Towards Smart(er) European Borders

Development Assessment of Large-Scale IT Systems in the Area of Freedom, Security and Justice

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ABSTRACT

The abolishment of the internal border checks and the common procedures at the external borders fosters the decision-making of the European Union to establish large-scale IT systems in the area of freedom, security and justice. The decrease of the security deficit by the control of immigration flow consists of three endeavours: the common border control policy, the common visa policy and the common asylum policy. The aim of my thesis is to analyse and evaluate the development of the operational management of large-scale IT systems in the area of freedom, security and justice, i.e. the development of the operational management of SIS, VIS and EURODAC. The added-value of the IT Agency is to be defined, too. Furthermore, the joint evaluation of the RTP and the EES is drawn up focusing on the analysis of the prime mover of the RTP’s and the EES’s establishment and their expected effects on the security of Schengenland. The development of the operational management of these systems is not more than their integration into the IT Agency. The smart borders initiative presents the newest endeavours to the development of new (and related) large-scale IT systems in the area of freedom, security and justice. New technologies shall be harnessed to meet all the requirements including enhancing security and facilitating travel at the external borders. Therefore, the Commission set out main options for the way forward in its smart borders initiative. The EES and RTP related tasks are typically the competencies of the Member States. But today’s integration processes of the borderless Europe generate EU level challenges which can be effectively handled by EU level actions. This was the situation at the time of the establishment of the IT Agency.

Keywords:

Schengen • large-scale IT systems • information power
security deficit • facilitate travel
1. Introduction

“The international community must adopt a new strategy to combat terrorism by promoting international cooperation and its own effective use of information power.”

(KOHARA, MASAHIRO)

The abolishment of the internal border checks makes it easier for people to move around. We can travel freely in the Schengen area, which makes for economic, regional and cultural dynamism within Europe and especially the border areas. Any foreign visitor can travel to all Schengen States on a single visa, which means, for example, that economic activity related to tourism is promoted. At the same time, the Schengen cooperation aims to protect people and their property, since it fosters the cooperation among police forces, customs authorities and external border control authorities of the Member States in order to decrease the security deficit formed with the abolition of internal borders. The Schengen acquis provides systems of communication for police forces, hot pursuit of criminals and the cross border surveillance of suspects, as well as mutual operational assistance and direct exchanges of information among police authorities. In parallel, strict uniform rules have been adopted to ensure the protection of data and to protect people against any infringements of their fundamental rights.

The decrease of the security deficit by the control of immigration flow consists of three endeavours: the common border control policy, the common visa policy and the common asylum policy. This triad is manifested as “safer Europe” among the priorities of the 2012 Danish presidency of the EU Council. Furthermore, the European Union should facilitate travel and handle illegal migration at the same time.

The European Union realised the opportunity of the exploration of the information power by the establishment of the large-scale IT systems following the analogy of these policies. Thus, the legal instruments of the Schengen Information System (hereinafter: SIS), the Visa Information System (hereinafter: VIS) and the EURODAC were adopted by the European decision-makers. Irregular immigrants found in Member States can be registered in the SIS, but irregular immigration defies this registration itself. Those who

enter through asylum procedures are registered in EURODAC and those who enter using a legal channel, i.e. being issued a visa are registered by the VIS. The consideration for the integration of all systems into one “European Information System” is not new.\(^2\) This possibility shall aim the more effective use of information power, which contributes to the fight against terrorism, organised crime, human trafficking and illegal immigration.

The European Commission prepared the proposal and the related legal instrument for the establishment of an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice\(^3\) (hereinafter: IT Agency) in June 2009. This new regulatory agency was established by January 2012. It merged the operational management tasks of the further developed version of SIS (the SIS II), VIS and EURODAC and it is flexible to add other existing and potential new systems. However, the existing large-scale IT systems cannot handle all the challenges of the borderless Europe. Therefore, a new Commission proposal\(^4\) (hereinafter: smart borders initiative) was issued which presents the newest endeavours to the development of new (and related) large-scale IT systems in the area of freedom, security and justice. New technologies shall be harnessed to meet all the requirements including enhancing security and facilitating travel at the external borders. Therefore, the Commission set out main options for the way forward in its smart borders initiative. According to the initiative, an entry/exit system (hereinafter: EES) and a registered traveller programme (hereinafter: RTP) should be introduced.

The aim of my thesis is to analyse and evaluate the development of the operational management of large-scale IT systems in the area of freedom, security and justice, i.e. the development of the operational management of SIS, VIS and EURODAC. The

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added-value of the IT Agency is to be defined, too. Furthermore, the joint evaluation of the RTP and EES is drawn up focusing on the analysis of the prime mover of RTP’s and EES’s establishment and their expected effects on the security of Schengenland.

I assume that there is a spill-over effect, a clear development process with the sings of multi-level governance in the field of the European large-scale IT systems. The focus of the thesis is on the interrelations of this phenomenon. My research is very much output-oriented, since the results are examined from the “smart(er) borders” point of view. The signs and the forms of appearance of this process are followed, elaborated, examined and evaluated in order to give an assessment of the large-scale IT systems’ development.

Furthermore, it is interesting to consider that this development process serves the increase of the efficiency of information power and the decrease the security deficit. This is a very topical question while, on the one hand, the European Union applies an active approach in the establishment of a more secured Europe, but, on the other hand, the policy making process in migration could lead to serious concerns, in particular regarding transparency, accountability and human rights.5

My analysis is limited in time. The relevant information sources, legislations, proposals and the academic literature are examined, which were issued before 1 March, 2012. EU documents such as founding treaties, communitarised international treaties, regulations, directives, council decisions, commission documents, EU policy documents and other preparatory documents are used as primary sources. Due to the nature of this theme high on the political agenda, predominately the primary sources are examined at the first instance. Furthermore, the academic literature related the topic is worked up. After repeated systematic searches for relevant source of academic literature, any fully relevant Hungarian work has not been detected. Mainly Anglo-Saxon literature was found and researched. In particular, concerning journals and periodicals, the European Journal of Migration and Law contains several relevant sources. These primary and secondary sources are synthesised in order to give the most suitable interpretation of the above detailed problems. Moreover, my working experience and my BA thesis were of assistance to this thesis, too.

In the next chapter, the core legislation of large-scale IT systems operating in the European Union is presented. The core legislations are composed by Community or intergovernmental legal acts which create fundamental legal basis for the establishment of these systems. This part is not about to draw up the legal development of SIS, VIS and EURODAC. The aim is to place large-scale IT systems in Community or, better to say after 1 December 2009, in the Union law. This explanation is crucial observing the tendencies regarding smart borders initiative. To be more precise, this process would help to understand the legal basis of the envisioned EU level entry/exit system and of the registered traveller program.

In the third chapter, the development and the basic tasks of the existing large-scale IT systems is to be highlighted in order to give a background for the evaluation of SIS, VIS and EURODAC’s integration. It is important to understand the underlying logics of EU level actions on the field of border management for the examination of the smart borders initiative. Moreover, this analysis is crucial to understand the common grounds and possible connections with large-scale IT systems and with the IT Agency.

Furthermore, it is fundamental to consider how the newest segment of the large-scale IT systems’ operational management contributes to the smarter European borders. In the fourth chapter, firstly the legal predestination of the IT Agency’s establishment is drawn up. Then it is essential to understand the aims and the basic tasks of the IT Agency in order to evaluate the scope of the IT Agency taking into account the principle of subsidiarity and proportionality. Thirdly, the general and governance structure of the IT Agency are in focus. For that, the legal basis of the IT Agency is analysed. Furthermore, the problem of the territorial scope of the IT Agency is raised. Then the governance structure of the Agency is summed up. Fourthly, the relationship of the IT Agency with other EU agencies is observed. The status of these organisations is defined in the everyday work of the IT Agency. For that a layer model is presented to highlight the interrelations. Fifthly, two approaches are presented to answer the question of how the new IT Agency contributes to the smarter European borders. The first approach is rather theoretical. With the help of that, the motives behind the establishment of the IT Agency are revealed. Then the added-value of the IT Agency is summarised like a SWOT analysis which is to define how the development process of the large-scale IT systems’ operational management of contributes to the increase the efficiency of the information power.
In the fifth chapter, two developments are presented, which are relevant to the scope of the large-scale IT systems operating in the area of freedom, security and justice. On the one hand, the amendment of the FRONTEX Regulation\(^6\) contains some elements which, in a broader context, affect the field of large-scale IT systems. On the other hand, the smart borders initiative presents the newest endeavours to the development of new (and related) large-scale IT systems. In that section, these novelties are examined and evaluated. The current, above presented systems and methods of the Schengen regime are the pillars of Schengenland’s internal security. However, further tasks have to be carried out in order to meet the double requirements of enhancing the security and facilitating travel among the countries of borderless Europe where this challenge is faced primarily by third country nationals. The smart borders initiative is firstly technically and operationally examined. Then it is interpreted in a broader European policy context in order to assess the repercussions.

In the concluding part, the results are synthesised. The development process of these systems’ operational management is defined. It is considered how the delineated development process of the large-scale IT systems’ operational management contributes to the increase of the efficiency of the information power in order to decrease the security deficit thus contributing to a more secured Europe.

2. The Changing Institutional Framework related to the Large-Scale IT Systems of the IT Agency and of the Smart Boarders Initiative

This chapter presents the core legislation of the large-scale IT systems operating in the European Union. The core legislations are composed by Community or intergovernmental legal acts which create fundamental legal basis for the establishment of these systems. This part is not about to draw up the legal development of SIS, VIS and EURODAC. The aim is to place large-scale IT systems in Community or, better to say after 1 December 2009, in the Union law. This explanation is crucial observing the tendencies regarding smart borders initiative. To be more precise, this process would help to understand the legal basis of the envisioned EU level entry/exit system and of the registered traveller program.

First Attempts: the Mixture of Intergovernmental and Community Acts

The foundation of large-scale IT systems in the European Union is a typical spill-over process. For the realization of the single market, Member States approved the Single European Act (SEA). Article 13 of SEA modified the EEC Treaty. The EEC Treaty was amended with Article 8a, requiring the Community “to adopt measures with the aim of progressively establishing the internal market over a period ending on 31 December 1992”.

That means the abolishment of the fiscal, physical and technical barriers along the borders of members of the EEC. The 1992 Maastricht Treaty (the Treaty on European Union, the TEU) transformed these rights to the level of single citizens. The four basic freedoms have already become a reality in the European Union.

But the Schengen integration stated before TEU or SEA. The Benelux Economic Union, the Federal Republic of Germany and the French Republic agreed first the Schengen

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7 For that see: Ch. 3. and Ch. 4.1.
Agreement⁹ (hereinafter the Agreement) in 1985 and then the Convention implementing the Schengen Agreement¹⁰ (hereinafter the Convention) in 1990. These are intergovernmental agreements i.e. these legal acts were not originally part of the Community legal system. After the accession of some more Member States to the Agreement and the Convention they entered into force in 1995.

The principle of the Agreement is the abolishment of internal border checks among its signatories. In order to implement this objective the Agreement drew up a detailed list of measures to be agreed upon. The Convention defined more elaborated rules on abolishing internal border checks, strengthening external borders, harmonising visa policy, and regulating movement of third-country nationals among its signatories in Articles 1-25. Further rules were set out on restricting irregular immigration¹¹, allocating responsibility for asylum requests¹², addressing criminal judicial cooperation and police cooperation issues¹³, and creating a database which is the Schengen Information System (SIS) in Articles 92-119.¹⁴

The abolishment of internal border checks obviously entails higher security risks. As Steve Peers explains “the underlying logics of Schengen rules was that there must be extensive ‘compensatory’ measures, including a common visa policy and a transfer of checks to the external borders of the signatories, in order to ensure that internal border checks could be abolished without a corresponding loss of security”¹⁵. The Agreement and the Convention are the core legislation preparing the field for the SIS.

I shall mention that there were three segments to ensure the security in the foreseen Schengenland. The SIS decreases the security deficit inside the Schengen area; in parallel the VIS gives a reliable reference point for the selection of the entering third-country nationals and keeps visa shopping. The third missing segment was the asylum component. The other IT systems could be inefficient if common minimum standards are not required for the asylum applications. The EURODAC is the large-scale IT system which fills this gap. It is provided for being an EU wide tool which helps to determine which Member State is responsible for examining an asylum claim.

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¹⁵ Ibid.
The EURODAC is a coherent part of the “Dublin process”. The Schengen Implementing Convention also contains measures in relation to asylum law, which were replaced by the measures of the Dublin Convention\(^\text{16}\). The Dublin Convention was signed by all members of EEC in 1990 and entered into force in 1997. It was part of Community law. The Dublin Convention was replaced by the Dublin II Regulation\(^\text{17}\) in 2003, which refined the responsibility of the Member State related to asylum application procedure.\(^\text{18}\) Hereinafter I mention the EC Treaty amendments which are relevant to the asylum policy, too.

Not all of the Member States were ready to accept the idea of the common visa and common asylum policy in order to counterbalance the abolishment of the internal borders. Some of them did not want to join either the Schengen Agreement or the Schengen Implementing Convention. These could be additional reasons why these legal acts took a long time to enter into force.

As I have mentioned above, the TEU gave an institutional framework for the construction of the so-called basic freedoms. Furthermore, the 1992 Maastricht Treaty is the first milestone in the field of Justice and Home Affairs (JHA), since it gave rise to the so-called pillar system. The Coordination Committee which was responsible for the JHA cooperation (the Third Pillar) became a new forum in the Council for the articulation of interests of the Member States. In that way, it helped the integration by negotiating the debates belonging to its competence, while it is a more structured framework for cooperation, although it had obvious deficiencies.\(^\text{19}\)

Concerning visa and border issues, the TEU introduced two important articles. Article 100c was inserted into the EC Treaty. The Community got the scope of authority for example to “determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States”\(^\text{20}\) and to “adopt measures related to a uniform format for visas”\(^\text{21}\). In Article K.1 there are other provisions

\(^{16}\) Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, 19.8.1997, OJ C 254, pp. 1-12.

\(^{17}\) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, pp. 1-10.

\(^{18}\) Peers, Steve, EU Justice and Home Affairs Law, p. 303.


\(^{21}\) Ibid, Art. 100c(3).
delegated the competence to the third pillar such as the “asylum policy”\textsuperscript{22}, rules on the crossing of external borders of the Member States “and the exercise of controls thereon”\textsuperscript{23}, and the “immigration policy and policy regarding nationals of third countries”\textsuperscript{24,25}. The division of competence for visas between the First and Third Pillars under the Maastricht Treaty is a result of political compromise among the Member States. That is the reason why the Council adopted an across-the-pillar approach where the circumstances required so.\textsuperscript{26}

Meanwhile, the Schengen Implementing Convention entered into force in March 1995. On the one hand, the measures of the Convention (see above) were implemented. On the other hand, the Executive Committee adopted further measures belonging to the sphere of visa and border control issues.

**Communitarisation: Handling the Cross-Pillar Structure**

The Treaty of Amsterdam \textsuperscript{27} gave more power to the EC in connection with these delicate questions. The Third Pillar of the Maastricht Treaty was regarded as an anteroom by a number of Member States which shall be communitarised. At the price of three Member States’ opt-out, the Amsterdam Treaty communitarised many areas which were previously within the scope of the Third Pillar.\textsuperscript{28} It should be noted herein that these opt-outs pertain to the application of the so-called Schengen *acquis* which had not been the part of the community law before the Amsterdam Treaty.

The Treaty of Amsterdam fundamentally changed the structure of JHA which might be the most important achievement of the Treaty\textsuperscript{29}. The progressive establishment of the area of freedom, security and justice became the aim of the European Community. This endeavour has been based on the idea of the free movement of persons.

The Title IV was added to the EC Treaty by the Treaty of Amsterdam addressing “visa, asylum, immigration and other policies related to free movement of persons”.

\footnotesize{
\textsuperscript{22} Ibid, Art. K.1(1).
\textsuperscript{23} Ibid, Art. K.1(2).
\textsuperscript{24} Ibid, Art. K.1(3). See also in particular: *ibid*, Art. K.1(3)a-c.
\textsuperscript{26} Meloni, Annalisa, *op. cit.*, pp. 138-141.
\textsuperscript{27} Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Relates Acts, OJ C 340, 10.11. 1997, pp. 1-144.
\textsuperscript{28} Meloni, Annalisa, *op. cit.*, p. 124.
\textsuperscript{29} Cf. Treaty on European Union, *op. cit.*, Art. K.9.}
Concerning visa and border issues, the tools to achieve to above mentioned goals are set out in Article 62 EC. Article 62(1) EC clearly refers to the abolishment of the internal border checks stating the “the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders”. Other related measures such as asylum and immigration policy, external and internal border control and judicial cooperation in civil matters became First Pillar issues, became the part of the EC law since the Treaty of Amsterdam came into force. Visa policy as a whole was transferred to the First Pillar, too. But as ANNALISA MELONI highlighted, the nature of visa policy, “because of its ramifications, [it] continues to be a subject with straddles all the Pillars of the Union.”³⁰ It “reflects such a state of affairs.”³¹ The communitarisation of the Schengen Agreement and the Schengen Implementing Convention, respectively of the Schengen acquis was a great achievement of the Treaty of Amsterdam. Accordingly, the enclosed protocol of the Treaty of Amsterdam set for the implementation of the Schengen Agreement and the related legislation to the framework of the European Union to achieve the communitarisation of external border checks such as the abolishment of internal border checks and the merger of external border checks.³² The Treaty of Amsterdam entered into force on 1 May 1999. After that date, the Schengen acquis was inducted to the First or to the Third Pillar depending on their jurisdiction and these legislations has become coherent part of the EC or EU law, i.e. the acceding countries shall accept them.³³ The United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland have never signed either the Schengen Agreement or the Schengen Implementing Convention. Referring to their special status, these countries do not have to apply the Schengen Agreement and the related Schengen acquis.³⁴ The Treaty of Amsterdam gave the third opt-out to the Republic of Denmark. This country has the right to decide case by case about the application of new EC and EU legislations on the field of the

³⁰ Meloni, Annalisa, op. cit., p. 141.
³¹ Ibid.
Schengen *acquis*.\(^{35}\) These protocols affect on the common asylum law, too, i.e. they shall be taken into account in connection with the “Dublin process” and consequently in relation to the EUROPDAC.

The 1997 Amsterdam Treaty also strengthened the Third Pillar (Police and Judicial Cooperation in Criminal Matters) and revised its sources of law and its decision-making procedure.

The Treaty of Amsterdam inserted Article 63(1) and 63(2) into the EC Treaty, conferring powers upon the Community to adopt measures concerning asylum and international protection. Asylum powers were subject initially to standard rules applying Title IV (First Pillar). The Treaty attached a Protocol on asylum for nationals of Member States of the European Union.\(^{36}\)

Consequently, the achievement of the area of freedom, security and justice became one of the aims of the European Union. As I pointed above, this requirement faced a cross-pillar task, i.e. the policies on free movement and on immigration, asylum and visas belonged to the First Pillar, while police and judicial cooperation in criminal matters fell within the Third Pillar. Before the entry into force of the Amsterdam Treaty, the cross-pillar nature of the visa and the external and internal border control and security issues was recognised in the Vienna Action Plan. “As the Vienna Action Plan emphasized, the concepts of freedom, security and justice are inseparable: ‘one cannot be achieved in full without the other two’\(^{37}\).”\(^{38}\) The Vienna Action Plan concerned to agree on the rules on the procedures and conditions for issuing visas, on the rules on a uniform visa. It foresaw the full harmonisation of visa lists and of airport transit visa requirements. These shall be realised in a two-year period.\(^{39}\) Within five years, the mechanism to prevent visa shopping and further security for standard EC visa format shall be elaborated as well as the Schengen representation arrangements shall be extended.\(^{40}\) In order to implement the latter measures of the Vienna Action Plan, the Council


\(^{38}\) Meloni, Annalisa, *op. cit.*, p. 163.


established the High Level Working Group on Asylum and Immigration. As a provision of the Vienna Action Plan the common procedure of seeking asylum building on common standards was assigned. This ambition was built on the communitarisation of the Dublin Convention. The Tampere summit called the Commission to form a five-year scoreboard based on the Vienna Action Plan. The Tampere Conclusions set an ambitious agenda for developing a “Common European Asylum System” (it is often referred as CEAS), inter alia, the promptly realisation of the system for the identification of asylum seekers (EURODAC) out.

The 2001 Treaty of Nice supplemented the related policies to JHA in connection with the First and also in relation to the Third Pillar. The Treaty of Nice contains changes regarding the decision-making. The Treaty extended the enhanced cooperation to the Third Pillar, too.

I would like to note that several authors emphasised the importance of 9/11 concerning JHA cooperation. I think that September 11 is not the cause. However, the unexpectedness of the tragedy is a relevant external factor which changed the priorities of the European Union. All in all, the further development of JHA suits for the accelerating integration process of these policies.

The Hague Program set another five-year agenda for the development of the area of freedom, security and justice out. Regarding the large-scale IT systems, these tasks were the following which were fixed in the Hague Program: the application of SIS II, a review of the powers of the border agencies, the establishment of the Common European Asylum System, the eventual creation of visa officers, a report on interconnection between information systems and continued integration of biometrics.

41 See also: Meloni, Annalisa, op. cit., pp.184-185.
45 Cf. Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, Prüm, 27.5.2005, source: 10900/05 Prüm Convention, Brussels, 7.7.2005; and cf. Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008, pp. 1-11.
The area of freedom, security and justice still faces challenges. That is why the European Council endorsed the Stockholm Programme. This program handles the SIS II and the VIS as a key objective. The European Council invited the Commission “to undertake a feasibility study on EURODAC as a supporting tool for the entire CEAS, while fully respecting data protection rules”.

**Implications of the Non-Pillar Europe**

The Constitutional Treaty would have significantly changed the structure of JHA if it had come into force. The Treaty of Lisbon inherited the substantive changes proposed in the Constitutional Treaty. As a result of the disappearance of the Pillars, the decision-making procedure of measures in relation to the area of freedom, security and justice is basically the ordinary decision legislative procedure. The European Union

“[...] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Members States [...]”.

The Treaty confirmed the tendency towards the integration of external border controls, since it investigates the establishment of a Union policy on border checks. The protocols on the special status of the United Kingdom, Ireland and Denmark are included in the Treaty with some minor amendments.

In connection with common asylum policy the Treaty of Lisbon states that

“[...] [t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country

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47 Ibid., p. 57.
48 Ibid.
51 Ibid., Art. 77, pp. 75-76.
national requiring international protection and ensuring compliance with the principle of non-refoulement.⁵³

The Lisbon Treaty closed the process started by the Treaty of Amsterdam, since the Third Pillar ended and the decision-making procedure concerning the area of freedom, security and justice was reviewed. I think that the realisation of the area of freedom, security and justice will remain the most dynamically developing part of the integration, which belongs to the shared competencies.

Examining the smart boarders initiative of the European Commission⁵⁴, it endeavours for the establishment of the European level entry/exit system (hereinafter: EES) and of the registered traveller programme (hereinafter: RTP) are the results of a typically spill-over process.⁵⁵ All the above highlighted legal developments help to understand the formation of EES and RTP’s legal ground.

Article 77 of the Treaty on the Functioning of the European Union (TFU) is the core of smart borders initiative. On the basis of Article 77(1), Article 77(2)b and Article 77(2)d envisioned checks on persons crossing the external borders and “any measure necessary for the gradual establishment of an integrated management system for external borders”⁵⁶.

Reading Commission Communication about smart borders initiative⁵⁷, the link to the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice is unclear. However, as I pointed above, TFEU Article 77 (2)d stipulates one, unified management system for the external borders. Therefore, the operational management of these systems have to be merged into the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.⁵⁹

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⁵³ Treaty on the Functioning of the European Union, op. cit., Art. 78, p. 76.
⁵⁵ See also: Ch. 5.2.
⁵⁶ Treaty on the Functioning of the European Union, op. cit., Art. 77(2)d, p. 76.
⁵⁹ See also: Ch. 4.4.
Programmes, action plans and communications are compasses of future legislation. The detailed presentation of the core legislation was highly important, since it is indispensable to understand the legal development and the nowadays practice of the European large-scale IT systems and the smart boarders initiative drawn up in the next chapters.
3. Towards Smart European Borders – Specific European Large-Scale IT Systems in Practice

The European Union established the Schengen Information System (SIS), the Visa Information System (VIS) and the EURODAC to support the realisation of Community/Union policies in connection with immigration, visa, asylum and the free movement of persons within the Schengen area. These information systems are highly important for the border security strategy, since the systematic data gathering and data exchange of information concerning third country nationals happen through them. However, today’s regulatory framework is proved to be insufficient according to the smart border initiative. Travellers who stay beyond their authorised stay mean significant risk for EU, since they are considered as the main source of irregular migration. Therefore, the Commission proposed the establishment of EU level specific systems.

In the next subchapters, the development and the basic tasks of the existing large-scale IT systems is to be highlighted in order to give a background for the evaluation of SIS, VIS and EURODAC’s integration. It is important to understand the underlying logics of EU level actions on the field of border management for the examination of the smart borders initiative. Moreover, this analysis is crucial to understand the common grounds and possible connections with large-scale IT systems and with the IT Agency.

3.1. Schengen Information System (SIS)

The Schengen Information System is a large-scale IT system that allows the competent authorities i.e. national police, customs, and border control authorities when making checks on persons at external borders or within Schengenland, and the immigration officers when dealing with third-country nationals, in particular when deciding whether to issue visas or residence permits to obtain information regarding certain categories.

of persons, vehicles and objects. Officials may only search the data necessary for the performance of their tasks.\footnote{Ibid, Art. 101(3), p. 45.}

The SIS has become operational with the entry into force of the Schengen Implementing Convention in March 1995.\footnote{See: Ch. 2.} Further rules were laid down by the decisions of the Schengen Executive Committee, such as “the Decision establishing the SIRENE\footnote{It stands for Supplément d’Information Requis à l’Entréé NationalE.} Manual, which governs subsequent exchanges of information following a ‘hit’ in the SIS.”\footnote{Peers, Steve, “Key Legislative Developments on Migration in the European Union: SIS II”, European Journal of Migration and Law, 10(1), 2008, p. 79.} The factual data are stored on the SIS but the SIRENE bureaus make it possible to exchange ‘soft’ data such as criminal intelligence information.\footnote{Broeders, Dennis, \textit{op. cit}, p. 80.} The power of the Executive Committee and its working groups was transferred by the Treaty of Amsterdam to the Council and to its working groups.\footnote{See: Ch. 2.} The SIS consists of two fundamental elements: the central database (called C-SIS) that is located in Strasbourg and the national SIS-bases (called N-SIS) in all of the participating states.

The corresponding authorities can enter certain types of information about or relating to persons. Submitted personal data are certain personal details and an indication of whether he or she is armed or dangerous.\footnote{Schengen Implementing Convention, \textit{op. cit}, Art. 94(3), p. 43.} “There are six broadly defined reasons for which information can be included on the SIS.”\footnote{Peers, Steve, \textit{EU Justice and Home Affairs Law}, p. 548.} These are the so-called types of SIS ‘alerts’.\footnote{See: Schengen Implementing Convention, \textit{op. cit.}, Art. 95-100., pp. 43-45.}

The SIS is communitarised as a Schengen \textit{acquis} with the entry into effect of the Treaty of Amsterdam.\footnote{See: Ch. 2.} In spite of the protocols on the special status of the United Kingdom and Ireland, they also connected to the SIS for criminal law and policing purposes\footnote{Peers, Steve, Key Legislative Developments, p. 80.}; however they do not apply the Schengen \textit{acquis}.\footnote{See: Ch. 2.}

The original SIS has already been updated to ‘SIS 1+’ in order to enable linking the Nordic countries to SIS. Thus the Schengen Implementing Convention SIS rules were amended in 2004 and 2005 within the current technical framework. As a result of the
amendments, the judicial authorities, the Europol, the Eurojust and with another regulation the vehicle registration authorities got access to SIS data. A further decision conferred power upon the Commission to amend the SIRENE Manual.72

The data storage capacity of SIS was planned for a limited number of countries (eighteen is the average opinion), so due to the eastern enlargement the Member States decided to develop and to build up the second generation SIS (SIS II) till March 2007. It became clear at the meeting of the Ministers of Justice and Home Affairs in December 2006 that more time is needed for the development of SIS II. Thus they agreed on that the accession of those new Member States from the ten which are ready to join to the Schengen area shall happen with the accession to the SIS 1+, while the SIS II should have been operational in the enlarged Schengenland in 2008. This proposal came from Portugal for the development of a ‘SIS One4 All’. As I have mentioned, the SIS One 4 All is the extension of the existing SIS 1+, a solution which had previously been understood to be technically impossible.73

Once the development phase of SIS II comes to an end, the operational phase starts expectedly in 2013.74 Three legal instruments will govern SIS II during the operational phase.75 The SIS II shall maintain public security and public policy and safeguarding of security within the area of freedom, security and justice of the European Union. SIS II shall be composed of three parts. The first is the central system (“Central SIS II”) containing a technical support function (“CS-SIS”) containing a database, the “SIS II database” and a uniform national interface (“NI-SIS”). Secondly, there are national systems (“the N.SIS II”) in each Member States, consisting of the national database which communicate with the Central SIS II. An N.SIS II may contain a data file (“national copy”), containing a complete or a partial copy of the SIS II database. The third part of SIS II is the communication infrastructure between the CS-SIS and the NI-

73 Peers, Steve, Key Legislative Developments, pp. 81-82.
SIS (“the communication infrastructure”) that provides an encrypted virtual network dedicated to SIS II date and the exchange of data among SIRENE Bureaux.\(^{76}\)

New functions were added to the second generation SIS compared to the SIS 1+. These include biometric data, new categories of data and the possibility for running searches on the basis of incomplete data.\(^{77}\) The function of SIS extended to provide for the fight against terrorism\(^{78}\) and adopted to enable the storage of photographs and fingerprints after 11 September 2001. The addition of biometric information to SIS is one of the key aspects of the overhaul, while biometric data can be used both to confirm someone’s identity and to indentify somebody.\(^{79}\) The SIS II has a further novelty concerning to the access of data, i.e. persons listed on the EU terrorist list based on decisions by the Sanctions Committee of the UN Security Council can be included in the SIS.\(^{80}\)

The Charter of Fundamental Rights of the European Union\(^{81}\), especially its Article 45\(^{82}\) shall be taken into account applying the SIS II rules. However it is less clear how the SIS relates to third country nationals. In the preamble of SIS II Regulation\(^{83}\), it is said that further harmonisation of the provisions on the grounds for issuing alerts concerning third country nationals for the purpose of refusing entry or stay and the clarification of their use in the framework of asylum, immigration and return policies are needed.\(^{84}\) On the one hand, it is unfortunate that the express clause giving priority to other EU immigration and asylum legislation was dropped. On the other hand, it is still arguable that such legislation takes priority over the SIS II legislation even in the absence of an express rule to that effect.\(^{85}\)


\(^{77}\) *Ibid.*


\(^{84}\) Boeles, Pieter and Heijer, Maarten den and Lodder, Gerrie and Wouters, Kees, *op. cit.*, p. 424.

As a result of legal, political and technical problems, the set out deadlines in the global SIS II timetable\(^{56}\) cannot be observed. That is why the Commission formulated a proposal for the a Council Regulation amending Regulation (EC) No 1104/2008 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II)\(^{87}\). A group of experts (i.e. the Global Programme Management Board) has been set up to elaborate the technical specifications for the switch to the operational phase of SIS II which is envisioned to start in 2013.\(^{88}\)

### 3.2. Visa Information System (VIS)

The so-called Santiago Plan\(^{89}\) included proposals, inter alia, on visa policy and on information exchange and analysis on migration flow. Regarding visa policy, it recommended the annual review of the visa lists, the inclusion of photo and biometric data of visa holders in their visas, the establishment of joint visa offices with a pilot project in Pristina, and the establishment of the Visa Identification System.\(^{90}\) The Visa Identification System has been renamed to Visa Information System (VIS). The VIS is a system for the exchange of visa data among its Member States. Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS)\(^{91}\) provides the legal basis for the development of the system. The VIS Regulation\(^{92}\) defines the purpose, the functionalities and the responsibilities concerning the VIS. It sets up the conditions and procedures for the exchange of data among its members on application for short-stay visas and on the related decisions.

\(^{56}\) 5780/07 Revised Global SIS II schedule in light of the SISone4ALL implementation, Brussels, 29.1.2007.
\(^{88}\) Ibid, especially Art. 1(5) and Art. 1(6).
\(^{90}\) Meloni, Annalisa, *op. cit.*, p. 178.
The technical setup of the system is similar to the SIS. The new visa system has a central database (C-VIS), and interface at the national level (N-VIS) and local access points (terminals) for police, immigration authorities and consular posts. The VIS can serve as an instrument to detect and identify those irregular migrants who travelled into the EU legally at any border, and the overstayed. It is not a law enforcement tool. However, it is a law enforcement access. The VIS is for facilitating border and police checks, to combat fraud, to improve consular cooperation and to prevent visa-shopping. The VIS facilitates the application of the Dublin II Regulation fixed in Article 21 and 22 of the VIS Regulation. However, the VIS data substantially contribute to the prevision, detection or investigation of terrorist offences and of other serious criminal offences.

Detailed rules on access for entering, amending, deleting and consulting VIS data as well as on access to biometrics (photographs, fingerprints) for verification at border crossing points, for verification within the territory of the Member States, for identification and as appointed in the previous paragraph for determining responsibility for asylum applications and for examining an asylum application. The VIS shall be connected to the national system of its Member States to enable the competent authorities of the Member States to process data on visa application and on visa issued, refused, annulled, revoked or extended.

The Schengen Borders Code has been harmonised with the VIS by a regulation. As of 2008, the VIS shall have begun operations by December 2010 as planned. In that case the expiry of the derogations in the VIS Regulation and the Schengen Borders Code concerning the use of biometrics in the VIS is at the same time as the entry-exit system could begin operation estimated by the Commission. As Steve Peers recalled “the initial three-year derogation from the use of fingerprint checks at external borders in the

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93 Broeders, Dennis, op. cit., p. 86.
94 Ibid, p. 85.
95 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, pp. 1-10.
97 Boeles, Pieter and Heijer, Maarten den and Lodder, Gerrie and Wouters, Kees, op. cit., p. 424.
VIS Regulation will overlap with the rolling out of the VIS – so the impact of use of the VIS at external borders will be limited for some time.”

The Visa Code has been applied from 5 April 2010. Article 54 harmonises the VIS Regulation with the Visa Code. If the applicant is a person for whom an alert has been issued in the SIS for the purpose of refusing entry, it indicates a ground for the refusal of the visa. Article 54(7) defines the data which the visa authority shall add to the application file if a visa is annulled or revoked. Furthermore, the Visa Code gives some aspects to the monitoring and the evaluation of the VIS and of the Visa Code.

Not only the operation of SIS II delayed – as I mentioned above, but also the operation of VIS. As JACQUES BARROT, the former Vice President of the European Commission for Justice, Freedom & Security, said in 2010 in relation to VIS “[a]t least three Member States are encountering major difficulties, and the delays due to these three States are even more significant than those caused by the central system.”

The VIS has been operational since 11 October, 2011. However, the VIS will have been applied step by step, i.e. region by region (regional rollout). The Commission adopted Decision 2010/49/EC which determines the first regions for the rollout. According to the Commission Decision, the VIS will subsequently be deployed in the Near East, and then in the Gulf region. In November 2011, the VIS started its full operation in North Africa after all Schengen States having visa-issuing consulates in the region informed the Commission that they had taken the necessary technical and legal arrangements for collecting and transmitting the data for all applications in the region to the VIS. The Commission planned to adopt another Decision determining a second step of regions for the VIS consular rollout by the end of 2011. However, as of 1 March, 2012, the goal has not been achieved.

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100 Ibid.
107 Ibid.
Commission Decisions fix only the minimum standards. If a Member State is ready to apply VIS elsewhere and the Member State has informed the Commission about it, the VIS can be applied there regardless of the regulated rollout regions.

3.3. EURODAC (European Dactylographic System)

EURODAC is a database that stores and compares the fingerprints of asylum applicants and illegal migrants apprehended in connection with the irregular crossing of an external border. It was established to allow Member States to determine the state responsible for examining an asylum application according to the Dublin Convention, and now the Dublin II Regulation\textsuperscript{108}. The EURODAC Regulation\textsuperscript{109} was adopted in 2000, and the Council adopted the implementing rules\textsuperscript{110} in 2002. The system has become operational in 15 January 2003.\textsuperscript{111} These regulations highly contribute to the building of the Common European Asylum System.

The EURODAC Regulation consists of the Central Unit managed by the European Commission containing an Automated Fingerprint Identification System (AFIS) which shall receive data and transmit “hit – no hit” replies to the national authorities (to the National Access Point servers) in each Member State. Its activity is monitored by the European Data Protection Supervisor. The national authorities are responsible for the overall quality of data transferred to, recorded or erased from the Central Unit and for the security of the transmission of data among their national authorities and the Central Unit. Several categories are defined for asylum applicants and aliens. The following data is collected for any asylum applicants over 14 years of age: fingerprints; sex of the data subject; Member State of origin, place and date of the application for asylum; reference number used by the Member State of origin; date on which the fingerprints were made.

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\textsuperscript{108} See the “Dublin process” in Ch. 2.


were taken, date on which the data were transmitted to the Central Unit and the operator user ID of the person who transmitted the data. ¹¹²

As it was highlighted by STEVE PEERS, “the Council’s March 2004 conclusions on anti-terrorism and the November 2004 Hague Programme, both of which call for the ‘interoperability’ among EURODAC, the planned Visa Information System (which will store fingerprints of visa applications), and the second-general Schengen Information System (which will have the capacity to store fingerprints).”¹¹³ In December 2008 the Commission proposed the first three measures which would constitute the second phase of the Common European Asylum System: amendments to the EURODAC Regulation, the Dublin II Regulation and the Reception Conditions Directive¹¹⁴.¹¹⁵

The 2010 Belgian Presidency was committed to speedy completion the Common European Asylum System. The Dublin and EURODAC Regulations and the Long Term Residence and Qualification Directives have been prioritised with ensuring coherence in relation to the Reception Conditions and Procedures Directives.¹¹⁶ Therefore, the legislative package of the Common European Asylum System includes six legislative proposals which EU Member States have committed to adopt by 2012.¹¹⁷ As of 1

March, 2012, their debates are ongoing in the framework of the European Union’s decision-making procedures.
4. The Operational Management of the Large-Scale IT Systems Operating in the Area of Freedom, Security and Justice

Problems of the existing IT systems were highlighted in the previous chapter. Henceforward it is fundamental to consider how the newest segment of the large-scale IT systems’ operational management contributes to the smarter European borders.

The establishment of a new European Agency were proposed by the European Commission for the operational management of the large-scale IT systems in the European Union.118 It was established in 1 January, 2012. Therefore, at the time of writing, it is the newest European Agency. Its establishment means the integration and the institutionalisation of the existing large-scale IT systems’ operational management. This chapter gives an over-all picture of the Agency with a special focus on its effects concerning the realisation of smarter borders in Europe.

Firstly, it is worth to consider why the establishment of the Agency was legally predetermined, since the previous hints for its establishment points out security deficit perceived by the European Commission.

Then it is essential to understand the aims and the basic tasks of the IT Agency in order to evaluate the scope of the IT European Agency taking into account the principle of subsidiarity and proportionality.

Thirdly, the general and governance structure of the IT Agency are in focus. For that, the legal basis of the IT Agency is analysed. Furthermore, the problem of the territorial scope of the IT Agency is raised. Then the governance structure of the Agency is summed up.

Fourthly, the relationship of the IT Agency with other EU agencies is observed. Therefore, a subsection concentrates on the legal instruments of the SIS II and VIS and the existing and proposed legal instruments of EURODAC in order to identify the EU level agencies which have access to and/or influence on the large-scale IT systems. The

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status of these organisations is defined in the everyday work of the IT Agency. For that a layer model is presented to highlight the interrelations.

Finally, two approaches are presented to answer the question of how the new IT Agency contributes to the smarter European borders. The first approach is rather theoretical. With the help of that, the motives behind the establishment of the IT Agency are revealed. Then the added-value of the IT Agency is summarised like a SWOT analysis which is to define how the delineated development process of the large-scale IT systems’ operational management contributes to the increase of the efficiency of the information power in order to decrease the security deficit thus contributing to a more secured Europe.

4.1. Legal Predestination

This section draws up a detailed picture of the legislative integration process of the information systems working for the European Union’s public safety. Hence the essential milestones are presented. Hereinafter the connection points of the legal predestination to the installation of a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice are highlighted.

The EU Member States want to foster the integration of the information systems for seven years at least. As the Hague Programme states

“[...] [t]he European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals. [...]”\(^{119}\).

The fundamental legislation of the Second Generation Schengen Information System (SIS II)\(^{120}\) was adopted on 20 December 2006. This is the SIS II Regulation. Worthy of

note, the SIS II has more legal instruments. Article 15(1) of the SIS II Regulation states the followings:

“After a transitional period, a management authority (the „Management Authority”), funded from the general budget of the European Union, shall be responsible for the operational management of Central SIS II. [...]”.

Till the establishment of the Management Authority, during a transitional period, the Central SIS II is managed by the Commission. In the interim transitional period the Commission may delegate its power to two Member States. Thus the

“CS-SIS, which performs technical supervision and administration functions, shall be located in Strasbourg (France) and a backup CS-SIS, capable of ensuring all functionalities of the principal CS-SIS in the event of failure of this system, shall be located in Sankt Johann im Pongau (Austria).”

Based on Article 55(1), the SIS II Regulation entered into force on 17 January 2007. A Joint Statement of the Commission, the Council and the European Parliament on Article 15 relating to operational management of SIS II assigns

“[...] the necessary legislative proposal to entrust an Agency with the long-term operational management of the Central SIS II and parts of the Communication Infrastructure. [...]”

It means that these proposals shall be published in 2009. According to the Joint Statement the Agency shall take up fully its activities in 2012.

The same legislative techniques are used in case of the adaptation of legal instrument of the Visa Information System (VIS). The VIS Regulation was adopted on 9 July

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125 Peers, Steve, Key Legislative Developments, pp. 86-87.
2008\textsuperscript{127}. After a transitional period the Management Authority shall be founded\textsuperscript{128}. During that period the Commission is responsible for the operational management of VIS, which may delegate its power to two Member States\textsuperscript{129}. Consequently, the central VIS is located in Strasbourg (France) and the back-up central VIS in Sankt Johann im Pongau (Austria)\textsuperscript{130, 131}.

A Joint Statement of the European Parliament, the Council and the Commission on Article 26 relating to operational management of VIS\textsuperscript{132} was approved. Its requirements, its goals and the planned deadlines are the same as in the Joint Statement relating to the SIS II. According to the Joint Statement, an Agency has been established for the long-term operational management of the VIS. The Statement added that

“[...] [t]he impact assessment could form part of the impact assessment which the Commission undertook to carry out with regard to the SIS II. [...]”\textsuperscript{133}.

The third IT system is the EURODAC. Its interoperability shall be ensured in line with the Hague Programme. The Commission issued three proposals\textsuperscript{134}, inter alia, to promote the harmonisation of the EURODAC with other IT systems. One of the proposals\textsuperscript{135} would like to implement a new recital as Recital 11 into the Dublin II Regulation\textsuperscript{136} in order to tone in with the VIS Regulation although the recitals are not legally binding. But these items of a regulation express the purpose of the legislators and the legal basis. In disputes the recitals can be very important adopting the soft law approach to the specific situation.

Another proposal\textsuperscript{137} suggests replacing Article 4 of Council Regulation (EC) No 2725/2000\textsuperscript{138} with the followings:

\textsuperscript{127} Regulation (EC) No 767/2008 \textit{op. cit.}
\textsuperscript{128} Ibid, Art. 26(1), p. 72.
\textsuperscript{129} Ibid, Art. 26(4), p. 72.
\textsuperscript{130} Ibid, Art. 27, p. 73.
\textsuperscript{131} Peers, Steve, Legislative Update, pp. 86-87.
\textsuperscript{133} Ibid.
\textsuperscript{136} Council Regulation (EC) No 343/2003, \textit{op. cit.}
\textsuperscript{137} COM(2008) 825 final, \textit{op. cit.}
\textsuperscript{138} Council Regulation (EC) No 2725/2000, \textit{op. cit.}
“1. After a transitional period, a Management Authority, funded from the general budget of the European Union, shall be responsible for the operational management of EURODAC. […]
4. During a transitional period before the Management Authority takes up its responsibilities, the Commission shall be responsible for the operational management of EURODAC. […]
7. The Management Authority referred to in this Regulation shall be the Management Authority competent for SIS II and VIS.”

The recast version of the proposal[139] is a bit specified from this aspect. But the core of the proposal remained the same.

All the three cited proposals have been recast by the European Commission in order to be adjusted to the endeavours of legislators (i.e. the European Parliament and the Council) and of the changed legal context (i.e. the Lisbon Treaty). However, the basic intentions for EURODAC’s harmonisation with the other IT systems are ensured in the new versions, too. In the case of EURODAC, the same legal solution is to be used to identify the competences of the Management Authority as in case of the SIS II and the VIS Regulation.

Pursuant to the three cited proposals concerning EURODAC and to the above mentioned Joint Statement, a European Agency shall have been established for the long-term operational management of SIS II, VIS and also EURODAC until 2012. Therefore, the foundation of the IT Agency was legally foreordained, which could have signed the perception of some security deficit in Schengenland.

4.2. Roadmap to a New Regulatory Agency

The undertaking of this subsection is to demonstrate the aims and the basic tasks of the IT Agency. The European Commission elaborated five options for the establishment. Hence, the elected one and the legal and technical conditions of the Commission’s impact assessment[140] are analysed in order to evaluate the scope of the IT Agency taking into account the principle of subsidiarity and proportionality.

As it has been detailed above, the European Commission, the Council and the European Parliament, in joint statements attached to the SIS II and VIS legal instruments, committed the Commission to present, within two years of the entry into force of the SIS II and VIS legal instruments, the necessary legislative proposals, following an impact assessment containing a substantive analysis of alternatives from the financial, operational and organisational perspective, to entrust an agency with the long-term operational management of the VIS, of the Central SIS II and of parts of the Communication Infrastructure. The EURODAC would need to be upgraded in terms of capacity after the new Member States joined the EU in 2004 and 2007. The biometric matching, synthesising the above mentioned, in the form of the service-oriented architecture of the Biometric Matching System (BMS), is, in the first instance, made available for the VIS. It is likely to be provided on a larger stage for SIS II and EURODAC. Accordingly, the operational management solution for EURODAC has also been reviewed in the impact assessment of the Commission (hereinafter impact assessment).\textsuperscript{141} Combining the systems, on the one hand, in a joint Agency could provide opportunities for considerable synergies such as sharing facilities, staff and common technology platform. On the other hand, these systems cannot function properly without a long-term central operational management authority, which ensures uninterrupted flow of data, operational management of the systems and continuity, while it has also been legally predetermined.\textsuperscript{142}

The impact assessment defines proper criteria in order to compare the opportunities of alternatives. The Commission calculated by the following factors: the efficient management of the systems taking their critical character and their 24/7 availability into account; the need to involve the views of all stakeholders and the roles of the EU institutions; the heterogeneous group of participating countries\textsuperscript{143}; the need for (cost-) efficient management and for the timely and adequate funding; the importance of effective data protection and supervision; the effective mechanisms and redress for management of large-scale IT systems in the area of freedom, security and justice and Proposal for a Council Decision conferring upon the Agency established by Regulation XX tasks regarding the operational management of SIS II and VIS in application of Title VI of the EU Treaty, Impact Assessment, Brussels, 24.6.2009.

\textsuperscript{141} Ibid.
\textsuperscript{142} See: Ch. 4.1.
\textsuperscript{143} See: Ch. 4.3.
abuse or faults causing damage; the principle of subsidiarity and proportionality and the added value of EU action.\textsuperscript{144} The Commission chose five options to evaluate in the impact assessment based on these criteria using the qualitative and the quantitative approach regardless to the alterations introduced by the Treaty of Lisbon.

Option 3, “a new Regulatory Agency” is found to be the best alternative among the analysed opportunities. On the one hand, according to this option, the IT Agency is responsible for the long-term operation management of SIS II, VIS and EURODAC, and the IT Agency shall organise trainings related to the use of SIS II, VIS and EURODAC.\textsuperscript{145} On the other hand, the Agency shall develop and manage other IT systems.\textsuperscript{146} The initiatives for the development of new large-scale IT systems shall be in line with the European legislators, and of course their establishments shall be based on the legislative procedures foreseen in the treaties.

One of the basic aims of all the options presented in the impact assessment is to foster the interoperability among the large-scale IT systems. This endeavour creates synergies and thus reduces costs; consequently, it contributes to their cost-effective operation.

Option 3, the related proposals\textsuperscript{147} and the accepted Regulation\textsuperscript{148} respect the principle of subsidiarity, since, evidently, the above presented aims cannot be achieved by the Member States individually. Furthermore, concentrating on the proportionality principle, the competences of the IT Agency are kept to the minimum, since it manages only the central parts of SIS II, the central parts of VIS and the national interfaces, the central part of EURODAC and certain aspects of the communication infrastructure, without having responsibility for the data entered in the systems.

As the European Data Protection Supervisor (hereinafter EDPS) highlighted in his opinion\textsuperscript{149}, during the legislative and public debate “concerns have been voiced about the possible creation of a ‘big brother agency’.”\textsuperscript{150} These feelings are in relation to the

\textsuperscript{144} SEC(2009) 837, op. cit., pp. 10-17.
\textsuperscript{145} Regulation (EU) No 1077/2011, op. cit., Art. 3-5, p. 6. See also: Ch. 4.3.
\textsuperscript{146} Ibid, Art. 6, p. 7. See also: Ch. 4.3.
\textsuperscript{149} 5039/10 Opinion of the European Data Protection Supervisor on the proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and on the proposal for a Council Decision conferring upon the Agency established by Regulation XX tasks regarding the operational management of SIS II and VIS in application of Title VI of EU Treaty, Brussels, 7.1.2010.
\textsuperscript{150} Ibid, Point 24.
possibility of function creep and the issue of interoperability. The EDPS also stated that “the risk of mistakes or wrong use of personal data may increase when more large-scale IT systems are entrusted to the same operational manager.”

The Regulation of the IT Agency properly guarantees the involvement of public interest, the data protection and the security rules on the protection of classified information and non-classified sensitive information; and regulates the access to documents. On the one hand, after the entry into force of the Treaty of Lisbon, the fundamental rights and freedoms shall be more carefully respected by the European institutions. On the other hand, the appropriate accountability of the European Agencies is ensured by the European Parliament and the European Data Protection Supervisor. Furthermore, the European Court of Justice and the General Court have full jurisdiction over the activities of the IT Agency.

### 4.3. Structure of the IT Agency

After the presentation of the aims and the tasks of the newest EU Agency, its general and governance structure are focus in this subsection. Firstly, the legal basis of the Agency is analysed. Secondly, the problem of the territorial scope of the IT Agency is raised. It is the so-called *la géométrie variable*. Then the governance structure of the Agency is summed up.

**General Structure**

According to the impact assessment, the IT Agency should have been a first pillar agency with accompanying acts covering third pillar legal issues. Since the proposals were submitted, the Treaty of Lisbon has become operational. The EDPS advised that Article 87(2)(a) TFEU could be the sole basis for the proposed measures. Taking Article 87(2)(a) TFEU as the legal basis, the Commission was be able to merge to two previous proposals. The only disputable point of the EDPS’s approach is that the cited article concerns to the police cooperation. The SIS II is more related to the police cooperation.

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cooperation. But the VIS and the EURODAC system are clearly connected to the common visa and the asylum policy.

The IT Agency is responsible for the protection of personal data. In that way, the application of the Treaty of Lisbon is more preferred, since the personal data protection “stems from a fundamental right acknowledged by Article 16 TFEU and Article 8 of the Charter of Fundamental Rights, which became binding on 1 December 2009.”

On 19 March 2010 the European Commission merged the two previous proposals into one united proposal pursuant to Article 293(2) of the TFEU. The amended proposal is the equivalent of the two previous proposals. Besides the clarification of the legal basis of the Agency, there is not any significant amendment. The united proposal suggested the Title V of TFEU as the legal basis of the IT Agency. Article 87(2)(a) remained as one of its legal basis. Finally, the accepted Regulation (hereinafter: IT Agency Regulation) refers to the articles of Title V of TFEU as the legal basis of the IT Agency.

As the legal basis of the IT Agency was merged under Title V of the Treaty of Lisbon, the IT Agency is affected by la géométrie variable arising from the protocols on the positions of the United Kingdom, Ireland and Denmark, since these protocols are included in the Treaty of Lisbon with some minor amendments. The IT Agency Regulation constitutes the development of the Schengen acquis and builds on the provisions of EURODAC related measures. Hence la géométrie variable of the IT Agency is highlighted taking the changed legislative framework and the non-Schengen EU Member States not obtaining opt-out on the Schengen acquis into account.

In accordance with the Protocol on the Position of Denmark, Denmark decided to implement the SIS II and the VIS Regulation. By virtue of the same protocol, she does not take part in the adaptation of the EURODAC Regulation. However, Denmark applies the current EURODAC Regulation, following an international agreement.

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155 5039/10 Opinion of the European Data Protection Supervisor on the proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and on the proposal for a Council Decision conferring upon the Agency established by Regulation XX tasks regarding the operational management of SIS II and VIS in application of Title VI of EU Treaty, Brussels, 7.1.2010, Points 15-17.
156 Ibid, Point 15.
159 See: Ch. 2.
160 Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark.
On the one hand, the United Kingdom and Ireland do not take part in the provisions of Schengen *acquis* in accordance with the protocol on their special status. On the other hand, concerning their request to take part in some provisions of the Schengen *acquis*, they are involved in the provisions relating to SIS II. But these countries are not taking part in the adoption of the provisions of Schengen *acquis* and are not bound by them or subject to their application insofar as they related to VIS. The United Kingdom and Ireland are bounded by the EURODAC Regulation following their notice of their wish to take part in the adaptation and application of that Regulation based on their protocol attached to the Treaties.

On the basis of Recital 33 of the IT Agency Regulation, the United Kingdom notified the Council about her intention to take part in the adaptation of the regulation based on her Protocol annexed to the treaties. It means that the United Kingdom is be bound by the regulation and she is the subject to its application. But this fact does not affect the application of the VIS Regulation concerning the United Kingdom. Having regard to Recital 34, Ireland does not take part in the IT Agency Regulation.

Concerning the association of Norway and Iceland with the implementation, application and development of the Schengen *acquis*, these countries are associates in SIS II and VIS. Furthermore, they are also associates with the EURODAC related measures. The same legalisation technique was used concerning the association of Switzerland. Liechtenstein joined the agreements between the EU and Switzerland on the basis of protocols attached to the original agreements. However, the Principality has been

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162 Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters’ association with the implementation, application and development of the Schengen *acquis*, OJ L 176, 10.7.1999, pp. 36-49.

163 Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ L 93, 3.4.2001, pp. 40-47.

164 Cf. Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen *acquis*, OJ L 53, 27.2.2008, pp. 52-79; and Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53, 27.2.2008, pp. 5-17.

165 Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement
fully involved in large-scale IT systems as associate in the SIS II, VIS and EURODAC based on the protocols which are enclosed to the agreements concerning the association of Switzerland referred in the previous paragraph.166

Base on the accession treaties, Bulgaria, Cyprus and Romania are the signatories of the Schengen Agreement, and the Schengen *acquis* is binding them, but they still do not implement these rules. On the one hand, there is the Cyprus dispute. On the other hand, the accession of Bulgaria and Romania is politically not supported in the Council. It means that these countries still do not participate in the SIS II and VIS. But they are participating in the EURODAC.

I did not mention the remaining twenty-one EU and Schengen Member Countries. Of course, they apply the Schengen rules, the SIS II, VIS and EURODAC Regulation.

**Governance Structure**

In terms of the governance structure, the IT Agency facilitates the appropriate representation of users in the decision-making structures. On the basis of the IT Agency Regulation, its structure and organisation are presented below. The Agency is a Union body and has legal personality.167 The administrative and management structure of it comprise a Management Board, an Executive Director and Advisory Groups.
The Management Board compose of one representative of each Member State, two representatives of the Commission and the representatives of the countries associated with the implementation, application and development of the Schengen acquis and the EURODAC related measures (hereinafter associates). The terms of office of the Management Board’s members are four years, which may be once renewed.\(^{168}\) The Chairperson and its alternate are elected by the Management Board among its members for a two-year term, which may be once renewed. But the Chairperson may only be appointed from among those members who are appointed by Member States that participate fully in the adoption or application of the legal instruments governing all the systems managed by the Agency.\(^{169}\) Each member of the board has one vote in the Management Board, i.e. not only the Member States but also the associates have one vote.\(^{170}\) Voting right is guaranteed for a Member State if she is bound under Union law by any legislative instrument governing the development, establishment, operation and use of a large-scale IT system managed by the IT Agency.\(^{171}\) Generally, the decisions shall be taken by a majority of its members with a right to vote.\(^{172}\)

The Executive Director of the Agency shall be appointed for a period of five years by the Management Board among the suitable candidates identified in an open competition organised by the Commission. The Executive Director shall be appointed on the basis of his or her personal merits, experience in the field of large-scale IT-systems and administrative, financial and management skills. The Management Board shall take the decision by a two-thirds majority of all members with a right to vote. The European Parliament shall adopt an opinion setting out its view of the selected candidate. The term of office of the Executive Director could be extended once for up to three years. The Executive Director shall be accountable to the Management Board for his/her activities.\(^{173}\) The Agency shall be managed and represented by its Executive Director who is independent in the performance of his/her duties. The Executive Director, inter alia, shall assume full responsibility for the tasks entrusted to the Agency. The European Parliament or the Council may invite the Executive Director of the Agency to report on the implementation of his/her tasks. The Executive Director shall ensure the Agency’s

\(^{168}\) Ibid, Art. 13, p. 9.  
\(^{169}\) Ibid, Art. 14, p. 10.  
\(^{170}\) Cf. Ibid, Art. 16, p. 10 and Art. 37, p. 17.  
\(^{172}\) Ibid, Art. 16(1), p. 10.  
\(^{173}\) Ibid, Art. 18, pp. 11-12.
day-to-day administration; prepare and implement the procedures, decisions, strategies, programmes and activities adopted by the Management Board.\textsuperscript{174}

The SIS II Advisory Group, the VIS Advisory Group, the EURODAC Advisory Group and any other Advisory Group related to a large-scale IT system when so provided in the relevant legislative instrument governing the developed, establishment, operation and use of that large-scale IT system shall provide the Management Board with the expertise related to the respective IT systems and, in particular, in the context of the preparation of the annual work program and the annual activity report. For the membership and chairmanship of the Advisory Groups, the methods of the Management Board are applied \textit{mutatis mutandis}. However, the terms of appointments are three years, which may be once renewed. And the Commission has one representative in each Advisory Groups. Furthermore Europol and Eurojust may each appoint a representative to the SIS II Advisory Group. Europol may also appoint a representative to the VIS Advisory Group.\textsuperscript{175}

All in all, the Member States and the Schengen associated countries play an important role in controlling the systems as they are presented in the Management Board. The board and the Executive Director together carry out the day-to-day management of the IT Agency. It is necessary to establish the Advisory Groups to support the Management Board on system-specific issues in order to address issues arising from the different constituencies of the three current systems. The Commission is represented in the Management Board and in the Advisory Groups. Its influence on the budget and on the work programme would allow aligning of the operational management of large-scale IT systems with wider policy objectives. Furthermore, the democratic-control characteristic of the European Parliament is “ensured by the institutional mechanisms put in place to meet financial and management reporting obligations to which European agencies are subject.”\textsuperscript{176}

However, the complex and non-transparent structure of rules and procedures to accommodate \textit{la géométrie variable} could involve governance risks as delays, inconsistent decision-making and reduced supervision.\textsuperscript{177}

\textsuperscript{174} Ibid, Art. 17, pp. 10-11.
\textsuperscript{175} Ibid, Art. 19, p. 12.
\textsuperscript{176} SEC(2009) 837, \textit{op. cit.}, p. 23.
\textsuperscript{177} Ibid, p. 100.
4.4. Relationship of the IT Agency with other EU Agencies

This subsection is to concentrate on the legal instruments of the SIS II and VIS and the existing and proposed legal instruments of EURODAC in order to identify the EU level agencies which have access to and/or influence on the large-scale IT systems. Hence is to define the status of these organisations in the everyday work of the IT Agency. For that a layer model is presented to highlight the interrelations.

The first layer is the *Agency level*. It means the incorporation of other agencies interests into the Management Board and into the Advisory Groups of the IT Agency. Europol and Eurojust have access to SIS II data based on the Article 41 and Article 42 of Council Decision 2007/533/JHA. Europol also has access to VIS data in accordance with Council Decision 2008/633/JHA.

The IT Agency Regulation gives a legal solution for the involvement of the intentions of the Europol and Eurojust in the work of the IT Agency related to the SIS II and VIS. Article 15(4) grants observer status to Europol and Eurojust at the meetings of the Management Board of the Agency, when a question concerning SIS II, in relation to the application of Decision 2007/533/JHA, is on the agenda. Moreover, Europol can be an observer on the meetings of the board, when a question concerning VIS, in relation to the application of Decision 2008/633/JHA, is on the agenda.

Furthermore, the Europol and the Eurojust may each appoint a representative to the SIS II Advisory Group. The same rules would be applicable for the Europol in connection with the VIS Advisory Group.

Article 19(1)d takes further developments into account, since it says that any other Advisory Group can be set up, which relates to a large-scale IT system when in the relevant legislative instrument governing the development, establishment, operation and use of that large-scale IT system is so provided.

The second layer is the *management level*. It encompasses the agency level and the “cross large-scale IT Agency relations”. All these relations are regulated in separate

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legislative acts. It has been explicitly stated in Article 1(4) of the IT Agency Regulation, too. As of now, only one “inter large-scale IT Agency act” is in force. The VIS have been harmonised with the Schengen Borders Code by a regulation\textsuperscript{181}. The Visa Code\textsuperscript{182} shall be applied from 5 April 2010. Article 54 harmonises the VIS Regulation with the Visa Code. It means that if the visa applicant is a person for whom an alert has been issued in the SIS for the purpose of refusing entry, it indicates a ground for the refusal of the visa\textsuperscript{183}.

Article 6 of the IT Agency Regulation gives the possibility for the Agency to be entrusted with the preparation, development and operation of other large-scale IT systems. Therefore, it is worth to consider the “cross large-scale IT Agency relations” and the agency level together as another layer, called the management level.

The third layer is the cooperation level. As I have mentioned above, Europol and Eurojust are involved in the work of the IT agency on the agency level. To stretch the horizon, it is important to consider the cooperation of these JHA agencies with the other JHA agencies – such as CEPOL and FRONTEX. That is to be called as the cooperation level.

The Europol and the Eurojust are connected to other JHA agencies via formal cooperation agreements. The main focus of these innominated acts is to strengthen the operative cooperation among EU crime-fighting agencies. The JHA agencies have established an extended cooperation framework based on bilateral cooperation and information exchange. Moreover, a multilateral cooperation is planned among them\textsuperscript{184}. Only between Eurojust and FRONTEX, there is not a formal working agreement\textsuperscript{185}. However, it is planned and fostered by the Commission, too. Between Europol and FRONTEX and between Europol and Eurojust exists operational cooperation, i.e. regular exchange of information in the framework of their operation. Europol and FRONTEX exchange strategic information mainly related to illegal immigration and

\textsuperscript{181} Regulation (EC) No 81/2009, op. cit.
\textsuperscript{182} Regulation (EC) No 810/2009, op. cit.
\textsuperscript{183} Ibid, Art. 54(6)b, p. 24.
\textsuperscript{185} Ibid.
cross-border crimes. The Memorandum of Understanding on a Table of Equivalence allows the Eurojust and the Europol to exchange information up to and including the level of “restricted”.

These interrelations could have complementary influence on the operational practice of the IT Agency.

There is no other explicitly named EU body relating to assess of data neither in the existing nor in the proposed legal instruments of EUROCAC.

Concerning to the Regulation establishing a European Asylum Support Office (hereinafter: EASO Regulation), it is conceivable to link it to the EUROCAC, however, it is not stated in the regulations. Inter alia, Article 4(c) of the EAOS Regulation states that the Support Office shall manage and develop further a portal for gathering information on countries of origin. Theoretically, it is possible to delegate this task to the IT Agency. But the European Asylum Support Office has its own Management Board and Executive Director. Therefore, the delegation is not likely, since it is not expressed in the EAOS Regulation.

**4.5. Evaluation**

Two approaches are presented to answer the question of how the new IT Agency contributes to the smarter European borders.

The first approach is rather theoretical. It is about an ideal typical identification of the large-scale IT systems’ operational management in the area of freedom, security and justice. With the help of that, the motives behind the establishment of the IT Agency are revealed.

Secondly, the added-value of the IT Agency is summarised like a SWOT analysis. The analysis is for to define how the delineated development process of the large-scale IT systems’ operational management contributes to the increase of the efficiency of the

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information power in order to decrease the security deficit thus contributing to a more secured Europe.

4.5.1. Operational Management as surveillant assemblage

This section is about an ideal typical identification of the large-scale IT systems’ operational management in the area of freedom, security and justice. The combination of control society paradigm including surveillance society and risk society theories\(^{189}\) with the theoretical framework of intelligence cycle approach could give an account of operational management’s position in social processes.

According to control society paradigm, the presence and spread of surveillance techniques are merged into system which is to be called as surveillant assemblage.\(^{190}\) The current control culture expends reframing the scope of democracies. *Surveillant assemblage* is a specific pattern of control society. It is an enormous network which is embodied as joining control culture organising all fields of social life and technology up. The change of being disappeared has disappeared in this system.\(^{191}\) On the one hand, more and more moments of one’s life are cognoscible, recordable, retrievable, analysable and organisable. On the other hand, increasing number of players can have the chance to into their possession. Therefore, today’s post modern surveillance society is the agglomerate of various tools for surveillance and of multitude of players’ different motivation to use them.

The notion of risk is being hidden behind today’s processes concerning crime control. It has resulted in the converting relationship between freedom and security which are more likely opposing being hardly accessories of each other. Concerning risk society theory, information and knowledge have gained greater role, since they are crucial in how to handle and manage threats.\(^{192}\) However, the knowledge is reflexive, i.e. there is no such a thing as objective knowledge. Therefore, the cognoscibility of risks is

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\(^{189}\) Special thank to Ms. Petra Bárd, professor at the Central European University, for the personal conversations. She gave me an insight into these paradigms. Cf. Bárd, Petra and Borbíró, Andrea, “Kontrollálatlan kontrolltársadalom”, *Kriminológiai tanulmányok*, 47(1), 2010, pp. 87-112.


\(^{191}\) Ibid, p. 619.

characterised by considerable uncertainty.\textsuperscript{193} To sum up, risk society is determined by risk and information which applies to risk.

In criminal control, risk is recognition of criminal risk, its effective neutralisation and minimisation of damage. However, fear creates market for risk society. Fearing of fear constellates a vicious cycle around risk societies, which results in a never satisfiable need for managing fear-constellated risks.

If an over ensured process occurs, not only the rights of criminals are infringed. Technological and scientific developments make intense control possible. The control tries to tackle public security problems. However, this solution raises many legal and ethical conflicts as well.

The intention of the centralisation of large-scale IT systems and smart borders initiative – the latter is discussed in the next chapter – has a clear connotation related to the intelligence studies. The intelligence process is a proper indicator to evince the significant connections. On the basis of Mark M. Lowenthal’s work\textsuperscript{194}, the operational management is not more than the processing and exploitation phase of the intelligence process or intelligence cycle. Lowenthal analysed CIA materials and he pointed at that there are only two reference points to give feedback to the processing and exploitation phase of the intelligence cycle. These are the consumption phase and the analysis and production phase.

Applying this theory to the division of powers within the European Union, data collection is the task of the Member States. But the collected data are stored in large-scale IT systems which are totally or partly owned by the European Union. The data processing and the dissemination of the outputs are basically realised on Member State level. It means that the sphere of the consumption coincides with the sphere of analysis and production.

It is highly true that the constitutional guarantees do not allow the abuse of power or the ill-treatment. However, the realist idea of the raison d’État and the legally ‘special’ status of the intelligence shall be taken into account. The more the stored amount of files and the access points, the easier it is to create high quality intelligence reports. That could be an additional cause for the presence of public interest, data protection and

security rules on the protection of classified information and non-classified sensitive information in the IT Agency Regulation\textsuperscript{195}, which can counterweight the possibility of the encroachment.

Concluding the above mentioned, the attitude of the Member States is clear. Intelligence always has been a grey byway in democratic systems. Decision-makers are interested in a deeper cooperation to increase the efficiency and the amount of the stored data and of the access quality. Conversely, even decision-makers shall harmonise their endeavours with the checks and balances of the rule of law. This double requirement defines the perceptions of the political players and of the state administration, which builds up the surveillant assemblage nature of the operational management.

4.5.2. Assessment of the IT Agency’s Utility

Hence the added-value of the IT Agency is summed up like a SWOT analysis in order to define how the delineated development process of the large-scale IT systems’ operational management contributes to the increase of the efficiency of the information power in order to decrease the security deficit thus contributing to a more secured Europe.

The added-value of the IT Agency is observed in terms of the following criteria: human rights, accountability and transparency. The analysis is the synthesis of the chapter’s results and of the prior impact assessment\textsuperscript{196}.

The centralisation of large-scale IT systems is strength of the IT Agency, since it insures interoperability among the incorporated systems. It contains two further segments: the institutionalisation and the long-term cost-effective operation. The institutionalisation of the operational management creates clear ground for the accountability. The accountability of the IT Agencies is ensured by EU institutions. Furthermore, the IT Agency provides a visible and dedicated structure which is also more visible and approachable for the civil society. The long-term cost-efficiency is guaranteed by the fostered interoperability and by the preparation, development and operational management tasks related to other IT large-scale systems, which might be

\textsuperscript{195} Cf. Regulation (EU) No 1077/2011, \emph{op. cit.}, Art. 21, 28 and 29, pp. 13-14.

\textsuperscript{196} SEC(2009) 837, \emph{op. cit.}

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delegated to the IT Agency. The expenditures and the running costs are managed together. Many of the tasks related to the running of the systems, procurement and project management are overlapped for all of the systems managed by the Agency; meanwhile less staff shall be employed. Furthermore, the co-location of network installations also indicates synergies in installations, operational management and monitoring.

The accommodation of *la géométrie variable*\(^{197}\) could be a **weakness** in the future operation of the IT Agency, since the IT Agency has to handle a complex matrix of legal environment where too many parties are involved on different legal bases and where not all parties use or participate in all segments of the IT Agency’s work. Furthermore, the IT Agency is not cost-efficient in short-term. The costs and time of setting up the Agency and the (hypothetical) transition to new location result in the loss of key staff, training costs and could result in delays in planning and deployment; which means discontinuity. In short-term, there would be also high overheads which would eventually decrease. These overheads could be the insufficient critical mass of operational activity to justify setting up dedicated governance and management structures which result in extra labour costs and redundancy at administrative level; since the long start-up time for the establishment of the IT Agency’s organisation, due to legislative procedures and discussion about location, governance structure, employment of stuff could result in delays, staff turnover and probably additional maintenance costs to keep old hardware running. However, these significant start-up costs would be compensated by the achievement of a higher potential for exploiting operational synergies. The operational management of these systems would be more cost-effective in the long run.

The Agency could prepare, develop and manage other large-scale IT systems, too. It is a great achievement, a valuable **opportunity** concerning the operational management of large-scale IT systems, since the IT Agency creates a cost-effective institutional framework for the future development of new large-scale IT systems, for the integration of the other existing ones and for the further development of the SIS II, VIS and EURODAC.

\(^{197}\) See: Ch. 4.3.
Concerns which have been voiced about the possible creation of a ‘big brother agency’ are in relation to the possibility of function creep and the issue of interoperability. Function creep by the IT Agency can be avoided if the scope of (possible) activates of the IT Agency are limited and clearly defined in the founding legal instrument. The application of ordinary legislative procedure decreased the risk of this factor. The IT Agency Regulation is clear and enumerates well-defined tasks. However, the possibility of function creep is a clear threat.

Reflecting the concerns of human rights, the importance of the Charter of Fundamental Rights of the European Union has to be underlined. Furthermore, the EU law contains proper principles against ill-treatment. Accountability of the European Agencies is ensured by the European Parliament and the European Data Protection Supervisor. Moreover, the European Court of Justice and the General Court have full jurisdiction over the activities of the IT Agency. The EU also has applied several acts to ensure data protection of individuals. Furthermore, the IT Agency is responsible for the protection of personal data.

Concerning transparency, the main problem is the above presented la géométrie variable related to the IT Agency. Delays in setting annual budget and work programme due to multi-level governance could lead to delays and inconsistent decision-making. The questions of different levels of countries’ participation and new users in the SIS II, VIS and EURODAC could be addressed by putting in place differentiated procedures in the Management Board. The complex and non-transparent structure of rules and procedures are needed to accommodate la géométrie variable. It reduces the level of supervision giving more places to the risk of function creep.

Based on the above examined criteria and aspects, the establishment of the IT Agency has more advantages than negative impacts in the long run. The highlighted strengths and the opportunities constitute the added-value of the Agency, which are the

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followings: interoperability; the preparation, management and development of other IT systems; long-term cost-efficiency; centralisation and institutionalisation of the operational management of the large-scale IT systems; visibility and approachability for the civil society. These enumerated attributions have a clear connotation to the increase of efficiency of the information power, in particular to the issue of the interoperability, of the preparation, management and development of other IT systems, and of the centralisation and institutionalisation of the large-scale IT systems’ operational management. It means that the establishment of the IT Agency and the development of the large-scale IT systems in the area of freedom, security and justice contribute to the decrease of the security deficit accordingly the examined aspects, criteria and processes, and regarding the presuppositions.
5. Smart(er) European Borders – New Digital Borders of Europe?\textsuperscript{200}

The core attributes of smart European borders are crystallised along a 2008 Communication of the European Commission\textsuperscript{201}. Two developments are very much connected to the manifestation and realisation of this initiative, which are relevant to the scope of the large-scale IT Agencies operating in the area of freedom, security and justice.

On the one hand, the amendment of the FRONTEX Regulation\textsuperscript{202} contains some elements which, in a broader context, affect the field of large-scale IT systems. On the other hand, the smart borders initiative presents the newest endeavours to the development of new (and related) large-scale IT systems.

In this section, theses novelties are examined and evaluated. The current, above presented systems and methods of the Schengen regime are the pillars of Schengenland’s security. However, further tasks have to be carried out in order to meet the double requirements of enhancing the security and facilitating travel among the countries of borderless Europe where this challenge is faced primarily by third country nationals.

5.1. The 2011 Modification of the FRONTEX Regulation and the EUROSUR

In this section the information systems related segments of the modified FRONTEX Regulation\textsuperscript{203} are outlined.

FRONTEX coordinates the operational cooperation among the Member States in the field of management of external borders. It assists Member States in the training of

\textsuperscript{200} Adapted from Broeders, Dennis, \textit{op. cit.}
\textsuperscript{202} Regulation (EU) No 1168/2011, \textit{op. cit.}
\textsuperscript{203} \textit{Ibid.}
national border guards. FRONTEX provides the necessary support in organising joint return operations for the Member States. It assists the Member States in circumstances requiring increased technical and operational assistance at external borders. The amendment of the FRONTEX Regulation was necessary in order to ensure the proper and well-defined functioning of FRONTEX as the explanatory memorandum of the Commission had highlighted.  

The amended FRONTEX Regulation guarantees more effective use of information concerning the following two aspects. On the one hand, FRONTEX is now able to develop and operate information systems which enable swift and reliable exchanges of information regarding emerging risks at the external borders. On the other hand, as a result of the modification, FRONTEX is responsible for providing “the necessary assistance to the development and operation of a European border surveillance system and, as appropriate, to the development of a common information sharing environment, including interoperability of systems.”

The latter is very important from the comparative point of view, since this provision can guarantee a link with the so-called EUROSUR initiative which was proposed by the European Commission.

The core of the EUROSUR initiative is to carry a three-phase common technical framework out in parallel in order to set up a European border surveillance system (EUROSUR). It is planned to support the Member States in their efforts to reduce the number of illegal immigrants.

The first phase is to be designed for the modernisation and for the expansion of national border surveillance systems and for the creation of national external border control coordination centres in the Member States forming the eastern and southern maritime borders of the European Union. A secured computerised communication network is

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206 Ibid.
planned to be set up to exchange data and facilitate the coordination of activities between national centres and with FRONTEX.\textsuperscript{208}

The modified FRONTEX Regulation and the EUROSUR initiative foster the more effective use of information power among the countries in the area of freedom, security and justice.

In June, 2011 the European Council has prioritised EUROSUR and asked the Commission to develop the system further in order to become operational by 2013.\textsuperscript{209} Therefore, the Commission prepared the EUROSUR proposal\textsuperscript{210} in fall 2011, which has not been accepted yet. The proposal is part of the so-called “EU Internal Security Strategy in Action” package.\textsuperscript{211}

The tendency of the progress is clear. More and more actions are needed and planned to ensure the cooperation among the countries related to the Schengen area. Even newer policy fields are affected by an even closer cooperation. Therefore, the European institutions shall catalyse these processes in order to achieve more secured borders for Europe with the use of smarter tools.

5.2. On the Way to Smarter Borders – Proposed Systems for a More Secured Schengenland

The smart borders initiative presents the newest endeavours to the development of new (and related) large-scale IT systems in the area of freedom, security and justice. A 2008 Communication of the European Commission\textsuperscript{212} has given an outline of European smart borders as a beacon to be followed.

In summer 2011, the Council emphasised the responsibility of the Member States for the control and surveillance of the external borders lies. The European Border Surveillance System will be developed further in order to ensure the effective management of and the application of same standards at the external borders. The

\begin{itemize}
\item \textsuperscript{208} \textit{Ibid}, pp. 5-7.
\item \textsuperscript{211} IP/10/1535 “Commission presents a new set of EU measures to better protect European citizens”, \textit{Europa Press Releases RAPID}, Brussels, 22.11.2010.
\item \textsuperscript{212} COM(2008) 69 final, \textit{op. cit.}
\end{itemize}
European Border Surveillance System was referred as priority with a target date of 2013. Concerning the authorities of the Member States carrying out border surveillance activities, the basic aim is to share operational information and improve cooperation among these authorities.\(^\text{213}\)

New technologies shall be harnessed to meet all the requirements including enhancing security and facilitating travel at the external borders. Therefore, the Commission set out main options for the way forward in its smart borders initiative. According to the initiative, an entry/exit system (hereinafter: EES) and a registered traveller programme (hereinafter: RTP) should be introduced in order to tackle the above highlighted problems effectively.

In this subsection, theses novelties are examined and evaluated. Firstly, the RTP and the EES are presented separately. Then their joint evaluation is drawn up. The focus of the analysis is the prime mover of RTP’s and EES’s establishment and their expected effects on the security of Schengenland.

5.2.1. Registered Traveller Programme (RTP)

The basic role of the RTP would be to ensure fast and simple border crossing for third-country nationals at the external borders.

According to a 2010 long-term forecast of the EUROCONTROL\(^\text{214}\), in 2030, there will be 1.4-2.2 times more flights than in 2009. The estimates include a significant number of East European and non-EU citizen frequent travellers. The growing number of travellers is owing to the increased volume of regular travellers. They show the predominant majority of third-country nationals fulfilling all entry conditions.\(^\text{215}\)

Currently the same checks are applied to all third-country nationals regardless of the level of general risk and regardless of the possibility to overstay. The planned RTP envisions a single request procedure with a single token. The use of biometric identifier


is proposed.\textsuperscript{216} It shall be fingerprints and the digital facial image as it was chosen for the EURODAC, VIS and SIS II. The procedure would be EU-wide interoperable and internationally facilitated. The RTP could enhance cross-EU re-attribution of border control resources, since obviously the current procedures, i.e. same border checks regardless of the level of risk and the frequency of travel, are resulted in the ineffective use of border guards.

As I have mentioned above, the tangible core of the RTP is the reduction of time, queues and costs crossing the external borders of the Schengen area. It would significantly facilitate border crossings for frequent third-country national travellers at the external borders of Schengen. These travellers must be pre-vetted and carefully pre-screened. In the long-run, it would reduce the time spent at the border crossing points. Synergies with the use of new technologies such as Automated Border Control systems which is used also for EU travellers are fostered by the European Commission.\textsuperscript{217}

\textbf{5.2.2. Entry/Exit System (EES)}

The EES would take the challenge of establishing a more effective monitoring tool for travel flows and for the movements of third-country nationals across the external borders.

The smart borders imitative highlights that the main sources of illegal migration are the so-called overstayers, i.e. persons who stay longer in a Member State as it is allowed. Today’s regulations do not have any effective means to record the cross border movement of the travellers, since the authorised stay is calculated on the basis of manual stamps. Entry and exit dates are not centrally recorded.\textsuperscript{218}

The EES would allow the calculation of authorised stay basically for third-country nationals in the Schengen area. Individual travel history of third-country nationals obliged to obtain visa to enter \textit{Schengenland} is crucial for frequent travel. Furthermore, it is an essential part of first line risk-assessment concerning visa exempted travellers,

\textsuperscript{216}Ibid, p. 12.
\textsuperscript{217} Ibid, p. 4.
\textsuperscript{218} Ibid, pp. 3-4.
too. The issue of the verified individual travel history links the EES with the RTP, since these records may help to estimate travellers’ risks during the process of granting them registered traveller status.

The EES will replace the current system of stamping passports with an electronic registry of the dates and places of third country national admitted for short stays. Its main purpose would be to monitor authorised stay of third country nationals, i.e. the EES is supposed to combat overstayers. Furthermore, the EES would make border check procedures more effective. And it would enhance security at the moment of the crossing the external borders.

As it is planned in relation to the RTP, the EES shall use biometric identifier which is likely to be fingerprints and the digital facial image as it was chosen for the EURODAC, VIS and SIS II, too.

As I have implied in Chapter 3.2, a fully operational Visa Information System is a prerequisite for the smart European borders. Concerning mainly the EES (and the RTP to some extend), a reliably functioning VIS is needed in order to make maximum usage of the existing systems and tools. VIS goes and EES could go hand in hand with Decision No 1105/2011/EU on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list. On the basis of the Decision, synergies with the FADO could be obtained in the long run. FADO is an online system for exchanging information on false and authentic documents accessed solely by border control officers.

5.2.3. Evaluation of the Smart Borders Initiative

The smart borders initiative prepared by the European Commission is a short summary of the main options, implications and of the possible way forward. At the time of writing, no impact assessment or any further concrete documents and/or data, analyses

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219 Ibid, p. 4.
220 Ibid.
221 Ibid, p. 12.
222 Ibid, pp. 7-8.
223 Decision No 1105/2011/EU of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list, OJ L 287, 4.11.2011, pp. 9-12.
were not available. However, the fourteen-page long smart borders initiative gives enough clues for a quick assessment of the planned directions towards the achievement of smarter European borders. Therefore, firstly, the technical and operational solutions are examined. Then the smart borders initiative is interpreted in a broader European policy context in order to assess the repercussions.

The cornerstone of the EES and the RTP is speed. If the estimations are valid, using the current procedures, the rising number of border crossings at the external borders will need an extreme accrual of human resources. Therefore, it is logical to foster a technological shift. The smart borders initiative aims to reinforce checks while speeding up border crossings for regular travellers. The EES combating overstayers helps law enforcement. Their interaction handles the problem of the increasing travel flow without compromising security.\textsuperscript{224}

According to Commission estimates\textsuperscript{225}, if the RTP and the EES would use the same technical platform and would be built together, 30% savings could be achieved during the three-year long development process and the first five-year operation at central and national level. In the long run, the RTP is reckoned to operate at a 15% higher cost. The short-term interest of the member states is in favour of enhancing security. Therefore, the EES as a kind of law enforcement tool is much more preferred. However, the RTP facilitates border crossings and would result in long-term savings for the member states, too. Calculating a three-year development and a five-year operation cost as total costs at national and central level, concerning the common establishment of the RTP and the EES, the barriers to entry is 1.5 times higher than the sole establishment of the EES. If the RTP and the EES would be built separately (e.g. the EES will be established by 2015 and the RTP will become operational by 2020), the cumulated barriers to entry will be 2.14 times higher than the sole establishment of the EES. If the two systems would be carried out separately, it will be an irresponsible waste of public money. However, if only one of the systems would be operational and the other one would be cancelled, it is a matter of political decision-making and policy formation. According to my calculations, the establishment of one of the systems or the common establishment is desirable taking exclusively the costs into account.

\textsuperscript{224} Cf. COM(2011) 680 final, \textit{op. cit.}, p. 4.
The existing systems are insufficient to cope with the challenges which could give birth to the RTP and the EES. As I have mentioned above, a fully operational Visa Information System is a prerequisite for the smart European borders.\textsuperscript{226} Moreover, the VIS is the prerequisite for the EES, since VIS could be used in conjunction with identity checks within the Schengen area. Furthermore, using VIS, it would be possible for the EES to identity undocumented persons.\textsuperscript{227}

Legally and technically it is practicable that the IT Agency may develop and operate the newly envisioned RTP and/or the EES. Moreover, it would be desirable, since experience and practice of the existing large-scale IT systems’ development and operation could be directly implemented into the new systems without any special authorisation. Article 77 (2)d of the TFEU stipulates one, unified management system for the external borders. Therefore, the operational management of the RTP and the EES have to be merged into the IT agency, if the RTP and the EES would be defined as large-scale IT systems.\textsuperscript{228}

The EES and the RTP related tasks are typically the competencies of the Member States. But today’s integration processes of the borderless Europe generate EU level challenges which can be effectively handled by EU level actions. This was the situation at the time of the establishment of the IT Agency, as I have pointed it out in the previous chapters.

However, these challenges are not solely external. Other European policies foster the realisation of the examined smart borders initiative’s aims. The envisioned systems could help the common visa policy. The Member States do not have enough capacity to manage the increasing travel flows which are the results of the common visa policy efforts. Furthermore, the EES (and to some extend the RTP) is needed to gather more information on travel flows into and out of Schengenland.\textsuperscript{229} This information may help further policy formation with reliable data.

\textsuperscript{226} See also: Ch. 5.2.2.
\textsuperscript{227} Cf. COM(2011) 680 final, op. cit., p. 11.
\textsuperscript{228} See also: Ch. 2.
\textsuperscript{229} Cf. COM(2011) 680 final, op. cit., p. 3.
Concluding, the smart borders initiative is in favour of facilitating travel into and out of the Schengen area focusing on long-term goals and efficiency without compromising security. Moreover, it is a part of a process catalysed by the surrounding policy fields.
6. Conclusions

In this section, the results are synthesised. The main focus of the research was to draw up the development process of the operational management of large-scale IT systems working in the area of freedom, security and justice. It is also considered how the delineated development process of the large-scale IT systems’ operational management contributes to the increase of the efficiency of the information power in order to decrease the security deficit thus contributing to a more secured Europe.

The aim of my thesis was to analyse and evaluate the development of the operational management of these large-scale IT systems, i.e. the development of the operational management of SIS, VIS and EURODAC. The added-value of the IT Agency was to be defined, too. Furthermore, the joint evaluation of the RTP and the EES was drawn up focusing on the analysis of the prime mover of the RTP’s and the EES’s establishment and their expected effects on the security of Schengenland.

As I have tried to highlight, the legal instruments originally establishing SIS and EURODAC were international legal acts which were communitorised. As the Member States recognised the importance of the common border control, common visa and common asylum policy in the fight against terrorism and cross-border crime, the treaties integrated these endeavours. The history of the European integration contains several examples for well-balanced political compromises. Thus the opt-outs related to Schengen acquis could be introduced in the treaties. The TFEU and the Charter of Fundamental Rights of the European Union (hereinafter the Charter) mean a great progress in the JHA, since basically the legislation of JHA acts moved to ordinary decision-making process which means a higher level of democratic control, in parallel, the Charter protects people against any infringements of their fundamental rights. I think the Member States realised that the police and judicial cooperation in criminal matters is an opportunity for increasing the level of security in Europe.

Reading Commission Communication about smart borders initiative\textsuperscript{230}, the link to the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice\textsuperscript{231} is unclear. However, TFEU Article 77 (2)d stipulates

\textsuperscript{230} COM(2011) 680 final, \textit{op. cit.}

\textsuperscript{231} Regulation (EU) No 1077/2011, \textit{op. cit.}
one, unified management system for the external borders. Therefore, the operational management of these systems have to be merged into the Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, if the RTP and the EES would be defined as large-scale IT systems.  

The European Union established the Schengen Information System (SIS), the Visa Information System (VIS) and the EURODAC to support the realisation of Community/Union policies in connection with immigration, visa, asylum and the free movement of persons within the Schengen area. These information systems are highly important for the border security strategy, since the systematic data gathering and the exchange of information concerning third country nationals happen through them. 

The Schengen Information System is a large-scale IT system that allows the competent authorities i.e. national police, customs, and border control authorities when making checks on persons at external borders or within Schengenland, and the immigration officers when dealing with third-country nationals, in particular when deciding whether to issue visas or residence permits to obtain information regarding certain categories of persons, vehicles and objects. Officials may only search the data necessary for the performance of their tasks. Once the development phase of SIS II comes to an end, the operational phase starts expectedly in 2013.

The so-called Santiago Plan included proposals, inter alia, on visa policy and on information exchange and analysis on migration flow. Regarding visa policy, it recommended the annual review of the visa lists, the inclusion of photo and biometric data of visa holders in their visas, the establishment of joint visa offices with a pilot project in Pristina, and the establishment of the Visa Identification System. The Visa Identification System was refined by the Visa Information System (VIS), while the VIS is a system for the exchange of visa data among its Member States. Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS)
provides the legal basis for the development of the system. The VIS Regulation\(^{239}\) defines the purpose, the functionalities and the responsibilities concerning the VIS. It sets up the conditions and procedures for the exchange of data among its members on application for short-stay visas and on the related decisions. The technical set-up of the system is similar to the SIS. Detailed rules on access for entering, amending, deleting and consulting VIS data as well as on access to biometrics (photographs, fingerprints) for verification at border crossing points, for verification within the territory of the Member States, for identification and, as appointed in the previous paragraph, for determining responsibility for asylum applications and for examining an asylum application. The VIS has been operational since 11 October, 2011. However, the VIS will have been applied step by step, i.e. region by region (regional rollout). However, if a Member State is ready to apply VIS elsewhere and the Member State has informed the Commission about it, the VIS can be applied there regardless of the regulated rollout regions.

EURODAC is a database that stores and compares the fingerprints of asylum applicants and illegal migrants apprehended in connection with the irregular crossing of an external border. It was established to allow Member States to determine the state responsible for examining an asylum application according to the Dublin Convention, and now the Dublin II Regulation\(^{240}\). The EURODAC Regulation\(^{241}\) was adopted in 2000, and the Council adopted the implementing rules\(^{242}\) in 2002. The system has become operational in 15 January 2003.\(^{243}\) These regulations highly contribute to the building of the Common European Asylum System. The 2010 Belgian Presidency was committed to speedy completion the Common European Asylum System. The Dublin and EURODAC Regulations and the Long Term Residence and Qualification Directives have been prioritised with ensuring coherence in relation to the Reception Conditions and Procedures Directives.\(^{244}\) Therefore, the legislative package of the Common European Asylum System includes six legislative proposals which EU


\(^{240}\) See the “Dublin process” in Ch. 2.


\(^{243}\) Peers, Steve (ed.), *EU Immigration and Asylum Law*, p. 259.

Member States have committed to adopt by 2012.\textsuperscript{245} As of 1 March, 2012, their debates are ongoing in the framework of the European Union’s decision-making procedures. Conversely, today’s regulatory framework is proved to be insufficient according to the smart border initiative. Travellers who stay beyond their authorised stay mean significant risk for EU, since they are considered as the main source of irregular migration. Therefore, the Commission proposed the establishment of EU level specific systems.

The development of the operational management of these systems is not more than their integration into the IT Agency. The installation of this Agency was legally predetermined by the existing and proposed legal instruments of SIS, VIS and EURODAC.

Concerning the establishment of the IT Agency, the attitude of the Member States is clear. Intelligence always has been a grey byway in democratic systems. Decision-makers are interested in a deeper cooperation to increase the efficiency and the amount of the stored data and of the access quality. Conversely, even decision-makers shall harmonise their endeavours with the checks and balances of the rule of law. This double requirement defines the perceptions of the political players and of the state administration, which builds up the \textit{surveillant assemblage} nature of the operational management.

Reflecting the concerns of \textit{human rights}, the importance of the Charter of Fundamental Rights of the European Union has to be underlined. Furthermore, the EU law contains proper principles against ill-treatment. \textit{Accountability} of the European Agencies is ensured by the European Parliament and the European Data Protection Supervisor. Moreover, the European Court of Justice and the General Court have full jurisdiction over the activities of the IT Agency. The EU also has applied several acts to ensure data protection of individuals.\textsuperscript{246} Furthermore, the IT Agency is responsible for the protection of personal data.\textsuperscript{247}

Concerning to \textit{transparency}, its main problem is the above presented \textit{la géométrie variable} related to the IT Agency. Delays in setting annual budget and work programme due to multi-level governance could lead to delays and inconsistent decision-making.


\textsuperscript{246} E.g.: Directive 95/46/EC, \textit{op. cit.}; and Regulation No 45/2001, \textit{op. cit.}

The questions of different levels of countries’ participation and new users in the SIS II, VIS and EURODAC could be addressed by putting in place differentiated procedures in the Management Board. The complex and non-transparent structure of rules and procedures are needed to accommodate la géométrie variable. It reduces the level of supervision giving more places to the risk of function creep.

Based on the above examined criteria and aspects, the establishment of the IT Agency has more advantages than negative impacts in the long run. The highlighted strengths and the opportunities constitute the added-value of the Agency, which are the followings: interoperability; the preparation, management and development of other IT systems; long-term cost-efficiency; centralisation and institutionalisation of the operational management of the large-scale IT systems; visibility and approachability for the civil society. These enumerated attributions have a clear connotation to the increase of the efficiency of the information power, in particular to the issue of the interoperability, of the preparation, management and development of other IT systems, and of the centralisation and institutionalisation of the large-scale IT systems’ operational management. It means that the establishment of the IT Agency and the development of the large-scale IT systems in the area of freedom, security and justice contribute to the decrease of the security deficit accordingly the examined aspects, criteria and processes, and regarding the presuppositions.

The smart borders initiative presents the newest endeavours to the development of new (and related) large-scale IT systems in the area of freedom, security and justice. New technologies shall be harnessed to meet all the requirements including enhancing security and facilitating travel at the external borders. Therefore, the Commission set out main options for the way forward in its smart borders initiative. According to the initiative, an entry/exit system (hereinafter: EES) and a registered traveller programme (hereinafter: RTP) should be introduced in order to tackle the above highlighted problems effectively. The basic role of the RTP would be to ensure fast and simple border crossing for third-country nationals at the external borders. The EES would take the challenge of establishing a more effective monitoring tool for travel flows and for the movements of third-country nationals across external borders. The cornerstone of the EES and the RTP is speed. If the estimations are valid, using the current procedures, the rising number of border crossings at the external borders will need an extreme accrual of human resources. Therefore, it is logical to foster a technological shift. The
smart borders initiative aims to reinforce checks while speeding up border crossings for regular travellers. The EES combating overstayers helps law enforcement. Their interaction handles the problem of the increasing travel flow without compromising security.248

The EES and RTP related tasks are typically the competencies of the Member States. But today’s integration processes of the borderless Europe generate EU level challenges which can be effectively handled by EU level actions. This was the situation at the time of the establishment of the IT Agency.

However, these challenges are not solely external. Other European policies foster the realisation of the examined smart borders initiative’s aims. The envisioned systems could help the common visa policy. The Member States do not have enough capacity to manage the increasing travel flows which are the results of the common visa policy efforts. Furthermore, the EES (and to some extend the RTP) is needed to gather more information on travel flows into and out of Schengenland.249 This information may help further policy formation with reliable data.

To extend the point of the interpretation of the problem, the society’s acceptance of new technologies in criminal justice has three levels such as the technology and research, the technology and privacy, and the technology and society.250 Concerns with a new technology will decrease if that technology is fully integrated, accepted in the society. In a perfect world, immigration control would be a neutral policy facilitating the entry of those who have right to enter or reside, and preventing entry and ensuring removal of those without right to stay. In fact, immigration control serves a dual aim: erecting barriers and providing safeguards. However, there is a thin line between those barriers and safeguards.251 “[...] [A]lthough the Community acquis on immigration control is rapidly evolving, the present state of law still leaves considerable discretion to Member States.”252 In the future, several immigration control matters will expectedly become more intertwined and inseparable part of the Union law. Presently, this process has only begun.253 Therefore, further research is needed to explore the interrelations of large-

253 Ibid.
scale IT systems with JHA cooperation and with other related policy fields such as the long-term prospects for the envisioned EU immigration code\textsuperscript{254}. Furthermore, it would be worth to compare the European systems with the practice of the United States of America in order to give the comparative interpretation of the problem, which shall be the subject of another study.

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Appendix 1: The Development of the Operational Management of SIS, VIS and EURODAC – Simplified Sketch of the Legislation

As of 1 March, 2012

Schengen Agreement (Signed in 1985) +

EEC Treaty of Rome

Recommendation for Visa Identification System
Communitarised in 1997

Dublin Convention (Signed in 1990)

not Community law

Convention (Signed in 1990)

Santiago Plan (2002).

Visa Identification System has been renamed to the Visa Information System (VIS).

EURODAC Regulation (2000)

EURODAC

Communitarised in 1997

SIS I

entered into force (1995)

SISone4ALL (2006)

SIS II Regulation (2006)

COM(2009) 293 final

SIS I+

SIS II Decision (2007)

COM(2009) 294 final


Visa Information System

Council Decision 2004/512/EC

Dublin II Decision (2007)

COM(2010) 555 final

SIS II Regulation (2006)

COM(2010) 294 final

COM(2008) 825 final (Recast)

VIS Decision (2008)

COM(2008) 820 final

Visa Identification System

EURODAC

 ר介紹

SIS II Decision (2007)

COM(2008) 825 final

Como (2010) 555 final

IT Agency Regulation (2011)
Appendix 2: *La géométrie variable* – the Matrix of the Scope of SIS II, VIS and EURODAC

**Schengen opt-ins**

CH, IS, LI, NO: associates in the development of the Schengen *acquis* and the provisions of the EURODAC related measures. (Schengen associates.)

**Schengen opt-outs**

DK: implementing SIS II and VIS on the Protocol + EURODAC based on international agreement. (Schengen Member)

UK, IE: implementing EURODAC on the Protocol and SIS on criminal law and policing purposes

**21 EU and Schengen Members:** AT, BE, CZ, DE, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK.

**EUROPEAN UNION**

**THE SCHENGEN AREA**

- use SIS II, VIS and EURODAC;
- use SIS II and EURODAC;
- actually using EURODAC + obliged to the future use of SIS II and VIS based on the accession treaties
Appendix 3: Relationship of the IT Agency with other EU Agencies – the Layer Model

Only between Eurojust and FRONTEX, there is not a formal working agreement. CEPOL cooperates with all other JHA Agencies in the field of training.

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