESBG*. Unasis, Final Report Version 3.00 16 June 2014.

*Member States*, and with this aim, it established a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, informally known as Frontex.<sup>141</sup> Under this Frontex Regulation, responsibility of the external border control fell into the sole competence of the Member States.<sup>142</sup> To compare, the EBCG Regulation 2016/1624 sees the objective of Union policy in the field of external border management in development and implementation of the European integrated border management at national and Union level, in terms of *a shared management*<sup>143</sup>, with the aim to manage the crossing of the external borders *efficiently*<sup>144</sup>, where Member States retain the main responsibility over the management of the external border.<sup>145</sup> The EBCG Regulation reflects the shift from intergovernmental cooperation where the old Frontex Agency had a supportive role, towards reinforcement of the Agency within the external border management. Thus, it has renamed the former Frontex Agency on the European Border and Coast Guard Agency, today also labelled as Frontex. In fact, the old Frontex Agency (Regulation 2007/2004 with some subsequent amendments) was repealed and replaced by the new Frontex (EBCGA) Agency, as explicitly says the headline of the EBCG Regulation. This informal label, however, appears very often in the EU documents; thus, it may create confusion, on the other hand, the subject matter remains and keeping the informal label suggest continuity and succession between the Frontex Agency and the EBCGA. This change has been introduced and adopted in the response to the migration/refugee crisis, and simultaneously, the EBCG Regulation does not abandon the principle of *efficiency*, thus, we can implicitly confirm the aim of the regulation is to *seek a better regulation* of the external border management.

**Composition** – Former Frontex was of supportive and coordinating character and apart of staff of 300 people, it did not have any own operational staff to be deployed directly in the field at its disposal and was fully dependent on capacity pooling by the Member States in ad hoc pilot joint operations. On contrary, the EBCGA has at its disposal a permanent staff of 1,500 border guards and the border guards of the Member States. The EBCGA and the responsible national authorities constitute the European Border and Coast Guard.<sup>146</sup>

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<sup>141</sup> Recital 2 of the Frontex Regulation.

<sup>142</sup> Rec. 4 and Art. 1 of the Frontex Regulation.

<sup>143</sup> Explanatory Memorandum of EBCG Proposal, Art. 3(1) of the EBCG Regulation.

<sup>144</sup> Recital 2 and Art. 2 of the EBCG Regulation.

<sup>145</sup> Recital 6 and Art. 5(1) of the EBCG Regulation.

<sup>146</sup> Art. 3 of the EBCG Regulation.

**New competences** - The EBCG Proposal aimed to provide for a more integrated management of the EU's external borders, inter alia by providing the EBCGA, in other words, the new Frontex, with *more competences* in the fields of external border management. Previously, the external border management was defined on the basis of strategy papers and recommendations provided by the Commission or the Council, such as the non-binding Updated Schengen Catalogue 2009, and the former Frontex's main task then was to render border control more effective by coordinating Member States' joint activities, providing surveillance data, technical support and expertise<sup>147</sup> The EBCGA was awarded with several new competences. First, it has gained competence to establish a technical and operational strategy for European integrated border management<sup>148</sup>, second, to carry out vulnerability assessments, which would complement the Schengen evaluation mechanism, in order to evaluate the *capability and readiness of Member States' border guard* to act in emergencies.<sup>149</sup> In both these new activities the Agency gained a new tool for supervision, superior control and planning ex ante, and supranationalist elements have been increased. First, the strategy is proposed by the executive director and adopted by a two-thirds majority of the members the Management Board.<sup>150</sup> Thus, an individual Member State potentially opposing can be outvoted, but they are still required to develop its national strategy *complying* the strategy adopted by the Agency.<sup>151</sup> Second, the vulnerability assessment is supposed to fulfil a supervisory role, it should be carried out by the Agency with the aim to identify deficiencies concerning the equipment, infrastructure, staff, budget and financial resources of Member States as well as their contingency plans to address possible crises at the external borders. Where the Agency identifies deficiencies, the executive director should identify the measures to be taken and recommend them to the Member State concerned as well as set a time-limit within which those measures should be taken. If the concerned Member State does not follow the recommendation and does not adopt the necessary measures within a set time-limit, the Agency's management board should decide upon further steps (Art. 12 of the EBCG Regulation). Third, while the former Frontex had a right to deploy its liaison officers in the third countries only<sup>152</sup>, the

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<sup>147</sup> ROSENFELDT, Herbert. Establishing the European Border and Coast Guard: all-new or Frontex reloaded? In PEERS, Steve (ed.). *EU Law Analysis Blog*. [online 2016-10-16]. [cit. 2018-11-11]. Available at <<http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>> .

<sup>148</sup> Art. 3(2) of the EBCG Regulation.

<sup>149</sup> Art. 8(1)(b) of the EBCG Regulation.

<sup>150</sup> Management Board consists of one representative of each Member State and two representatives of the Commission, all with a right to vote.

<sup>151</sup> Art. 4(3) of the EBCG Regulation.

<sup>152</sup> Art. 14 of the Frontex Regulation.

ECBGA has gained, in addition, a right to deploy liaison officers to the Member States to monitor and report to the executive.<sup>153</sup>

**Information and data** – the Member States possess most of the relevant data on the situation, trends and possible threats at the external borders and in the field of return, as well as statistical and operational data collected in relation to the implementation of the Schengen acquis, which they are obliged to provide the Agency. In practice, the ECBGA has gained access to consult SIS, which the former Frontex did not have, but only the Member States can perform both, enter data to SIS and consult them. Thus, the ECBGA is dependent here on the Member States Regarding the data collection and providing information.

**Dependency upon request and consent** – Dependence of the Frontex Agency upon a formal request submitted by the capital of the concerned Member State was challenged when Greece did lodge a formal request for support, even though facing an extreme pressure at its external border management. Here we can identify rather a competitive optics, as it was not perceived as an administrative deficiency but rather as the intentional omit with a political background. In result, seemingly from recitals 28 and 29, the ECBGA was awarded by its own operational initiative to some extent. Speaking of joint operations and rapid interventions and their organisation, launching, coordination and deployment, the consolidated Frontex Regulation refers solely to request of the Member State concerned, i.e. the Agency's involvement is upon request of the Member State concerned<sup>154</sup>. However, the EBCG Regulation provides the Agency to perform *its own initiative*.<sup>155</sup> That implies, the ECBGA can perform some initiative independently on the Member State concerned, however, it is necessary to review how what Treaties say and if the Member State concerned itself can limit (brake) the ECBGA independent performance on joint operations and rapid interventions. First, Art. 4(2) TEU lies limits due to territorial integrity and retaining safeguarding national security in hand of the Member States, second, Art. 72 TFEU bans ECBGA to overtake Member States' powers of control or to require Member States to carry out a particular operation.<sup>156</sup> Concerning the limits laid down in the EBCG Regulation, the ECBGA seems to be limited by the conditionality of agreement of the Member State concerned. Regarding the consent on joint operations, the

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<sup>153</sup> Rec. 20, Art. 8(1)(c), Art. 12 of the EBCG Regulation.

<sup>154</sup> Comp. Art. 8 of the Frontex Regulation.

<sup>155</sup> Comp. For instance Rec. 28 and 29 of the EBCG Regulation.

<sup>156</sup> Comp. PEERS, Steve. The Reform of Frontex: Saving Schengen at Refugees' Expense? [online 2015-12-16]. [cit. 2018-11-11]. Available at: <<http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>>.

Recital 24 contains a ‘*should*’ clause only on the mutual agreement, which might be misleading at first glance<sup>157</sup>, however, the legally binding text in Art. 16 already provides for a hard conditionality ‘*shall*’. Thus, both sides shall agree upon the operational plan of the joint operation. Regarding the consent on rapid intervention, Art. 15(2) and Art. 17(1) affirm the necessity of the request of the Member State, as well as Art. 17(6) refer to mutual preparation of the operational plan of a rapid intervention and thus implies agreement by the Member State concerned. This may be result of political competitive bargaining, but also the administrative correction as it is hardly to imagine how the EBCGA would operatin in the Member State concerned if it would be agaist.

**Operational planning** – Regarding the joint operations at the external borders, the executive director, in cooperation with the host Member State, reviews resources needed and then draws up an operational plan for. The Agency is here dependent on information provided by the Member State (cooperative administrations but perhaps competitive political interests). Regarding the rapid interventions, the executive director *together with a* the Member State concerned shall draw up an operational plan (cooperative administrations but projection of competitive political interests is possible). Adoption of the operation plan conditioned by agreement of the executive director, the host Member State, and consultation with the participating Member States. The plan is binding for all the participating parties.<sup>158</sup> When we compare the division power between the Member State concerned and the Agency, there is no change between the Frontex Regulation (Art. 3a) and the EBCG Regulation (Art. 16).

**Command** – the host Member States is responsible to instruct the European Border and Coast Guard teams during their deployment, where the EBCGA can provide its opinion. However, the host Member State shall take EBCGA’s views into consideration and follow them to the extent possible<sup>159</sup> and it is the Agency’s executive director is in charge to terminate the joint operation while the Member State concerned shall be only informed in advance.<sup>160</sup> Having analysed division of competences concerning command and instructing, the division of competence was the same by the former Frontex and there is no new shift of power from the Member State concerned towards the EBCGA.<sup>161</sup>

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<sup>157</sup> Explanatory recitals usually avoid normative language.

<sup>158</sup> Ibid, Art. 16.

<sup>159</sup> Ibid, Art. 21.

<sup>160</sup> Ibid, Art. 25.

<sup>161</sup> Comp. Art. 3a(1)(f) and Art. 3c of the Frontex Regulation, and Art. 21 of the EBCG Regulation.

**Administrative decision** - I agree with Rosenfeldt that it is important to ask to what extent the EBGGA participating in the external border management via its officers influences or determines the Member States' decisions on entry, to afford international protection or to return migrants might be.<sup>162</sup> As the EBCG Regulation explicitly retain primary responsibility for the management of their sections of the external borders in hand of the Member States, as we have seen in Chapter 3 that the Member State takes final decision, and this continuity has not been challenged by the EBCG Regulation, as well as with respect to application of national jurisdiction, it is possible to conclude that *the final decision is taken by the Member States* and any influence of the EBCGA would be rather of informal character.

**A need of urgent response, compliance and enforcement** - Considering the situational context outlined in the Chapter 4.2., crisis management and right to intervene upon an implementing at the expense of the sovereignty of the Member State concerned was a crucial element of the debate on further development of the external border management. Here we can observe the tensions between the ambition of the Commission to support supranational elements in response to the state-centric behaviour of Greece, and the national brakes used by the Member States within the interinstitutional bargaining, as well as seeking for a better regulation which would cope with the similar situation in the future. The EBCG Proposal suggested that where a Member State does not follow the decision taken by the EBCGA management board to comply with the recommendation to remedy its vulnerabilities (Art. 12 of the EBCG Regulation), or when a Member State is not able to cope with the pressure at its external border to such an extent that it risks putting in jeopardy the functioning of the Schengen area, *the Commission* may adopt an implementing act, identifying the measures to be implemented by the Agency and requiring the Member State concerned to cooperate with the Agency in the implementation of those measures.<sup>163</sup> However, this raised concerns and reservations by the Member States on States' sovereignty safeguards, also laid down in Art. 4(2) TEU and Art. 72 TFEU. According to data provided by the Member States to IPEX<sup>164</sup>, understating the common interest of maintaining the functioning Schengen Area without internal borders, having in mind that some Member States had used, the Member States mostly welcomed a supranational supervision of the Member States constituting and having responsibility for the external border, and mostly endorsed the shift from intergovernmental system towards supranationalism. However, they did not agree this supervision to be conducted by the purely supranational

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<sup>162</sup> ROSENFELDT, Herbert. *Establishing the European Border and Coast Guard...*

<sup>163</sup> Ibid, Art. 18.

<sup>164</sup> Comp. ANNEX 1.



Commission. In provided opinions, the Member States argued that even an emergency does not justify to delegate power to the Commission and the Member State should have get at opportunity to present its arguments. Thus, some Member States proposed in their opinion, *the Council* should adopt a decision instead, allowing an intergovernmental dialogue.<sup>165</sup> In result, the supranational control would be triggered, with the aim to protect a common interest and the dependent Member States, however, *by an intergovernmental organ, but by qualified majority voting*, as it is (a) an AFSJ shared policy, (b) delegated competence, allowing to outvote the Member State concerned. Within the ordinary legislative procedure, such approach was endorsed and reflected via legislative amendments. The adopted EBCG Regulation provides in explanatory note in Recital 28, that *‘the implementing power to adopt such a decision should be conferred on the Council because of the potentially politically sensitive nature of the measures to be decided, which are likely to touch on national executive and enforcement powers’*.<sup>166</sup>

**Reintroduction of internal border controls** – Despite empowering the Agency with new supervisory and executive tasks, realizing the dependency upon request or agreement provided by the Member State concerned, and limits set by Treaties, the new Schengen Border Code 2016/399 and the EBCGA Regulation take over from the Schengen Border Code of 2006<sup>167</sup> a specific procedure for those situations where exceptional circumstances put the overall functioning of the area without internal border control at risk. It provided an additional amendment to the Art. 29 of the new Schengen Border Code 2016/399. The referred legislations introduced new reactive mechanism, when a Member State does not take the necessary measures in accordance with a decision of the management board to remedy its deficiencies and vulnerabilities, or when a Member State facing specific and disproportionate challenges at the external borders has either not requested sufficient support from the Agency or is not taking the necessary steps to implement actions under Articles 15, 17 or 18 covering the joint operation, rapid intervention or migration management support teams. The Member States may request the Commission to – or the Commission itself may - submit a proposal to the Council for a recommendation that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. The Council should adopt the decision as a last

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<sup>165</sup> Comp. Ibid.

<sup>166</sup> Rec. 28 of the EBCG Regulation.

<sup>167</sup> Comp. Art. 25 and Art. 26 of the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105, 13.4.2006, p. 1–32, and Art. 29 of the SBC Regulation 2016/399 and Rec. 28 and Art. 80 of the EBCG Regulation.

resort and as a measure to protect the common interests. The mechanism seems to be consolidates on its procedural level.<sup>168</sup>

### 4.3. Hypothesis confirmation and conclusion

First, despite the existence of previous explorations of further policy development of the external border management, the policy was developed with the aim to respond to deficiencies and dysfunctions revealed by the migration/refugee crisis. Having introduced the situational context, as well as reviewed opinions of the Member States provided in IPEX<sup>169</sup>, the goal was indeed to find a better regulation mechanism.

Second, on the basis of the comparative analysis of the Frontex Regulation and the EBCG Regulation, we can conclude, the supranational elements were reinforced in the external border management, mainly in terms of control and supervisory, secondary in terms of executive (e.g. operational planning and deployment of EBCGA resources), which is however dependent on the request or agreement by the Member State concerned. As the supranational elements were reinforced, it is possible to conclude there is a shift on the scale from intergovernmentalism towards supranationalism via this optics.

Third, despite a reinforcement of the supranational elements, the policy remain dependent on the Member States. The Member State truly stay in charge of its external border because of (1) having at their disposal fundamental safeguards (Art. 4 TEU and Art. 72 TFEU), (2) their request or consent for EBCG to operate is required, (3) the Member States command and instruct the (4) they provide access to their infrastructures (5) they take the final decision and the fundamental decision is made at the intergovernmental level.

Forth, if there is a common objective, the better regulation should be understood as common interest of all parts – the Union, the Member State concerned and the rest of the Member State. When it comes to the administrative level, we can understand the interrelation as supranationalism-intergovernmentalism, as the interactions between the supranational and intergovernmental elements seems to be conceptual and complementary. Well-functioning management of the external border is a common goal, thus although a Member State have at its disposal the conditionality of the consent and request and the EBCG Regulation does not exceed the central role of the Member State. However, if there is a supranational supervision and assessment carried out by EBCGA, the chance the Member State concerned would did not

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<sup>168</sup> Art. 29 of the SBC Regulation 2016/399 and Art. 80 of the EBCG Regulation amending this Article.

<sup>169</sup> ANNEX 1.

provide an agreement without having at least tried to cooperate (e.g. communicate and interact with the Agency or in the Council) is rather low. This reinforcement of mutual interaction should therefore lead towards a better regulation and optimal governance of the external border management. The crucial observation is, that the political optic seems rather support the competitive reading of the interplay of supranationalism and intergovernmentalism in comparison to the regulatory development in terms of administration. However, this tendency seems to be cut down by the followed objective towards the complementary interplay produced by the administrative level of policy development and function.

It is important to realize that the theory was developed as well as confirmed through a sectoral policy rather of administrative character, where reinforcing one (the Agency) does not have to necessarily need to weaken the other (the Member State concerned). If we focus on aspect management and administration of the external border management, the interplay should be perceived through the complementary optics. Via a method of induction, we could ask, whether the same approach might be applicable on the political higher aspects of the external border management or not. If a consensus on the followed objective is not firm or missing, that approach is likely not be applicable on the political aspects (e.g. international cooperation having political implications). To conclude, the paradigm of complementary supranationalism-intergovernmentalism conceptual approach seeking a better regulation may be confirmed, while the scale-type competitive approach should not be denied. I would rather suggest that while the competitive optics apply to the political part of the policy making, the complementary approach applies to the administrative cooperation, both serving to better understand the dynamics between the supranationalism and intergovernmentalism.

## **5. PROJECTION ON FURTHER POLICY DEVELOPMENT OF EXTERNAL BORDER MANAGEMENT**

The external border management is a very complex policy system of rather of state-centric intergovernmental character where the Union works primary as an normative regulator, supervisor and coordinator, and the Member State as executive implementor. Until the border management was rather of administrative character, this approach seemed sufficient. However, the topic gained a political attention first through the migration/refugee crisis, and additionally as the nexus between the internal and external dimension and the AFSJ, CFSP/CSDP and other external policies has strengthened. The CFSP and CSDP are considered to have a political sensitivity, as well as the debate on using other external policies such as development policy as a political tool.

It seems, that both approaches, a complementary one capturing the administrative interplay, and the competitive one capturing the political interplay, will interact in the further development of the external border management policy. The interactions might be brought into line by a strong horizontal objective. It corresponds also to the new reading of the latest EU governance development, observing the growing role of the European Council. To have a firm objective, it should be defined at the highest level – the strongly intergovernmental European Council, where rather than consensus unanimity would be provide the firmness. The more complex the horizontal objective is, the firmer political background provided by the European Council the Commission would require to be developed. This also correspond with the reading of the new post-Lisbon “paradox” suggesting the interdependence between supranationalism and intergovernmentalism – while the Lisbon Treaty enforced and introduced more supranational elements, role of the European Council gained more significance in the process of European integration and decision making.

However, the interplay the between administrative approach and the political seems to be also create an obstacle of the current debate how the nexus between two policies. It is therefore legitimate to ask if the nexus should be further developed, as well as how the policies involved should be developed and how they would influence each other. To provide an specific example – if the Member States would agree upon the qualified majority voting in CFSP/CDSPP concerning civil operation and building the supranational structures (developed for instance from the current PESCO<sup>170</sup>), it would make the civil naval operation in the Mediterranean more European, it may then result in the supranationalist approach of the distribution of people

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<sup>170</sup> Permanent Structured Cooperation (PESCO), an enhanced cooperation under CDSPP.

crossing the border to share the burden of the asylum, the EBCGA would get a stronger role in return as well as the Union would get a stronger position in the conclusion of readmission agreement, which would enhance supranationalism in the further cooperation with the third countries. If the approach to further policy development would be lead through AFSJ and administrative perspective via opting for creating external administrative centre, the administrative perspective might create a stronger pressure on political integration in CFSP/CSDP and other external policies, such as for instance the tool of imposing un-block conditionality on economic and development cooperation, which may challenge particular national interests. This dilemma can be for instance currently observed under the debate on the new multiannual financial framework, proposing greater allocations towards the EBCGA by budgetary cutting so-called traditional policies (cohesion and agriculture), in order to increase its staff capacity. This projection is arising a question, if increasing EBCGA capacities would be beneficial and what implications on the supranational and intergovernmental interplay it would have.

## CONCLUSION

The thesis aims to explore the central topic for the European governance and European integration and capture its development from the holistic perspective concerning the subject matter, as well as the role of the Union and the Member States in the policy development. Despite being on top of the agenda in Brussels and the Member States, as well as one of the shaping topics for the new, upcoming election period 2019-2024, understanding the in this field is rather missing.

Therefore, the first two chapters provide a descriptive analysis to understand the external border as subject matter. The finding is, the external border is composed by the external border of the Member States applying the Schengen acquis, therefore it is legitimate to speak of the Schengen external border. The second chapter attempts to capture the new understanding of the structure of the external border management, which is composed from various policies. The policies can be categorized as JHA/AFSJ policies, namely visa policy, asylum policy, and the Schengen cooperation, the CFSP/CSDP and the other external policies and international cooperation. The third chapter attempts to capture the system of the external border management from the perspective of the Union and the Member States via a widespread interpretation of the intergovernmental paradigm and the supranational paradigm as opposing, competitive (antagonistic) phenomena on one scale. Under this optics, the interrelation between the supranationalism and intergovernmentalism generates a question upon potential and limits between these two opposites. This optics prefers a potential of the Union to develop the external border management in a positive way, while the Member States have at their disposal use the intergovernmental limits. Even though the Commission may wait for the demand produced by the Member States, the bargaining itself among the Member States or even finding a unanimity subsequently tend to stronger European cooperation, producing a Europeanization effect (as seen by Howort, emphasizing the intensity of interactions between the supranationalism and intergovernmentalism in the European integration process). Here I would argue, that while the intergovernmentalism may spill-over to supranationalism, it will not be valid vice versa.<sup>171</sup> However, the European integration process (tending towards supranationalism) is limited by its dependency to be activated, to succeed in the legislative process<sup>172</sup>, and by the existing

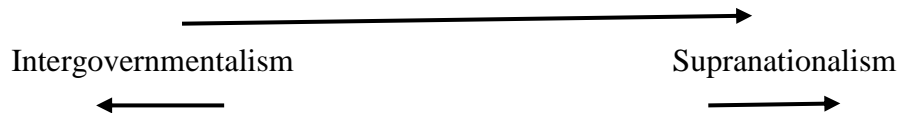
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<sup>171</sup> It would be rather an implosion as could be identified in Brexit, where such withdrawal generates rather an imploding effect.

<sup>172</sup> For instance, the proposal on the new Dublin system and the political dynamics involved in policy development in that area, which used to be perceived rather of administrative character to avoid so-called '*asylum shopping*' before its politization under the migration/refugee crisis.

safeguards for the Member States. In this perspective, it is possible to suggest, however, it does not mean the competitive antagonistic perspective should be forgotten, it plays a crucial role in the interplay.

**Figure 11: Corrected scale-type approach to interrelation between intergovernmentalism and supranationalism**

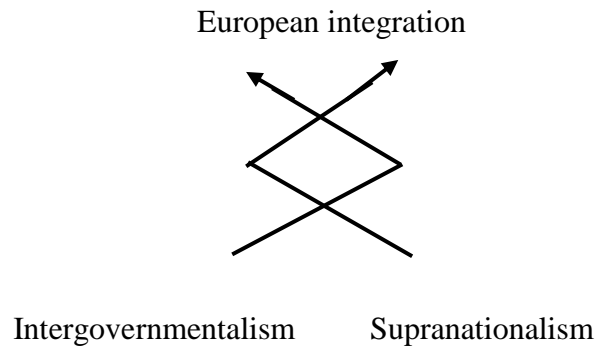


Nevertheless, this approach does not seem to capture the interrelation between the supranationalism and internationalism sufficiently. Therefore, Chapter 4 reviews a re-thinking concept, which does not deny the scale-type approach but rather identifies an additional interplay between the two paradigms. At the administrative level, it is possible to identify the complementary conceptual interplay between the two paradigms, while at the political level of policy making, the scale-type competitive approach would be rather applicable. Neither the approaches nor the paradigm exclude each other. However, it seems, the more political the policy development becomes, the more competitive it will be, and the firmer horizontal objective it will require to pass the legislative process. This creates a pressure on the level of European Council, which seems to be affirmed by the debate on the new, post-Lisbon EU governance, where besides the increase of supranational elements, also the significance of the European Council seems to gain on importance.

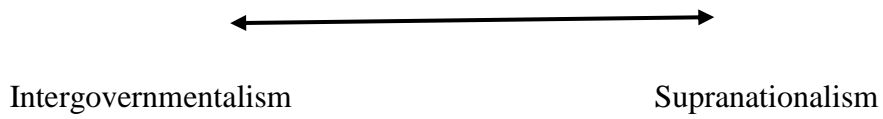
A methodological grasp of the interplay between intergovernmentalism and supranationalism remain problematic, especially in the conceptual understanding, as it is difficult to identify the particular dependencies between the variables, the way of their interplay, as well as to measure the outcome of their interplay. I believe it is legitimate to claim that none of the approaches excludes each other, they have rather a corrective effect. I would propose a following model which basically combines all the perspectives we have learned:

**Figure 12: Suggestion of perspectives to understand the interrelation**

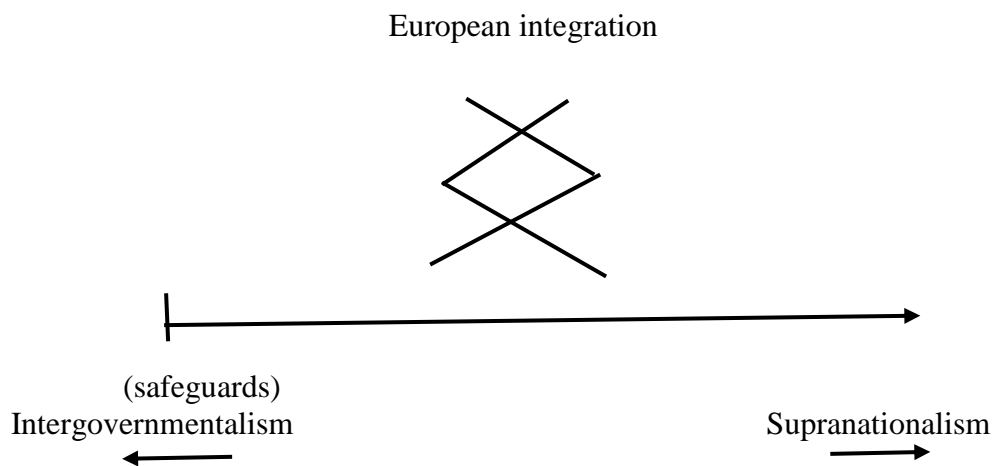
A) Administrative interrelation:



B) Political interrelation:



C) Complex model of interrelation:





A further recommended research concerning the interrelation between supranationalism and intergovernmentalism should focus on (1) methodology development; (2) the interplay of the complementary and competitive approach; (3) verification and applicability in other shared policy areas. Concerning the external border management, I would recommend further research on (1) the nexus between the JHA/AFSJ policies, CFSP/CSDP policies and other external policies, (2) administrative and political interplay in further policy development. The thesis has explored a policy external border management capturing the policy itself by explaining the character of the policy, as well as the interrelation between supranationalism and intergovernmentalism. It should provide a contribution to theorizing the process of the European integration by developing a new model on understanding interrelation and interplay between supranationalism and paradigms, as well as it should contribute to capturing and understanding the ongoing debate on further policy development in field of external border management.

## REFERENCES

### Monographies

DE BRUYCKER, Phillipe and LABAYLE, Henri. *The Influence of EJC and ECtHR case law on asylum and immigration*. Study PE 462.438, Policy Department C, European Parliament. © European Union, 2012.

GUILD, Elsbeth et col. *Internal border controls in the Schengen area: is Schengen crisis-proof?* Study PE 571 356 for the LIBE Committee, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs - Civil Liberties, Justice and Home Affairs. © European Parliament, 2016, p. 124.

RIJPMAN, Jorrit. *The proposal for a European Border and Coast Guard: evolution or revolution in external border management?* Study PE 556.934 for the LIBE Committee, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs - Civil Liberties, Justice and Home Affairs. © European Parliament 2016, p. 40.

SVOBODA, Pavel. *Úvod do evropského práva*, 5<sup>th</sup> Edition. Praha : C.H. Beck, 2013, p. 432.

SCHÜTZE, Robert and TRIDIMAS, Taki et coll. *Oxford Principles of the European Law*. Volume 1: The European Union Legal Order. First edition. Oxford University Press, 2018. © The several contributors 2018. ISBN: 9780199533770 p.p. 1 440, p.198.

### Academic Contributions

BLOCKMANS, Steven. Differentiation in CFSP: Potential and Limits. In (ed.), *Differentiated Integration in the EU. From the Inside Looking Out*. Brussels, Centre for European Policy Studies (CEPS), 2014, pp. 46-56, p. 49.

FERNANDEZ, Maité. *The EU External Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts*. In MORENA-LAX, Violeta and PAPASTAVRIDIS, Efthymios (ed.). *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*. International Refugee Law Series, Volume: 7, 2016, pp. 381-407.

OOSTEROM-STAPLES, Helen. Has Europeanization silenced criticism on intergovernmental external border cooperation. In GUILD, Elsbeth and MINDERHOUD, Paul (eds.), *The first decade of EU migration and asylum law*. Leiden, Boston: Brill, Martinus Nijhoff Publishers, 2011, p. 93-126.

SCHOUT, Adriaan and WOLFF, Sarah. The “Paradox of Lisbon” Supranationalism-Intergovernmentalism as an administrative concept’. In LARSEN, Finn. (Ed). *The Lisbon Treaty: Institutional Choices and Implementation*. Ashgate, 2012, p. 328, pp. 21 – 38.

VAN ELSUUWEGE, Peter. *The duty of sincere cooperation (Art. 4 (3) TEU) and its implications for the national interest of EU Member States in the field of external relations*. Forthcoming in: VARJU, Marton (ed.), *Between compliance and particularism: Member State interests and European Union law* (Springer, 2018), peer reviewed, 2015, p. 17.

### **Academic Articles**

BICKERTON, Christopher J., HODSON, Dermont, PUETTER, Uwe. The New Intergovernmentalism: European Integration in the Post-Maastricht Era. *Journal of Common Market Studies (JCMS)*, 2015, Volume 53. Number 4., pp. 703–722, p. 712 – 713.

DE BRUYCKER, Phillipe. The European Border and Coast Guard: A New Model Built on an Old Logic. *European Papers*, Vol 1, 2016, No. 2, pp 559 – 569.

GIUMELLI, Francesco. Beyond Intergovernmentalism: The Europeanization of Restrictive Measures? *Journal of Contemporary European Research*, Volume 9, Issue 3 (2013), pp. 390-405.

HOWORT, Jolyon. Decision-making in Security and Defence Policy. Towards Supranational Intergovernmentalism? *KFG Working Paper Series*, No. 25, March 2011, Kolleg-Forschergruppe (KFG) “The Transformative Power of Europe“ Freie Universität Berlin.

MORAVCSIK, Andrew. The European constitutional compromise and the neofunctionalist legacy. *Journal of European Public Policy*, Vol. 12, Issue 2, 2005, pp. 349 — 386, p. 367.

NIEMANN, Arne and SPEYER, Johanna. A Neofunctionalist Perspective on the ‘European Refugee Crisis’: The Case of the European Border and Coast Guard. In: *Journal of Common Market Studies (JCMS)* January 2018, Issue 56 No. 1, p23-p43, 21p.

PEERS, Steve. The Reform of Frontex: Saving Schengen at Refugees’ Expense? [online 2015-12-16]. [cit. 2018-11-11]. Available at: <<http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>>.

POLLAK, Mark A. Theorizing EU policy-making, In POLLACK, Mark A., WALLACE, Hellen, YOUNG, Alasdair (eds). *Policy making in the European union*, 7<sup>th</sup> edition, Oxford: Oxford University Press, 2015, pp. 664, p. 25.

ROSENFELDT, Herbert. Establishing the European Border and Coast Guard: all-new or Frontex reloaded? In PEERS, Steve (ed.). *EU Law Analysis Blog*. [online 2016-10-16]. [cit. 2018-11-11]. Available at <<http://eulawanalysis.blogspot.com/2015/12/the-reform-of-frontex-saving-schengen.html>> .

SCHMIDT, Vivien A. The New EU Governance: New Intergovernmentalism, New Supranationalism, and New Parliamentarism. In *IAI Working Papers, Issue 16/11*. Instituto Affari Internazionali, Rome 2016, p. 16.

### **Academic Theses**

HOKOVSKÝ, Radko. *Border Security of the Schengen Area from the Perspective of the Public Goods Theory*. Prague, 2016. 179 s. Dissertation – Doctoral Thesis (Ph.D.) Charles University in Prague, Faculty of Social Science, Institute of Political Studies. Department of International Relations. Supervisor: doc. PhDr. Běla Plechanovová, CSc, p. 179.

KOUKAL, Michal. *Společná vízová politika EU a právo na odvolání proti zamítnutí žádosti o vízum. Common EU Visa Policy and the Right of Appeal against a Visa Refusal*. Praha, 2017, 220 s. Dissertation Thesis (Ph.D.) Charles University in Prague, Faculty of Law, Department of European Law. Supervisor: doc. Dr. iur. Harald Christian Scheu, Mag. phil., Ph.D., p. 208.

### **Commentaries**

PELKMNAS, Jacques and SIMONCINI, Marta. *Mellowing Meroni: How ESMA can help build the single market*. © CEPS 2014.

Informal commentary of Ms Pavla Novotna, Head of Asylum and Migration Unit, Ministry of Interior of the Czech Republic, provided on the panel debate ‘European borders’ organized by TOPAZ, Wilfried Martens Centre for European Studies, and Konrad Adenauer Stiftung on 25 October 2018 in Prague, Czech Republic.

### **EU Legal Acts**

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, *OJ L 328, 5.12.2002, p. 17–18*.

Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007, and Decision 2005/267/EC.

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L 105, 13.4.2006*.

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation). *OJ L 218/60, 13.8.2008*.

Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) *OJ L 243, 15.9.2009, p. 1–58*.

Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. OJ L 180, 29.6.2013, p. 31–59.

Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 189, 27.6.2014, p. 93–107.

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52.

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJ L 251, 16.9.2016, p. 1–76.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence OJ L 328, 5.12.2002, p. 1–3.

## **EU Documents**

BUX, Udo. Fact sheet – *Management of the External Borders*. European Parliament, 2018.

Council. *Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection*. Brussels, 22 July 2015 (OR. en) 11130/15 ASIM 62 RELEX 633.

Council. *Interinstitutional File 2016/0105 (COD)*, Brussels, 20 February 2017.

Council. *Interinstitutional File 2016/0106 (COD)*, Brussels, 20 February 2017.

Council. *The Schengen Area*. © European Union, 2018, doi 10.2860/2503.

European Commission. *Communication from the Commission to the Council and the European Parliament 'Towards Integrated Management of the External Borders of the Member States of the European Union'*. Brussels, 7.5.2002 COM(2002) 233 final.

European Commission (DG Home). Fact-sheet: *Common European Asylum System*, July 2016.

European Commission (DG Home). Fact-sheet: *Asylum procedures: Reforming the Common European Asylum System*, July 2016.

European Commission. Fact Sheet: THE LEGAL AND PRACTICAL FEASIBILITY OF DISEMBARKATION OPTIONS FOLLOW-UP TO THE INFORMAL WORKING MEETING OF 24 JUNE 2018.

European Commission. *JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Migration on the Central Mediterranean route Managing flows, saving lives*. Brussels, 25.1.2017, JOIN/2017/04 final.

European Commission. *Refugee Crisis: Greece activates EU Civil protection mechanism, agrees Frontex operation at border with former Yugoslav Republic of Macedonia and triggers RABIT mechanism*. Press Release IP/15/6249. [online]. Last update: 2015-12-03. Available at: <[http://europa.eu/rapid/press-release\\_IP-15-6249\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6249_en.htm)>.

Joint Communication on Migration on the Central Mediterranean route Managing flows, saving lives, JOIN/2017/04 final.

Opinion of the Council's Legal Service No. 13491/16.

## **Judgements**

ECtHR: Judgement *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09

CJEU: Judgement *N.S. case* (C-411/10).

CJEU: Judgement *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (Case 9-56).

## **Internet Websites**

*EEAS*. European Neighbourhood Policy (ENP). [online]. Last update 2016-12-21. Available at: <[https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp\\_en](https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en)>.

*EUR-Lex*. European Asylum Support Office. [online]. Last updated: 22.07.2014 [cit. 2018-10-11]. Available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ajl0022>>.

*European Commission*. International Cooperation and Development. [online]. Last update: 2018-11-16 [cit. 2018-11-16]. Available at <[https://ec.europa.eu/europeaid/relations-eeas-eu-institutions-and-member-states\\_en](https://ec.europa.eu/europeaid/relations-eeas-eu-institutions-and-member-states_en)>.

*Europol*. European Migrant Smuggling Centre – EMSC. [online]. © 2018 Europol [cit. 2018-12-11]. Available at <<https://www.europol.europa.eu/about-europol/european-migrant-smuggling-centre-emsc>>.

*IPEX*. [online]. Subsidiarity deadline under COD/2015/0310 2016-03-15 [cit. 2018-05-30]. Available at: <<http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150671.do#dossier-COD20150310>>.

*UNHCR*. Refugees/Migrants Emergency Response. Mediterranean: Greece. [online]. ©2018 UNHCR. Date of data collection: 2016-04-21. Available from: <<http://data.unhcr.org/mediterranean/country.php?id=83>>.

### **Other sources**

BACZYNSKA, Gabriela and KÖRKERMEIER, Tom. Greece threatened with expulsion from Schengen over migration crisis. [online 2016-01-25]. Available at: <<https://www.reuters.com/article/us-europe-migrants-ministers/greece-threatened-with-expulsion-from-schengen-over-migration-crisis-idUSKCN0V315L>>.

COJANU, Gabriela et col. *Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union – ESBG*. Unasis, Final Report Version 3.00 16 June 2014.

EURACTIV. Greece could be kicked out of Schengen. [online 2015-12-03]. Available at: <<https://www.euractiv.com/section/justice-home-affairs/news/greece-told-it-could-be-kicked-out-of-schengen/>>.

Meeting of the Expert Group ‘Management of the External Borders’ in Brussels on 19 - 20 June 2017 on European Integrated Border Management Strategy.

PRATT, Martin. Defining International Boundaries: Concept, Aims and Approaches. In OSCE. *Applied Issues in International Land Boundary Delimitation / Demarcation Practices*. Vilnius, Lithuania, OSCE 2011, pp 8 – 11.

Preparatory and Formal Meeting of the JHA Counsellors, WP Frontiers, 20 February 2018.

TARDY, Thierry. *Operation Sophia Tackling the refugee crisis with military means*. © EU Institute for Security Studies, 2015, doi: 10.2815/1141, p.4.

## **ABSTRACT**

The thesis *Securing Schengen External Border Analysis* provides an explorative and descriptive analysis on the subject matter of external border and its management. It explores how the external border management is governed by the Member States and the European Union through optics of intergovernmentalism and supranationalism. Two approaches on the interrelation between the intergovernmental and supranational paradigms were identified. The first optic was a scale-type, competitive understating of the interrelation between intergovernmentalism and supranationalism. However, this approach seemed to be insufficient to capture the dynamics of the EU governance concerning the external border management, and therefore this approach was challenged by a new understanding of the interrelation. The second optics was a conceptual complementary understanding of the interrelation between intergovernmentalism and supranationalism. Both optics were tested in a recently adopted Regulation EU 2016/1624 establishing the European Border and Coast Guard, with the aim to confirm the second optic, while the first one should not be denied. Both optics seems to be valid, however, the first, competitive one seems to be rather suitable to capture the interrelation between the intergovernmentalism and supranationalism concerning the political aspects of European integration and policy development, the second, complementary one seems to be rather applicable on the administrative level of the European integration policy development. Their targeting should ensure a firm objective of the EU governance whose stability should be ensured by the intergovernmental European Council based on unanimity and consensus. This understanding supports the conviction that, despite the increase in the capacities of transnational elements under the Lisbon Treaty, the role of the European Council for the orientation of European integration and the use of space provided by the Treatise for further integration, is increasing. On these findings, a new theoretical model capturing the interplay between the intergovernmentalism and supranationalism was proposed.

**Key words:** European Union, Member State, Schengen, External border management, European Border and Coast Guard, Border, CFSP, CSDP, European integration, EU Governance, Intergovernmentalism, Supranationalism.



## ANOTACE

Předložená diplomová práce *Securing Schengen External Border Analysis* (Analýza ochrany vnějších hranic schengenského prostoru) poskytuje explorativní a deskriptivní analýzu problematiky řízení zabezpečení vnější schengenské hranice. Dále skrze explorativní a obsahovou analýzu zkoumá, jakou roli sehraává Evropská unie a členské státy při řízení vnější Schengenské hranice skrze optiku mezivládního a nadnárodního paradigma a zkoumá vzájemné vztahy mezi těmito přístupy. Byly identifikovány dva přístupy k vzájemnému vztahu mezi mezivládními a nadnárodními paradigmaty. První optikou pro zkoumání vztahu mezi mezivládním a supranacionálním přístupem bylo pojetí tohoto vztahu jako antagonistické, soutěžní, kdy se jedná o vztah, který lze chápat jako protichůdné elementy. Tento přístup se však při zkoumání tohoto zdá být nedostatečný k zachycení dynamiky EU, a proto byl tento přístup doplněn novým pochopením vzájemných vztahů. Druhou optikou byl zvolen koncepční vzájemně doplňující se vztah mezivládním a supranacionálním přístupem. Obě optiky byly následně promítnuty v nedávno přijatém nařízení EU 2016/1624, kterým se zřizuje Evropská hraniční a pobřežní stráž, s cílem potvrdit druhou optiku, zatímco první by neměla být odmítnuta. Obě optiky se zdají být platné, avšak první, konkurenční se zdá být spíše vhodná k zachycení vzájemného vztahu mezi mezivládním a nadnárodním přístupem v politické rovině evropské integrace, druhá komplementární se zdá být spíše vhodná pro pochopení evropské integrace na administrativní úrovni, přičemž obě optiky působí na dynamiku evropského vládnutí a evropské integrace. Jejich usměrňování by pak měl zajišťovat pevně stanovený cíl, jehož stabilitu by měla zajistit mezivládní Evropská rada na základě jednomyslného rozhodování a konsensu. Takové pojetí dynamiky podporuje i teze, že přestože v rámci Lisabonské smlouvy došlo k navýšení kapacit supranacionálních prvků, zároveň se však zvyšuje role Evropské rady pro směřování evropské integrace a využití nebo nevyužití dalšího prostoru v rámci Smluv. Na základě těchto nových poznatků byl navržen teoretický model zachycující vzájemný vztah mezivládních a nadnárodních prvků.

**Klíčová slova:** Evropská unie, Členský stát, Schengen, Zabezpečení vnější schengenské hranice, Evropská pobřežní a pohraniční stráž, Společná zahraničních politika, Společná bezpečnostní politika, Evropská integrace, Evropské vládnutí, Intergovernmentalismus, Supranacionlismus.

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## ANNEX 1

Opinions of the Member States on Proposal on EBCG, COM (2015) 671 final<sup>173</sup>:

EU Member State	General position on proposal on EBCG	Reservation	Commentary
<b>Austria</b>	No important information to exchange. No decision, no parliamentary security or veto on subsidiarity adopted by the Austrian National Council or Austrian Federal Council.		
<b>Belgium</b>	Favourable.	-	-
<b>Bulgaria</b>	No information available.		
<b>Croatia</b>	No important information to exchange and no veto on subsidiarity.		
<b>Cyprus</b>	No information available.		
<b>Czech Republic</b>	<p>The Senate supports the proposal and reinforcement of the Agency.</p> <p>The Chamber of Deputies welcomes the proposal.</p>	<p>Art. 18: (intervention) The Senate:</p> <ul style="list-style-type: none"> <li>▪ asks for clarification on Art. 18,</li> <li>▪ considers it disproportionate and questionable with regard to Article 4(2) TEU</li> <li>▪ is convinced that such a politically serious measure cannot be decided by the Commission and must be left to the agreement in the Council of the EU.</li> </ul> <p>The Chamber of Deputies (and the Czech Government) asks for clarification of the concept of shared responsibility, and especially of the role of the EBCG concerning its presence on the territory of the Member States on the basis of the Commission's implementing decisions.</p>	<p>The Senate that the proposed measures may not be really effective in terms of reducing migration pressures and at the same time may lead to Member States shifting the responsibility for protecting their borders to the Agency.</p> <p>According to Chamber of Deputies, EBCG must not interfere Art. 72 TFEU.</p>
<b>Denmark</b>	No information available.		
<b>Estonia</b>	No information available.		
<b>Finland</b>	Supports reinforcement of the Agency.	<p>Art. 18: The Member States retain responsibility for external border management, the Finnish government does not support shift of the competences on the EU level. The EBCGA operating in a Member State shall be subordinated to its control.</p> <p>As occurrences from 2015 revealed, the Union should have means of imposing an obligation on a Member State to cooperate with the EU agencies and other Member</p>	<p>The Agency should be given sufficient competences to conduct risks and vulnerability assessment.</p> <p>The government welcomes the fact that all Member States are obliged contribute in the Rapid Reserve Pool as well as other activities coordinated by the Agency participation would be more mandatory.</p>

<sup>173</sup> Based on documents from IPEX Database, available at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150671.do#dossier-COD20150310>. Arrangement of national governance system is not taken into account for the purposed of the Thesis.

		States in situations where the functioning of Schengen is jeopardized. If the concerned Member State does not remedy, Finland would propose decision to be adopted by the Council instead of the Commission.	
<b>France</b>	Welcomes	Art 18: Supports implementation after a decision of the European Council by a qualified majority, in order to give the most possible legitimacy to this intervention in a crisis situation;	Desires a clear indication whether or not Frontex can intervene in international waters, or even in the territorial waters of a third State.  Requests that Frontex's competences for its operations in the international waters concerned be clearly specified, international agreements to be concluded with neighbouring third States in order to allow the necessary interventions in their territorial waters, for the protection of human beings, the fight against smugglers and the security of the external borders of the Union.
<b>Germany</b>	No important information to exchange and no veto on subsidiarity.		For Germany it is essential that the reinforcement of external borders is also accompanied by resettlement programs.
<b>Greece</b>	No important information to exchange and no veto on subsidiarity.		Greece warns that any new proposal should respect the interests of the Member States and their privileges, especially with regard to security and migration issues.
<b>Hungary</b>	No important information to exchange and no veto on subsidiarity.		
<b>Ireland</b>	No information available.		

<b>Italy</b>	Favourable opinion.	Art. 18: reservations, with respect to the proportionality principle. the agreement of the Member State involved in decisions under Art.18 is the needed to acquire whenever possible.	<p>Clearer division of competences between the EBCGA and the Member States.</p> <p>Ad hoc European support mechanisms for domestic management of migrants for the purposes of reception and integration in the social fabric of Member States should be developed.</p> <p>Greater coordination with the CSDP is needed.</p> <p>Member States not suffering significant migratory pressure at the borders should be involved more extensively in the formation of a rapid reserve pool under Article 19(5).</p> <p>Stricter procedures should be put in place regulating Member States' contribution to "joint operations" under Article 19(3) and the secondment of national experts under Article 19(8).</p> <p>Closer work with the Member States concerned in conducting vulnerability assessments under Article 12.</p>
<b>Latvia</b>	No information available.		
<b>Lithuania</b>	No important information to exchange and no veto on subsidiarity.		
<b>Luxembourg</b>	No important information to exchange and no veto on subsidiarity.		
<b>Malta</b>	No information available.		
<b>Netherlands</b>		The House of Representatives expressed reservation due to Art. 18.	
<b>Poland</b>	Supports.	<p>Art. 18: Doubts about the possibility of European Border Guard intervention even against the will of Member States concerned.</p> <p>The decision on launching an intervention by the European Border Guard in a Member State should be based on an implementing decision of the Council, and not of the Commission. Such a solution would guarantee that the</p>	The Regulation should provide help to the state that is unable to exercise effective control, but, on the other hand, will not violate the sovereign rights of such a state to protect its own borders.

		Member State concerned has the possibility to participate in the decision and to present its arguments.	
<b>Portugal</b>	Supports the creation of the European Border and Coast Guard important for the maintenance and reinforcement of the Schengen area.	Art. 18: It is, however, essential to ensure respect for each state's territorial sovereignty.	This initiative does not violate the principle of subsidiarity but it violates the principle of proportionality.  It should be clear that in the context of the contribution of Member States to reserve these human resources, their capabilities and needs to safeguard their own borders should be taken into account.
<b>Romania</b>	Supports setting up the European Border and Coast Guard Agency, which is equipped with new instruments and also supports sharing the responsibility in the management of the external borders.	Art. 18: Chamber of Deputies and the Senate considers and underlines that the emergency cannot justify adopting and implementing the European Commission's acts without consulting the Member States.  The fact that a decision of the Agency Executive director constitutes an obligation for a Member States is considered sensitive and doubtful.	Reasserts the support for the Agency's prerogative to initiate and to involve directly and substantially in the migrants' return operations, but notes the prevalent role of the Member States in the field.  Concerning mandatory quota pooling potential needs, institutional deadlocks should be avoided.
<b>Slovakia</b>	Supports.	No essential reservations.	Highlighted that EBCG operates on 'external' borders.  Suggest replacing "irregular" (crossing, migration...) by "illegal". <sup>174</sup>
<b>Slovenia</b>	No information available.		
<b>Spain</b>	No important information to exchange and no veto on subsidiarity.		Concerns on sovereignty reduction.
<b>Sweden</b>	No important information to exchange and no veto on subsidiarity.		
<b>United Kingdom</b>	Not participating in Schengen acquis, nevertheless, scrutiny reservation.	Reservations on Art. 18.	

<sup>174</sup> The term „irregular“ in context of border crossings or migration has been being recently replaced by the term „illegal“ in the EU acquis. Such replacement may be considered as another element enhancing securitization of migration and external border management.