

ESSAY ON EFFICIENCY OF LEGAL NORMS – SCHENGEN AGREEMENT

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Abstract

The capacity of the European Union (EU) to address the urgent migrant crisis is proved to be inadequate. The efficiency of the Schengen Agreement is hit by dramatic reality of migrant crisis that tends to escalate into humanitarian catastrophe. At the beginning of the XXI century, the EU has been hit by several successive crises. Those are the world financial crisis of 2007, whose source was the US financial market, the debt crisis of Greece, which lasts from 2008 and which has escalated in the summer of 2015, and in particular the case of the refugees' crisis. The mentioned events have shown that incomplete sovereignty of the EU, caused by a slowdown in building a European federal state prevents it from having adequate responses to emergencies. Because of its inter-governmental and confederal features, the EU cannot act in a fast, unified and adequate way in migrant crisis, as well as in other challenges in a globalized world.

More and more there are rumors and calls for the formal, i.e. the official abolition of the Schengen Agreement, which is a legal symbol of the space without borders among Member States, and in a situation of raising concrete and wire fences at border crossings between these same countries and in the midst of their mutual accusations of a lack of solidarity in the management of refugees.

The abolition of Schengen in late 2015 happened in a factual manner (de facto), which is non-institutional way and without formal decisions at the level of the Union. The situation is even more sharpened when one takes into account the negative safety dimensions of the migrant crisis. The EU Member States by refusing solidarity announce that they do not want security problems on own territory, which the influx of refugees inevitably brings. The exchange of safety-relevant data, takes place via the Schengen Information System (SIS), would once again have to be bilaterally regulated in the future, in case of the official cancellation of the Schengen Agreement. Without the SIS, automatic entries and requests across all Member States would no longer be possible. Coordinated efforts to combat people smuggling and drug-related crime, as well as organised crime and international terrorism, would become more difficult. Judicial cooperation between countries would also be adversely affected by a suspension of the Schengen Agreement.

Two decisions of the EU (2015), on an equitable distribution of asylum seekers to other Member States, in order to lessen the pressure on Italy, Greece and Hungary meant a temporary suspension of the Dublin asylum system. Dublin asylum system is the most criticized by A. Merkel, the German Chancellor, and also by other EU officials, because it allows the greatest pressure on countries that are on the front line of migrant flows. In her expose, Merkel, with a warning that such asylum system is outdated, called for the introduction of a new common EU asylum system based on a fair distribution of the burden of granting asylum and with the elimination of national egoism. Is it the "Europe - Fortress" underway or the Schengen Europe without borders, remains to be seen through the outcome of the migrant crisis in the upcoming mid-term.

The implementation of a pan-European coordination of refugee and migration flows is de facto and de jure barely possible without the Schengen Agreement. The termination of the Schengen

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Agreement, if happens, would be a unique event in the history of post-war Europe. For the first time in the European integration process, a central pillar of the European integration process would disappear without being replaced. It would not put a temporary halt to the unification process as would have been the case in the past, but it would be a noticeable regression.

Famous Jean Monnet, however, said a long time ago, that the great crisis are also great unifiers, and it remains to be seen whether this visionary idea is to be leading in overcoming the current narrow-minded EU approach.

Key words: *The European Union, Schengen Agreement, migrant crisis, EU migration and asylum policy*

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1. Introduction

The Schengen Agreement entered into force in 1995 and today consists of twenty six Contracting States. The Agreement includes all Member States of the European Union (EU), with the exception of Great Britain, Ireland, Romania, Bulgaria, Cyprus and Croatia. The Schengen agreement also includes non-EU countries: Norway, Iceland, Liechtenstein and Switzerland. The Agreement provides for the abolition required for checking persons at the internal borders within the Schengen area. The Convention on the implementation of the Schengen Agreement regulates the standardization of entry and residence, as well as issuing a visa for the whole Schengen area. The Schengen visa makes it possible to visit all the countries in the Schengen area and to cross internal borders without further formalities. At that time also measures of cooperation in the field of justice and home affairs between the EU Member States were agreed, as the addition to the provisions on asylum.

In light of the rapid growth of the refugee wave that flooded the EU and culminated in 2015-2016, the partial restoration of border controls is applied contrary to the provisions of the Schengen Agreement. The EU countries are faced with a significant increase in asylum seekers. Civil war in Syria has especially contributed to it¹, but also many years of political instability in countries such as Afghanistan and Pakistan and the difficult economic and political situation for many people in the Western Balkans, especially in post-conflict areas. The EU countries that are the most favorite destinations for asylum seekers are Austria, Germany and France, as well as Sweden, Denmark and Hungary, being a transit country.

¹ As Syria's war reaches another grim milestone today, refugees fleeing the 5-year conflict face greater hurdles to finding safety while international solidarity with its victims is failing to match and reflect the scale and seriousness of the humanitarian tragedy. *"Syria is the biggest humanitarian and refugee crisis of our time, a continuing cause of suffering for millions which should be garnering a groundswell of support around the world,"* said UN High Commissioner for Refugees Filippo Grandi. <http://donate.unhcr.org/international/syria>, April 2016.

The specificity of the EU legislation is contained primarily in its primacy over national legislation in the context of the supranational legal effects² and direct application³ in the Member States. However, those basic principles of the legal system of the Union are seriously disrupted in a situation of an emergency stopping of the immense influx of refugees to the territory of Greece and Hungary, being transit countries for migrants on their way to the wealthier EU Member States. Hence, it is important to consider the causes of derogations from the provisions of the Schengen Agreement without any official decision on the level of the EU institutions, but in the form of unilateral acts of individual Member States. It is also significant to point out the context of the implementation of the Schengen Agreement in the form of the EU standards of migration policy and the current crisis of a common the EU asylum policy.

2. Specificity of the Union

The European Union (EU) represents a totally new creation in international law and international relations, which is different from conventional international organizations for its elements of supranationality. Key EU institutions: the European Commission, the European Parliament and the European Court of Justice carry primarily the supranational essence of the Union⁴.

Regardless of the different roles of those bodies in the institutional structure of the EU and their different competencies, they have in common the fact that they represent the interests of the Union as a whole. Therefore, those institutions are to be independent of the influence of the national authorities of the Member States. At the same time, these institutions strongly encourage, through their activities, the further strengthening of the powers of the Union as a whole, at the expense of the sovereign powers of the Member States. The primary objective of this regional economic and political unification is a sustainable economic prosperity and distinctive international identity of the EU Member States in contemporary international relations.

In theory of European integration it is often stated that the EU is an economic giant and a political elf. Therefore, the question of prospects of the Union and where exactly its boundaries are, is one of the essential questions of the contemporary moment. This is even more important, given the fact that it is one of the largest trading blocs in global terms. Current processes of expansion of membership of the EU indicate that this is an unstoppable process, while accompanied by deepening internal, intraregional integration and by reforms of institutions and of the legal system of the Union.

² Gasmi G., *Theory of Law and Foundations of the European Union Law*, Belgrade, 2013, pp. 146-147.

³ Gasmi G., *Ibidem*, pp. 144-145.

⁴ Gasmi G., *Legal and Institutional Perspectives of the European Union*, in "Foreign Legal Life", no. 3/2015, p. 80.

The Union did not have a legal personality in explicit terms, until the entry into force of the Lisbon Treaty on reform of the EU at the beginning of December 2009. Until that date the former existing European Communities (European Community and Euratom) established by the founding treaties of Rome (1958), were subjects of international law with the legal subjectivity. Only the Treaty on the Functioning of the EU (Lisbon Treaty), which incorporated the Treaties of Rome, established explicitly provision by which the Union had acquired the status of legal entity. This means that the EU enjoys the legal and contractual capacity in the Member States, it may acquire and dispose of movable and immovable assets and may be a party to the proceedings (before a court, etc.). In the area of concluding the international agreements, the status of the legal entity of the EU provides a unique procedure of negotiating and concluding these agreements, instead of the previous two procedures that existed at EU level and at the level of Member States before the entry into force of the Lisbon Treaty.

The main reason for the establishment of the Community as a predecessor of today's EU, was primarily the establishment of lasting peace in the devastated Europe after the Second World War, and then gradually building up the internal market and ensuring sustainable economic development based on balanced economic growth, stable prices and a highly competitive market economy, contributing to full employment and social progress. Therefore in the EU is established customs, economic and monetary union. Further construction of the Union overcame this initial economic motive of integration. Namely, the Treaty on the EU from Maastricht (1993) provides that Member States implement a common foreign and security policy, including the gradual development of a common defense policy.

The Union is, according to the official wording of the Art. 2. The Treaty of Lisbon, based on the values of respect for dignity, freedom, equality, democracy, rule of law and respect for human and minority rights. Those values are, in the momentum of severe migrant crisis, threatened by the absence of solidarity of the EU Member States.

Given that the common security and defense policy of the EU is based on the cooperation among Member States while respecting their national sovereignty, this area is dominated by the decision-making in intergovernmental EU institutions. Thus, the European Council, which brings together Heads of state or government of EU Member States, is primarily competent to recognize Union's strategic interests, to determine the objectives and general guidelines of the EU foreign policy, including also the issues that have an impact on the field of defense.⁵ The European Council brings strategic decisions in this regard. For its part, the Council at the level of Foreign Ministers of the Member States, decides on foreign policy actions, but based on the strategic orientations of the European Council and makes decisions related to

⁵ Art. 26 of the Lisbon Treaty on EU

the Security and Defence Policy on the proposal of the High Representative for Foreign Affairs and Security Policy or on a proposal of a Member State⁶.

However, there is a clear intention to institutionally strengthen the efficiency of decision-making and representation of the Union on the international level through the Treaty of Lisbon (2009). Thus the Treaty of Lisbon provides that the European Council by qualified majority vote and with the consent of the President of the Commission appoints, for five years, the High Representative of the Union for Foreign Affairs and Security Policy, who is also the Vice President of the Commission.⁷ This solution created an institutional link between the Council and the Commission in the area of foreign affairs and security. The High Representative for Foreign Affairs and Security Policy chairs the meetings of the EU Council of foreign affairs ministers and has the authority to contribute by proposals to establishing foreign and security policy of the Union.⁸ The High Representative therefore, has the role of promoter and initiator of the foreign policy and security decisions, the same role as members of the Commission in their capacity of the proposers of legislative acts in the field of economics.

However, we should bear in mind that the High Representative, as opposed to the economic area, has not an exclusive right to propose the EU foreign policy and defense decisions, since that right also have representatives of the state, *i.e.* foreign affairs ministers of member States who are members of the EU Council of ministers. High Representative, on the basis of orders and instructions of the Council of ministers, is authorized to represent or carry out the Union's policy in the field of foreign affairs and defense at the international level. In that sense, the High Representative may lead a political dialogue with third parties and present the views and attitudes of the Union in international organizations and at international conferences. The High Representative is heading the Unit for planning and early warning within the EU Council of ministers.⁹ This body was established by the EU Treaty of Amsterdam within the Secretariat of the Council, consisting of experts from the Council Secretariat, from Member States and the Commission. Its task is to monitor the international situation, and to identify crisis areas in the world, recognize the interests of the Union and to advise the Council.

3. Relevant aspects of the EU migration policy

EU has suffered during the past turbulent year 2015 a huge influx of refugees, then serious debt crisis of Greece and two waves of terrorist attacks in Paris. From all those issues, the most devastating, however, is the migrant crisis, which has indicated the existing institutional problems and the absence of a common EU migration policy.

⁶ Art. 44 par 4 of the Lisbon Treaty on EU

⁷ Art 18 of the Lisbon Treaty

⁸ Art 27 of the Lisbon Treaty

⁹ Alomar B., Daziano S., Lambert Th., Sorin J., *Grandes questions europeennes*, Sedes, 3rd edition, Paris, 2013, p. 456.

The more and more there are dilemmas about the abolition of the Schengen agreement, which is legally recognized space without internal borders between Member States. Opposite to it, some Member States have raised wire barriers at border crossings, while at the same time have accused each other for the lack of solidarity in the management of refugees.

The situation is even more sharpened when one takes into account the negative safety dimensions of migrant crisis. Precisely, without a transparent registration of refugees and taking into account migrants' attacks in Germany (Cologne), Finland and Austria¹⁰, at the beginning of 2016, no one can guarantee that there are no a number of imported and well trained terrorists among refugees. On the other hand, this served as a reason for the national extreme right-wing movements and Eurosceptics in the EU Member States to strengthen their activities, and even more has become serious indicator of institutional weaknesses of the Union.

The Schengen Agreement (1985) is a reflection of the prosperous idea of free movement of people, but also is a reflection of the fears of immigration and cross-border crime¹¹. Schengen Agreement was followed by the Convention on its implementation (1990), which entered into force in 1995. These are the legal foundations of the "Schengen Acquis", which starting from the adoption of the EU Treaty of Amsterdam (1999), has become an integral part of the *Acquis* of the Union, *i.e.* "*Acquis Communautaire*". Many regulations within the Schengen Acquis are recommendations *i.e.* the so-called soft law standards of EU migration policy, such as the rights of entry, stay and return of foreigners, as well as issues of preventing illegal migration, combating human trafficking and the protection of personal data.

All of these types of recommendations are addressed to the Member States in order to create and apply a common migration policy of the Union. It is characteristic that the circle of countries signatories of the Schengen Acquis has gradually expanded, although it never covered all Member States. The United Kingdom, Denmark and Ireland have remained outside, as well as new members who had a task to perform a period of compliance with the Schengen criteria (Romania and Bulgaria, and recently Croatia), while Cyprus is outside the Schengen area due to the unresolved issue of the occupied Northern part of the Island by Turkey. States that are not members of the EU are also signatories to the Schengen (Norway and Iceland, 2001), followed by Switzerland (2008), as well as Liechtenstein¹².

Convention on the application of the Schengen Agreement established the Executive Committee with the mandate to regulate normatively the implementation

¹⁰ Yardley J., „Sexual Attacks Widen Divisions in European Migrant Crisis“, Reuters, January 2016.

¹¹ Signed by the Benelux countries (Netherlands, Belgium and Luxembourg), the Federal Republic of Germany and France that represent the five founding members of the Community and then the circle of signatories has successively expanded. The Schengen Agreement originally implied gradual suspension of internal control at common borders of the countries signatories. More detailed in: "The Schengen Agreement - For a Europe without borders", ed. Lopandić D. and M. Janjević, Belgrade, 1996, p. 225

¹² Piris J.C., *The Lisbon Treaty – A legal and Political Analysis*, Cambridge University Press, 2010, p. 192-193.

of provisions of the Schengen Agreement and to monitor their application. The Convention also regulates in detail the abolition of controls at internal borders of the states signatories of the Schengen Agreement and the conditions of entry of aliens, *i.e.* all persons who are not citizens of an EU Member State. *Exempli causa*, concrete consequences for citizens of third countries, *i.e.* those states which are not members of the Schengen Agreement are that the refusal of a visa by one Schengen member state, automatically means that the alien does not have the possibility of obtaining a visa in another Member State of the Schengen area. EU Treaty of Maastricht (1993) in its Art. 100c introduces a common visa list and unique visa format in Member States.

In this way, issues related to the visa regime (the list of third countries whose citizens need visas), have been transferred to the jurisdiction of the EU, *i.e.* the EU first pillar of supranational decision-making. This is not the case with other issues of cooperation of the EU Member States in the field of justice and home affairs, which made the former third pillar¹³ (before the EU Treaty of Lisbon and integration of all three pillars into one entity with the legal personality, *i.e.* the EU). That area is characterized by the intergovernmental cooperation between Member States, with the coordination of national policies of the Member States governed by the unanimity rule of decision making.

The Treaty of Amsterdam (1999), which is a revision of the Maastricht Treaty brings legal novelties. In addition to the fact that the issues of visas, asylum and judicial cooperation of Member States in civil matters have been "communautarized", *i.e.* transferred to the jurisdiction of the EU institutions, there has been a step forward in the direction of deepening internal integration – the Schengen Acquis was integrated into the EU Treaty. This is especially important because since the signing of the Schengen agreement, it was not a part of the *Acquis Communautaire*, *i.e.* it was not legally and formally connected with the EU law, because it was not signed by all EU members. Further legal evolution happened in the EU. The Treaty of Amsterdam proclaimed the creation of an Area of freedom, security and justice, which was then confirmed in the revised EU Treaty of Nice (2003). The Treaty of Lisbon (2009) formally abolished the separation of the cooperation of the Member States in this area from other forms of cooperation and the former third EU pillar merged into a single legal entity of the Union. However, it has not eliminated the essence of the intergovernmental cooperation on the principles of the consensus and on the basis of primary protection of national vital interests. More specifically, it is still within the competence of the Council of Ministers to establish the so-called White and Black lists of the visa regime. One of such examples is the Council Regulation No. 539 of 2001¹⁴.

¹³ Ivanda S., "Third pillar reflects the integration at very low level." Monograph: *The Schengen agreements and internal security*, Zagreb, 2001, p. 17

¹⁴ Council regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement⁴, Official Journal of EC, L 81, 21 March 2001, pp. 1-7.

The complexity of the cooperation among Member States in the domain of security, justice and home affairs, in addition to existing different national interests, further was intensified by the migrant crisis. The abolition of the Schengen at the end of 2015 happened in a factual way (*de facto*), *i.e.* non-institutional, without a formal decision at the level of the Union. Despite permanent efforts to build a security and foreign policy identity of the EU, the reality has denied these endeavours.

4. Challenge of migrant crisis in EU

Special session of the Council of Foreign Ministers held in September 2015 under the presidency of Luxembourg did not bring unity among EU Member States in terms of the proposal on quotas for the distribution of refugees. Frequent calls were for the internal solidarity by the Chairman J. Asselborn, Minister (Jean Asselborn) and the EU High Representative for Foreign and Security Policy, F. Mogherini (Federica Mogherini). The crisis, increasing mistrust on the part of the citizens regarding the institutions of Europe places the EU before a major political challenge¹⁵.

Despite validity of the Dublin Convention on asylum in the EU since the early 90's, there are the significant differences among Member States in relation to the dynamics of the processing of asylum applications and regarding the rate of recognition of asylum rights. Hence, the Chairman of the Council on this occasion called for the establishment of special powers at the EU level, which would be entrusted to the EU Asylum Support Office¹⁶ to establish common rules and principles for cases of asylum, which would be compulsory for all EU Member States. This call was supported by the Minister of Foreign Affairs of Germany, Frank-Walter Steinmeier.

Hungary is the first country affected by the asylum procedure, according to the EU Dublin Convention, which stipulates that the first country in which asylum seekers apply, has to implement the procedure for registering asylum seekers and consideration of the reasons for asylum. Migrants have massively refused their registration, which caused a conflict with the Hungarian police and amplified tensions within the EU, after the ban on migrants' further movement towards the other EU Member States.

Hence, Italy, speaking through the voice of its Minister of Foreign Affairs, Paolo Gentiloni pointed out the need for the adoption of uniform EU rules on asylum. Specifically, it was noted that the system of applying for asylum in the Member State in which the first migrants find themselves was no longer viable, as demonstrated by the example of Hungary. On the other hand, it is necessary to respect the values of the EU to protect human rights and democracy, and to ensure that refugees in the spirit of

¹⁵ Chopin T., „Euro zone, legitimacy and democracy: how do we solve the European democratic problem?“, Policy Paper, Fondation Robert Schuman/European issues n° 387 / 05th April 2016, www.robert-schuman.eu.

¹⁶ European Asylum Support Office (EASO)

the UN Geneva Convention (1951), who are fleeing war or dark dictatorship regimes, are protected and separated in their treatment from economic migrants. Italy and Germany have emphasized that dealing with asylum issues at the national level of Member States dramatically endangered the functioning of the Schengen agreement and the freedom of movement in the EU.

Many analysts¹⁷ even pose the question whether there has been a new division of the East-West within the EU, given the opposition of member countries of the former Visegrad Group (1991), Hungary, the Czech Republic, Slovakia and Romania, to the establishing a voluntary distribution of migrants through the quota system. Poland has, at the last moment, supported the majority view of the Member States at the September meeting of the Council of Ministers (2015). It can be assessed that it is not a new division of the East-West within the EU, although there is a lack of unity among the EU Member States. Namely, the countries of the former Eastern Bloc have never been colonial powers and therefore, have no tradition of accepting the immigration population in their societies. Besides, there are the different democratic traditions, various understanding of the concepts of the values of the Union, different level of political culture and perception of the EU identity and its place in the world compared to their Western neighbours, mostly the founders of the EU.

The dose of fear and rejection of refugees who are coming from countries out of Europe, can be explained by ignorance and by considerable level of tightness in Eastern European societies, due to the former Eastern bloc membership. If the aforementioned cultural reasons, also the economic problems in these countries are to be added, where the labor market is not as attractive as in the West of the Union, the situation becomes easily explained. For example, the minimum wage for the working hour in Bulgaria and Romania is around one euro, while in Germany it is more than eight euros (starting from January 2015)¹⁸.

The complexity of the migrant crisis is fostered by a mix of economic migrants with the war refugees and also by wrong identification of the Islamic religion with terrorism in many EU countries, especially in France and Germany. In this way, the concept of multiculturalism, on which a united EU is based, actually collapsed. Cicero¹⁹ said famous principle, long time ago:

“Patriae solum omnibus carum est”.²⁰ Many Europeans might withdraw back towards their national identity, which they feel will be the only one that can guarantee them their political rights.

*In varietate concordia*²¹ represents the motto of the EU that protects the diversity of various national identities and cultures of the EU Member States²². In the

¹⁷ Macek L., „Refugee Crisis: A new East – West rift in Europe?“, 27TH OCTOBER 2015 / EUROPEAN INTERVIEW N°88 / FONDATION ROBERT SCHUMAN, www.robert-schuman.eu

¹⁸ Schulten T, “Contours of a European Minimum Wage Policy”, Study, Friedrich Ebert Stiftung, <http://www.fes.de/international/moe>, October 2014, pp. 4 – 6.

¹⁹ Roman statesman, consul, lawyer, political theorist and philosopher. He is often thought to be one of Rome's greatest orators and prose stylists. Consul of the Roman Republic

²⁰ The homeland is dear to everyone.

situation of migrant crisis, this idea is fundamentally shaken. It remains to be seen whether it will come to a deeper political unification of Member States within the EU and consequently, further significant legal reforms of the Union in the next period of its development. Legal and institutional reforms of the Union are prerequisites for further economic strengthening of the EU in international economic relations²³.

The standpoint of Hungary is alarming, whose Prime Minister Orban opposed the quota system in the migrant crisis, although it is precisely Hungary that was the main beneficiary and winner of such a system. The mechanism of implementation of the quota would, however, imply the supranational decision making. Failure of the unanimous introduction of such unique system at the EU level, to the detriment of the national sovereignty of Member countries constitutes a litmus test of political unity within the EU. This is certainly the reason that most EU Member States decided on the establishing of the quota system, for the sake of effectiveness.

The Liberal Party in the European Parliament requested the application of the provisions of Art. 7 of the Lisbon Treaty against Hungary, whose government took a decision on the involvement of military forces on its borders. Slovenia has followed the example of Hungary in the use of military forces in the migrant crisis. The provisions of the Art. 7 represent a legal possibility for a kind of punishment of member countries in case of their violations of the basic values of the Union, including the rule of law. Preventive mechanism of the Art. 7 of the Treaty of Lisbon can be activated only in the event of a clear risk of a serious violation of fundamental EU values. Then the Council of Ministers sends a warning to concerned Member State. The mechanism of sanctions, i.e. punishment of "disobedient State" starts only in case of serious and persistent violations of the fundamental values of the Union²⁴ by the Member State within a certain period of time. Then the Council can suspend some rights that stem from the EU membership, including the right to vote in the Council of Ministers. The suspension may relate to the elimination of the use of structural funds of the Union in that particular Member State.

In recent practice, starting from 2009 since the entry into force of the Treaty of Lisbon, however, the application of preventive nor sanction mechanism, according to the provisions of Art. 7, did not happen. Precisely, the EU Commission, when being faced with a violation of the rule of law and with the breaking other basic values of the EU in some of the EU Member States, applied political pressure on the country or resorted to lawsuits to the European Court of Justice in cases of violation of specific EU legislation.

Basic values are defined by the provisions of the Art. 2 of the EU Treaty of Lisbon: respect for human rights, dignity, freedom, democracy, equality, the rule of law and respect for minority rights. In addition, the Member countries societies are based on non-discrimination, pluralism, tolerance, justice, solidarity and gender

²¹ Unified in diversity.

²² Gasmi G., *Theory of Law and Foundations of the European Union Law*, *op.cit.*, p.105

²³ *Ibidem*, p. 105

²⁴ Piris, J.C., *op.cit.*, pp. 71-72.

equality. Legal protection of those fundamental values of the Union is contained in the provisions of the Art. 7. In addition to the Commission and the Council of Ministers, other EU institutions also protect the basic values of the EU. The European Parliament has, on several occasions, initiated the initiative for regular assessment of the EU Member States about whether they continuously implement the Union's fundamental values, especially regarding the respect for democracy and the rule of law. Furthermore, in December 2014, Member States have committed themselves within the Council to establish an annual dialogue between all members of the Council, in order to promote and protect the rule of law as defined by the Founding Treaties of the EU.

5. Schengen Agreement and the crisis of the EU common asylum policy

At the EU level there is no accurate and reliable data on the number of refugees in 2014 and 2015. This means that an objective factual basis for the adoption of joint decisions within the Union is missing. Estimates range that it is about one million claims filed for asylum in Member States in 2015, as opposed to about 600,000 in 2014. Figures vary, both at national and at the EU level, due to different methodologies, the absence of registration of refugees, but also the lack of political will of the EU Member States.

Some analysts even mention the phenomenon of the invasion of refugees in the absence of accurate data, but it is undeniable that more than half of asylum applications goes to Germany, which is the most popular destination for asylum seekers in the EU²⁵. At the international legal field, the 1951 Geneva Convention on the protection of refugees also obliges the EU Member States. At the regional field, the European Convention on Human Rights (1950) of the Council of Europe is valid and the provisions of the Art. 18 of the EU Charter of Fundamental Human Rights, which became legally binding with the entry into force of the EU Treaty of Lisbon (2009).

The refugees, who are asylum seekers, are granted that they will not be returned to the country of origin where there is a danger to their life and health. Asylum seekers are entitled to fair and effective procedures and appropriate assistance for basic living needs. Based on these principles, the Member States have established a common asylum policy. In practice, however, it has been proved a huge weakness of this system established in the EU, with particular moral crisis of the lack of solidarity. The symbol of the moral sinking of applying the basic values of the EU is the lifeless body of a Syrian boy from drowning in the sea, the picture that went around the world and horrified millions of people.

Disagreements among the EU Member States regarding the implementation of a common asylum policy can be easily explained when looking at national statistics on

²⁵ Labayle H., "The Crisis of the Common Asylum Policy in the European Union", 13TH OCTOBER 2015 / EUROPEAN ISSUES N°367 / FONDATION ROBERT SCHUMAN, www.robert-schuman.eu, p. 2.

refugees published by Eurostat. In fact, in 2014 Poland has received 720 refugees, the Baltic countries a total of 120, 765 refugees in Czech Republic, and in Slovenia 45. In contrast, Spain has made 1585 positive decisions on asylum that year, while Bulgaria is flooded with 7020 refugees. Then, Belgium has issued 8045 positive decisions on asylum, while Sweden had accepted 30,650 refugees.

Given the enormous pressure of refugees, particularly in 2015, Germany has pointed out serious threat to the further functioning of the Schengen area, the area without borders. More specifically, the Schengen Agreement was created in the era of peace and economic boom of the Community, and cannot cope with large migrant crisis today. The same applies to the procedure established by the Dublin Convention on asylum.

While a clear, temporary, limited suspension of the Schengen Agreement is legally possible, some countries have discussed the reintroduction of permanent border controls within the European Union, and therefore in practice the termination of the Schengen Agreement. Due to its geographical location, Germany finds itself surrounded exclusively by the Schengen states and so is particularly affected by the Agreement. Open internal borders are considered a key aspect of intensive cross-border trading within the European Union.

Eastern European economies would also be significantly impacted by possible suspension of the Schengen Agreement. Annual economic growth in Poland, Slovenia, Slovakia, the Czech Republic and Hungary would be reduced. Poland would be affected particularly strongly. Among the Eastern European countries, the negative effects of border controls within the EU would to the greatest extent affect Poland, not only in absolute, but also in relative terms. In terms of gross domestic product, Poland is by far the largest economy in this selection of countries. The reintroduction of border controls would cost the country between an estimated €18 billion (scenario 1) and €54 billion (scenario 2). Slovakia, Slovenia, the Czech Republic and Hungary are characterized, in contrast to Germany, by high import quotas, i.e. they import many goods and services in relation to their GDP. Should the price of imported goods increase over the course of the reintroduction of border controls, the impact on prices would be particularly strong in these countries.

Representatives of the European transport sector operators doubt that the international railway service would be possible to actual extent without the freedom of movement of the Schengen Agreement. This is another proof against suspension of the Schengen agreement.

On the September meeting of the Council (2015) the EU Commission has proposed, as an interim measure, the distribution of asylum seekers (quotas) in order to reduce the pressure on Germany, Greece, Italy, Hungary and Sweden. President of the Commission, Junker held a historic speech calling on the EU Member States to show solidarity. The problem arose when the system of voluntary distribution of asylum seekers within the EU as a temporary measure, was clumsily presented as a system of quotas. Italy and Greece were unable to manage the situation, and this has led Germany to resort to measures of opening of national borders for refugees from

war-affected areas, mainly Syria and Eritrea. This led to the endangering of the survival of the Dublin asylum system at EU level²⁶.

EU two decisions (2015), on an equitable distribution of asylum seekers to other Member States, in order to reduce the pressure on Italy, Greece and Hungary meant the temporary suspension of the Dublin asylum system. The evaluation criteria were introduced for receptive abilities of Member States. These are the following parameters: 40% of the size of population and GDP²⁷, 10% unemployment rate, the average number of asylum requests during the last four years. The first EU decision relates to resettlement of refugees who arrived in Italy and Greece from 24th March 2015. EU second decision relates to asylum seekers who have arrived from 15th August 2015. Open question, however, is how to regulate the situation of potential asylum seekers who had arrived in Greece and Italy before the specified dates.

At the end of 2015 the resettlement of refugees was done, but the national authorities of the EU Member States showed the intolerable slowness in implementing the asylum procedure. Special session of the European Council, held on 23rd September 2015 in calm atmosphere, was focused on operational and financial measures to strengthen monitoring of the EU external borders, as well as the EU help to neighbours in the current migrant crisis. At the beginning of 2016 and onwards, demands of many officials of EU Member States (A. Merkel et al.) are loud for unified EU response to the migrant crisis in the direction of forming a new common migration and asylum policies.

6. Concluding remarks

The lack of solidarity among the EU Member States in the migrant crisis intensifies the strength of already existing Euro-skeptics and their political representatives in the Union. This leads to the conclusion that a particular result is present in the form of absence of complex security and defense identity and the absence of security integrity of the EU²⁸.

Through refusing the solidarity, the EU Member States send message that they do not the security problems on their territory, that the influx of refugees inevitably brings. Such cases have already occurred in the history of European integration, for example in 1956, when the crisis occurred in Austria²⁹. The main danger that arises is a return to the national systems of border control, which is contrary to the concept of the Schengen agreement and opposite to the fundamental values on which the Union is founded.

²⁶ *Ibid.*, p. 6.

²⁷ GDP – gross domestic product

²⁸ Unfortunately, recent terrorist attacks in France (Paris, November 2015) and in Belgium (Bruxelles, 2016) confirm this conclusion on the absence of the security integrity of the EU

²⁹ Cochetel V., “Political Asylum in Europe: responding to the challenges of the Mediterranean”, 8TH SEPTEMBER 2015 / EUROPEAN ISSUES N°365 / FONDATION ROBERT SCHUMAN, www.robert-schuman.eu.

The Schengen Agreement provides the basis for a common asylum and refugee policy. The implementation of a pan-European coordination of refugee and migration flows is *de facto* and *de iure* barely possible without the Schengen Agreement. The termination of the Schengen Agreement would be a unique event in the history of the post-war Europe. For the first time in the European integration process, a central pillar of the European integration process would disappear without being replaced. It would not put a temporary halt to the unification process as would have been the case in the past, but it would be a noticeable regression.

Jean Monnet, however, said long time ago, that the crisis is also a great unifier, and it remains to be seen whether this visionary thought will overcome the current narrow-minded approach of the EU.

When the migrant crisis is being considered from the economic aspects, it follows that the answer would be far more positive if strong economic growth in the EU and low unemployment in the Member States would be present. This unfortunately is not the case, because the EU is in a state of serious economic depression, with the aging population, with poor self-defense capacity and without the comprehensive security and defense identity.

Is the scenario of the "Europe - Fortress" or the scenario of the Europe without borders i.e. the Schengen Europe is at stake, remains to be seen through the outcome of the migrant crisis in the upcoming mid-term period. Dublin asylum system is the most criticized by A. Merkel, the German Chancellor, and also by other EU officials, because it allows the greatest pressure on the countries that are on the front line of migrant waves. In her speech, A. Merkel, with a warning that such asylum system is outdated, called for the introduction of a new common EU system based on a fair distribution of the burden of giving asylum and with the abolition of national egoism.

Freedom of movement is set as a basic human right, and is also one of the four freedoms on which is based the EU internal market³⁰. On the other hand, the protection of refugees is legally guaranteed, but on the other side there is a justified fear of Member States of the Union from the massive floods of refugees and the accompanying inevitable security risks. In a situation of absence of a comprehensive and complex security and defense identity of the Union, requirements for increased control of the external borders of the EU and for the internal reform of the Union's common migration policy are necessary consequences.

Third countries are still in a more difficult situation (Turkey, Balkan countries: especially Serbia and Macedonia) because they do not have adequate financial support from the EU in solving the migrant crisis, nor they are part of the EU institutions in making vital decisions. Third countries are not only hostages of the current EU institutional weakness and of the lack of solidarity among EU members, but generally perceive the EU as distant target without wise policy in the emergency of migrant crisis. Moreover, the migrant crisis is the most important problem facing

³⁰ More detailed in: Fairhurst J., *Law of the European Union*, Longman, Pearson Education Limited, GB, 2010, pp. 372-427.

the Union, according to the results of examination by Eurobarometer³¹ on attitudes of EU citizens, in the fall of 2015.

In addition to the economic impacts, the termination of the Schengen Agreement would bring about political consequences. The exchange of safety-relevant data, which currently takes place via the Schengen Information System (SIS), would once again have to be bilaterally regulated in the future. The SIS is an information system for the security authorities of the Schengen countries and is used for automated manhunts and tracing items. Without the SIS, automatic entries and requests across all Member States would no longer be possible. Coordinated efforts to combat people smuggling and drug-related crime, as well as organized crime and international terrorism, would become more difficult. Judicial cooperation between countries would also be adversely affected by a suspension of the Schengen Agreement.

The Schengen Agreement and the resulting advantages such as border-free travel, for example, are noticeable to the European population in Member States and are supported by the people. This has been confirmed by surveys of public opinion (Allensbach, 2014). Alongside the euro, citizens of Member States regard border-free travel as the most noticeable representation of the European unification process. The reintroduction of border controls within the Schengen area has accordingly great symbolic value.

Separate work and living areas or short shopping trips to neighbouring countries in the European border regions are hard to imagine in the event of permanently reintroducing border controls. Cultural exchanges, cross-border movements and cross-border experiences would decline. It is not possible to put a figure on the social and political costs of terminating the Schengen Agreement.

Finally, once a time, the EU has wisely concluded the Vienna Declaration (2006) on the security partnership between the Union and its neighbours. The Vienna Declaration is focused *inter alia* on the challenges of managing migration flows as one of the areas of security threats (in addition to terrorism, organized crime, human and drug trafficking and corruption). After one decade passed, contemporary processes indicate that it is necessary to establish partnership between the EU and the Balkan neighbours in this area, along with an effective common EU migration policy.

The reform of the Union must therefore involve a redistribution of powers and lead to an institutional structure that can rise to two challenges: the creation of clearer, more legitimate and

more accountable political leadership; and the strengthening of democratic legitimacy of European decisions by national parliaments and the European

³¹ White Paper by the Global Agenda Council on Europe, “Europe – What to watch out for in 2016 – 2017”, World Economic Forum, January 2016, p. 3

parliament so that Europeans can embrace, both politically and democratically, the issues that they have in common³².

The vital question of the EU future development depends on the EU capacity of making effective decisions, in a foreign policy area, and even more so in the internal domain, in terms of stimulating economic growth, employment and sustainable development.

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³² T. Chopin, „Euro zone, legitimacy and democracy: how do we solve the European democratic problem?”, Policy Paper, FONDATION ROBERT SCHUMAN / EUROPEAN ISSUES N°387 / 05TH APRIL 2016, www.robert-schuman.eu