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Fabian Lutz

Practical Guide to Schengen Law

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Foreword

It was rather unlikely that an idyllic Luxembourgish town on the river Moselle would become a household name across Europe and beyond. And yet, that is precisely what happened to the municipality of Schengen for the sole reason of its geographic proximity to where the borders of France, Germany and Luxembourg meet. At this location in 1985, representatives of the three above-mentioned states, together with Belgium and the Netherlands, signed an essentially political commitment gradually to abolish border checks. Participation of the Benelux countries was facilitated by the internal travel area they had established 25 years earlier.

One of the reasons why ‘Schengen’ turned into a household name are ambiguous relations with the European project, both historically and at present. Not all Member States of the European Union have abolished internal border controls amongst each other, whereas several associated countries have joined the venture. The result is an almost bewildering complexity of the legal material even experts struggle to comprehend. The *Practical Guide*, written by Fabian Lutz, provides the reader with a valuable and timely compass to chart this difficult legal terrain. In doing so, it unpacks what appears to be a paradox: the seemingly uniform ‘Schengen area’ is defined by underlying asymmetries from a legal perspective.

The designation of the volume as a *Practical Guide* aptly designates the essence of the contribution. Lutz is not concerned with the political assessment or a theoretical enquiry, even though a thorough understanding of historic processes defines all five chapters. His focus of attention is the legal-doctrinal conundrum of how to define the Schengen acquis, with regard to both its substantive scope (subject areas covered) and its variable geometry (participating countries). These questions will primarily be of interest for practitioners and legal academics working on one or several segments of the Schengen law. The book is by far the most comprehensive, detailed and reliable description of the topic under analysis. It deserves, as a result, to be the primary point of reference in the years to come.

Fabian Lutz is ideally placed to present readers with an authoritative statement of the scope of the Schengen law. He has worked within the European Commission’s DG Home Affairs for more than two decades, thus developing an intimate knowledge of core elements of the Schengen law and the practical difficulties its

demarcation can raise, notably with regard to border controls (Schengen Borders Code Regulation) and irregular migration (Carrier Sanctions Directive, Return Directive). The meticulous reconstruction of the status of all measures pertaining to the Schengen law, as well as the ‘lost children’ of former Schengen instruments, bears testimony to his insider knowledge of a Commission official.

At the same time, the *Practical Guide* is more than a reconstruction of the legal status quo. Lutz charts the evolution of the Schengen acquis over the past 40 years with an emphasis on the overlap and occasional tensions between inter-state cooperation and the EU institutions. In doing so, the book presents a formidable case study of how path-dependency and context-specificity define many critical areas of EU activities. There is, in other words, no master plan behind the Byzantine status quo, which, to the contrary, may reflect pure bureaucratic pragmatism. Just one example: how can we explain that some topics have never been discussed within the Schengen framework, even though they are, conceptually or practically, related to the abolition of internal border controls? National officials negotiating the original Convention Implementing the Schengen Agreement deemed it too complex and time-consuming to discuss these matters.

From a methodological perspective, the book is a doctrinal reconstruction of the legal material, which, however, goes far beyond what many other authors are doing. Lutz painstakingly demonstrates that ‘desk research’ can entail a veritable exercise in detective work. Throughout the chapters, he unearths documents illustrating the drafting history of specific instruments very few people are aware of, thus shedding light on the path chosen. In addition, Lutz conducted interviews with 25 ‘Schengen veterans’ who have worked on the subject matter from the late 1980s onwards. Chapter 5 summarises the outcome of these interviews, which also inform the remainder of the book. This contemporary legal history reaffirms the idiosyncrasies of the Schengen law as a product of path-dependency. It benefited from the interdisciplinary atmosphere as an ‘EU fellow’ at the European University Institute in Florence. This allowed Lutz to put into writing his expertise and the outcome of scrupulous research. Anyone trying to understand the present will benefit from the *Practical Guide*.

Konstanz, Germany

Daniel Thym

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Chapter 1

Introduction



1.1 Purpose and Structure of This Guide

Schengen law is legally complex and, at the same time, foundational for the free movement objectives of the European Union. This “Practical Guide to Schengen Law” seeks to explain the specific features of Schengen law and its differences from normal EU law. It focuses on the territorial scope of application of Schengen law (variable geometry) and on the determination of the substantive scope of the Schengen acquis. It also includes replies to frequently encountered practical questions arising in that field.

This guide aims to be a reference document for legal and policy experts in their daily work on Schengen-related matters. Following a brief introduction (this chapter), the guide describes the historical development of Schengen (Chap. 2), the substantive scope of the Schengen acquis as it presents itself in 2024 (Chap. 3) and the territorial scope of application of the Schengen acquis (Chap. 4). It also includes a summary of the outcome of research interviews with “Schengen veterans,” i.e., officials who had worked in this field in the early days of Schengen and who could still be reached and interviewed in 2022 and 2023 (Chap. 5). The research questions posed to these veterans focused on topics on which few or no replies can be found in official documents or academic literature and included the question “Why were certain subject matters considered as Schengen-related and others not, and why has this distinction changed in the course of years?” The result of these key informant interviews facilitate understanding of the context of certain legal questions discussed in Chaps. 2, 3 and 4 of this book. In its conclusions (Chap. 6), the guide summarizes the most relevant findings and suggests possible options for reducing legal complexity in the field of Schengen law.

The author is working in the European Commission’s Directorate-General Home Affairs. All views expressed in this article are purely personal and do not necessarily reflect the views of the European Commission.

The legal and factual description in these chapters is complemented by text boxes, with concrete and practical questions and answers on Schengen. A particular effort was made to provide the user with references to Schengen related data/information that cannot be easily found on the most frequently used EU legal websites (the European Union EUR-Lex website; the Court of Justice of the European Union CURIA website; the Official Journal of the European Union) and that may only be found at little known or little noticed other websites.

In addition to its descriptive function, this guide also aims at closing a gap in the scholarly analysis of Schengen. The substance of the Schengen *acquis* has already been subject of numerous publications, with specific emphasis on: border controls, security and human rights, institutional balance and implementation (Votoupalová, 2020, p. 407). However, there has been little scholarly attention to the challenges resulting from the application of the legal criteria, introduced in 1999, for distinguishing Schengen-related developments of the *acquis* from the broader Justice and Home Affairs *acquis* and the resulting legal and political problems.

1.2 Schengen in a Nutshell

Schengen is a brand name, derived from the name of the Luxembourgish city in which the two intergovernmental Schengen Agreements (the 1985 Schengen Agreement and the 1990 Convention Implementing the Schengen Agreement), which established an area without internal border control between participating States, were signed. When people speak about Schengen today, they normally refer to the Schengen area, characterised by the absence of internal border control and common standards applied at external borders.

The 1985 Schengen Agreement contained primarily policy statements which still had to be concretised by the 1990 Convention Implementing the Schengen Agreement. Further implementing measures (Executive Committee Decisions) were adopted in the early 1990s, based on the Convention Implementing the Schengen Agreement. Moreover, in accordance with a “Joint Declaration on Article 139” annexed to the Convention Implementing the Schengen Agreement, a verification that checks at external borders are effective had to be carried out before the Convention Implementing the Schengen Agreement could be brought into force in 1995.

Internal border control was eventually abolished in 1995 between a first group of seven Schengen States (the five signatories: Belgium, Germany, France, Luxembourg, Netherlands plus Spain and Portugal which had joined in 1991). Controls to Italy and Austria were lifted in 1998; to Greece in 2000; to Denmark, Sweden, Finland, Norway and Iceland in 2001; to Poland, Czech Republic, Slovakia, Hungary, Slovenia, Lithuania, Latvia, Estonia and Malta in 2007; to Switzerland in 2008; to Liechtenstein in 2011; and to Croatia in 2023. Internal border control to Romania and Bulgaria was lifted in 2024 (at air and sea borders; land border control remains in force pending a further Council decision to be taken in the future) and for Cyprus it was not lifted yet.