

Schengen and internal border controls

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PART 1: ASSESSMENT OF THE CURRENT SITUATION

While Schengen received little mention in the 1999 Tampere European Council conclusions, it is generally understood that the functioning of the Schengen Area was part and parcel of the motivations underpinning these conclusions. As such, an assessment of the current state of affairs of the Schengen zone and reflections on the way forward were considered important to add to this publication.

The migrant arrival numbers witnessed in 2015 and 2016 led to a governance crisis in the EU's Dublin system, which has spilled over into the Schengen Area. At the moment of writing, the Schengen free movement zone has not been border control-free for over four years. The first reintroduction of internal border controls dates back to September 2015 when Germany re-established checks at its land border with Austria, following large arrival numbers of asylum seekers via that route. Austria, in turn, reintroduced checks at its land borders as well, amongst others, to avoid becoming a 'cul-de-sac' where migrants could get stranded.² This marked the start of a larger chain reaction in which the following states, and in that respective order, reintroduced border checks as well: Slovenia, France, Hungary, Sweden, Norway, Denmark and Belgium. Six states – Germany, France, Austria, Norway, Sweden and Denmark – have since continued to re-extend controls.³

Crises in the Schengen Area are not new. Infamously, the lifting of the original border checks in 1995 went hand in hand with a severe political conflict that lasted several years, as France refused to lift controls at its internal border until, by and large, 1998.⁴ More recently, the Schengen free movement zone was the source of political tensions in the context of the so-called 2011 'Franco-

Italian affair' when, following the onward movement of Tunisians from Italy to France, border checks were introduced along the French border with Italy at Ventimiglia. This latter conflict spurred a rethinking of the Schengen rules on temporary internal border checks and a correspondent reform to the Schengen Borders Code 2016/399 (SBC), which was concluded in 2013.

The current crisis is unprecedented, however. Never before since the lifting of the original checks in 1995 have internal border controls been upheld for so long, and by so many states in parallel. Most recently, in November 2019, the six states referred to above sent in a renewed notification highlighting their intention to, again, extend border checks for a new six-month period running up to May 2020.⁵

These controls have been the subject of much controversy. Criticism relates first to states' practices of accumulating different legal bases for introducing what are intended to be 'temporary' controls, and second to the limited justifications adduced for doing so.

➤ Concerning the first point, what has been particularly contentious is the constant shifting from one legal basis to another to justify the extension of internal border controls, once the temporal limits of a certain legal basis have been exhausted. The European Parliament⁶ and certain member states – as appears from internal documents – have called this out as constituting unlawful behaviour.

➤ As regards the second point, the justifications provided for reinstating internal controls are generally regarded as weak, and it is highly questionable whether

they meet the necessity and proportionality requirements prescribed by the SBC.⁷ Since 2015, the states concerned have predominantly cited ‘threats’ – resulting from the so-called ‘secondary movements’ of asylum seekers from Greece and other states at the EU external border into Northwestern Europe – to justify these controls. Arrival rates of asylum seekers have, however, dropped significantly since mid-2016. At current, arrival numbers have, by and large, returned to pre-2015 levels. Numbers on subsequent secondary movements are more difficult to come by. The European Commission nevertheless reported, already in the fall of 2017, that such movements had become “limited” as evidenced by the “downward trend observed in asylum applications received at the internal borders of the Member States concerned”.⁸

Nevertheless, in the most recent notifications, Austria, Germany and France continue to refer to secondary movements, and Sweden, Austria and Germany mention concerns around a “situation at the external borders”.⁹ As appears from internal documents and cursory media comments, those member states are concerned about the numbers that are still arriving, even if they are more limited than before, as well as about the possibility of these numbers rising again in the future. In respect of the latter concern, they highlight that large numbers of asylum seekers remain present in Greece and Italy and that there is continued potential for renewed conflicts in Northern Africa which could lead to new increases in arrival numbers at the EU’s external borders. In this context, they also repeatedly raise concerns around the insufficient functioning of the Dublin system. These include, amongst others, concerns about the frontline states’ insufficient registration of fingerprints in the Eurodac database and continued difficulties in reception condition standards which preclude Dublin returns. Finally, the continuation of internal border checks is also increasingly linked to the problems and frustration surrounding the gridlock in the debates around a new responsibility sharing mechanism within the context of the Dublin reform (see also Part 2, C).

In the meantime, as the controls continue, they risk becoming the ‘new normal’ in the Schengen Area of the late 2010s. From there, arguing for much more fortified and widened controls, as witnessed for example in the calls of German Minister of the Interior Horst Seehofer in spring 2018¹⁰ becomes ever less problematic.

The situation urgently requires answers. A ‘Europe without Schengen’ – or with a hollowed-out version of Schengen – would come at a high cost.

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– To begin with, the economic consequences would be severe. A study commissioned by the European Parliament on the set-up and operationalisation of the border checks to date estimates that the annual operating expenses already range between €1 to €3 billion and may potentially run up to €19 billion in one-off costs. The broader costs connected to obstacles in the road transportation of goods (which accounts for more than 70% of goods transportation) are much larger.¹¹ Some of the Eastern European member states in particular (e.g. Poland, Hungary, Slovenia) are already feeling these effects on their goods transportation sectors and have repeatedly voiced complaints.

– Second, the sustained controls are a source of political tension between certain member states. To provide an example, increased controls in German airports that targeted Greek airlines led to a fierce political row between German and Greek authorities in the summer and fall of 2017.¹²

– Third, the reintroduced border checks and immigration control context in which they are applied are leading to increasing observations of practices of racial profiling, which are prohibited under EU law. Amongst others, a report from the *Financial Times* in August 2018 has highlighted how some of the border checks along the German-Austrian border in Bavaria were increasingly becoming subject to racialised practices.¹³ Such observations have been echoed by NGOs and are repeatedly shared on social media as well.¹⁴

– Finally, of a less direct but potentially highly problematic nature are the larger, long-term negative effects on public opinion in relation to the European project. A Eurobarometer survey on European’s perceptions on Schengen, published in December 2018, documented that seven in ten respondents consider the Schengen Area as one of the EU’s main achievements.¹⁵ This confirms trends in broader polls of

the past few years, which have repeatedly shown that a majority of European citizens consider the “free movement of people, goods and services” to be the Union’s most important achievement, even surpassing that of bringing about “[p]eace among the Member States”.¹⁶ Accordingly, a Europe without Schengen would entail fundamental legitimacy risks for the European project as a whole.

In what follows, this Chapter highlights a number of scenarios on the way forward for the Schengen Area. Section A considers policy scenarios that seek to provide remedies within the context of the SBC. Section B examines questions related to the use of police checks as alternatives for internal border controls. Section C reviews ideas on making membership to the Schengen Area conditional on cooperation and good governance in the Common European Asylum System (CEAS), which are gaining ground in certain political and policy circles.

PART 2: IDEAS & SUGGESTIONS FOR THE FUTURE

A. Improving rules on internal border controls in the Schengen Borders Code

In September 2017, the European Commission advanced a proposal to amend the SBC.¹⁷ This proposal envisages the possibility of reintroducing internal border controls for one year, plus an additional maximum period of two years if threats to public policy or internal security persist, resulting in a new maximum period of three years. This possibility would go hand in hand with stricter reporting requirements. In addition, an extension after one year up to the three-year maximum would need to be accompanied by a Commission opinion and a Council recommendation.

The proposal initially met with heated debates in the Council. A common position was nevertheless reached in June 2018.¹⁸ This position endorses the new timeframe envisaged but seeks to delete, amongst others, the requirement of a Council recommendation for a continuation of border checks after the first one-year period. The European Parliament, in turn, adopted its report in late November 2018.¹⁹ Its proposed amendments include limiting the time period for reintroduced border controls to a first period of six months (instead of one year), with a further extension only possible for an additional one year maximum (instead of two years). The Parliament also endorsed the requirement of a Council recommendation for prolongations beyond the first period. Given the divergent positions between the Council and Parliament, it soon became clear that a compromise would not be

reached before the European Parliament elections of May 2019.

Several pressing questions about the proposal's future now emerge: can negotiations be continued? Should they be? Beyond the difficulties arising from the strongly diverging positions of the European Parliament and Council, it can also be questioned whether extended periods for internal border checks, coupled with strengthened proportionality and necessity checks, provide the right way forward at this stage? In that respect, it is noteworthy that strengthened necessity and proportionality safeguards were also included in the preceding 2013 reform of the SBC. Arguably, and as has been advanced by some Eastern member states, the Commission could have already raised stronger concerns around the limited justifications adduced for the controls under the current rules. What was lacking was not the legal possibility to challenge the sustained border checks but, rather, the political will to do so. In this same light, some have also argued that the 2017 proposal amounts to a Commission attempt to draw up an ex-post legal framework to accommodate the practices of those member states maintaining internal border controls against the currently applicable rules. The way forward, from this point of view, would not necessarily be a reform of the current rules but rather the prioritisation of their correct implementation through infringement actions.

A counter-argument raised by the participants of the “From Tampere 20 to Tampere 2.0” roundtables and conference holds, however, that the first priority at this stage should be to reduce the strong emotions and politicisation that currently surround the internal border checks. Infringement actions risk having precisely the opposite effect. In relation, other participants highlighted that in a more generally emotionalised EU migration policy context, it would be highly counterproductive if the European Commission became seen by the general public, through such infringement actions, as prohibiting member states from setting up border checks.

In addition, and as a separate line of discussion, some participants argued that in case a reform of the SBC is on the table (despite the caveats mentioned above), it should not be limited to the rules on timeframes and necessity requirements. Instead, the reform effort should also be used as an opportunity to tackle a series of further outstanding questions. These include, notably, questions on the grounds for reintroducing border controls (see Part 2, C), on coordination among member states with regard to the moment at which controls are introduced or lifted, and on processes to be applied at internal border checks.

This latter question has been a source of particular political attention lately. As noted by experts, it was one of the issues that had not been sufficiently clarified in past SBC reforms.²⁰ More specifically, Article 32 of the SBC provides that where internal border checks are reintroduced, the SBC rules on external border controls (Title II) apply *mutatis mutandis*.²¹ What that implies in practice, however, has not always enjoyed consensus. The Commission noted in a 2010 report on the implementation of the SBC that when border control is temporarily reintroduced, such “internal borders do not become external borders”.²² This reading was recently confirmed by

the Court of Justice of the European Union (CJEU) in its *Arib* ruling from March 2019.²³ The Court ruled that France was wrongfully applying an exception clause from the Return Directive 2008/115/EC (Article 2.2 of said Directive) at its internal border checks. This exception clause allows member states to limit some of the Directive’s protection safeguards on the use of detention in relation to “third-country nationals who [...] are intercepted by the competent authorities in connection with the irregular crossing [...] of the external border of a Member State” (emphasis added).²⁴ The Court held, however, that an internal border at which controls have been reintroduced is not tantamount to an external border. Accordingly, the exception clause could not be applied to such situations. Essentially, the ruling has been interpreted as putting a check on member states’ discretion with respect to the detention of third-country nationals intercepted at internal border checks. Reportedly, it has spurred consternation in the Council and is the source of calls by some member states for legislative changes to the respective SBC rules, with the intention of annulling the judgment’s effects.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- Should the implementation of the current SBC rules on internal border checks be prioritised?
- Or, should we change these rules and, if so, how?

INITIAL SUGGESTIONS AND IDEAS:

1. Improving and strengthening the implementation of the current rules, including a stronger position-taking by the European Commission when necessity and proportionality requirements are not met.

2. Alternatively, continuing negotiations on the Commission's 2017 proposal, or starting over on the basis of a new proposal that

simultaneously tackles further outstanding issues.

B. The use of police checks in border regions

An additional dynamic observed in the Schengen Area after 2015 is the increased use of police checks by certain states in the border regions. This appears to be increasingly considered as a policy alternative to – or compensation for the absence of – internal border checks. Article 23 of the SBC establishes that police checks are allowed, provided that: (i) border control is not their objective, (ii) they are based on general police information and aim in particular to combat cross-border crime, (iii) they are devised in a manner clearly distinct from systematic checks at the external borders and (iv) they are carried out on the basis of spot checks.²⁵

In a number of judgments, the CJEU highlighted the need for precise legal rules when carrying out police checks in border zones. This was considered necessary in order to ensure that the controls do not run the risk of “having an effect equivalent to border checks”, which is precluded under the SBC.²⁶ Most recently, in December 2018, the Court concluded that German rules requiring coach transport companies to check passengers' passports and residence permits before crossing internal borders, at the risk of fines, fell within the scope of the SBC rules on police checks. In its subsequent examination of whether these rules were sufficiently precise in terms of the intensity, frequency and selectivity of the checks, the Court arrived at a negative conclusion. The German rules were found to amount to measures having an “effect equivalent to border checks” and hence were not allowed under the SBC.²⁷

At the same time, however, the European Commission has been calling on the states that still uphold border controls to lift them, while maintaining the same level of security by using other tools (e.g. reinforced police checks).²⁸ Several member states reportedly support this call and are keen to explore how the use of police checks can be strengthened in future. Most recently, in a leaked document on priorities for the new Commission prepared by the Directorate-Generals (DGs), Commission officials highlighted that “further alternatives to internal border controls” had to be reviewed. As also stated in the document, such alternatives could be the subject of a targeted legislative proposal that would set out “the possibility for enhanced police checks within the territory including in the internal border area and on the measures that can be taken on the basis of such police checks”.²⁹

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTION:

- ▶ What role to give to police checks in the Schengen zone of the future?
- ▶ What are the risks, if any, connected to using police checks as an alternative measure to border controls?

INITIAL SUGGESTIONS AND IDEAS:

3. Starting a series of renewed reflections on the relationship between internal border controls and police checks.

C. Making Schengen conditional on cooperation and good governance in the Common European Asylum System

On 4 March 2019, French President Emmanuel Macron called for a rethinking of the Schengen Area. He stated in this respect that “all those who want to be part of [Schengen] should comply with obligations of responsibility (stringent border controls) and solidarity (one asylum policy with the same acceptance and refusal rules).”³⁰ These statements were echoed by Dutch Prime Minister Mark Rutte who, in a media interview on 16 May 2019, declared that “if Eastern European countries continued to refuse solidarity, they needed to start feeling the consequences”.³¹ More specifically, these states had to be made aware that membership to the Schengen border-free zone came hand in hand with solidarity in the context of the EU’s asylum policy. If they would not live up to this, Western European countries could, in the future, respond by reinstating controls in such a way that they would cut off Eastern Europe from Schengen.

Conditionality links between Schengen and the CEAS – more specifically the Dublin system – are not new. They can, in fact, be traced back to 1990 when the Dublin Convention was adopted as a measure to compensate for control losses that were feared to emanate from the abolishment of internal border controls. Such links have since reappeared, for instance, in the context of association agreements.

The question of whether and how to give these links practical effect when faced with problems in the CEAS is a more difficult one. The current SBC already provides for the reintroduction of internal border controls in the event of “serious deficiencies in the carrying out of external border control”,³² which was triggered in 2016. However, it does not make an explicit link to deficiencies

in the CEAS generally, or the Dublin system more specifically.

Ideas on how to further link Schengen and the CEAS appear to be increasingly gaining ground. At least three scenarios on how this can be accomplished can be identified, but none of them are problem-free. In what follows, each scenario is considered in turn, highlighting specific options as well as limitations. In an overarching sense – and an opinion expressed by several participants at the roundtables and conference – any scenario that seeks to strengthen functional links between Schengen and the CEAS also risks worsening the already apparent spillover of problems in the Dublin system into the Schengen zone, at the expense of the latter (see Part 1).

1. To begin with, a first, more cautious scenario consists of a series of legislative changes that would bring the governance of both systems closer together. This could, to begin with, include stronger information-sharing and monitoring mechanisms as well as stronger cooperation and operational support structures. To provide some examples, stronger cooperation could be achieved by establishing a specific ‘Schengen Council’ within the Council’s structures that would meet regularly in order to detect and address potential problems (e.g. those identified by the Schengen evaluation mechanism reports) and provide joint remedies as early as possible. Further centralisation of operational support could be accomplished by enhancing the mandate of EU agencies. Options would be provided to escalate the process – should problems persist despite the closer governance – with, as a final step, the reintroduction of internal

border controls. This would require adding a new, more explicit ground for introducing border checks in the case of continued problems in the CEAS to the SBC (see Part 1, A). Scenarios along these lines appear to be under consideration within the Council structures, particularly by representatives of the north-western member states.

Similarly, the document of the DGs' proposed priorities makes mention of the possibility of "[c]reating legal links between a new system of determining and sharing responsibility (in the area of asylum) and the Schengen *acquis*". As the document continues, the new rules on determining and sharing responsibility could become part of the Schengen *acquis* so that, "on the one hand, the new rules would become subject of the Schengen evaluations", and "on the other hand, persistent deficiencies in the implementation of those rules would become a new reason for recommending the reintroduction of internal border controls."³³

It remains to be seen whether such proposals and particularly the idea of safeguards in the format of reintroduced internal border controls would be able to garner sufficient political support from the Southern and Eastern European states. It is noteworthy in this respect that the European Parliament already tried to provide for a stronger monitoring role of that agency within the context of the recent negotiations on a European Union Agency for Asylum, with an explicit reference to the triggering of Article 29 of the SBC.³⁴ This proposal – reportedly – was not accepted in Council, precisely due to opposition from those member states that are most often linked to a problematic implementation of the CEAS *acquis*.

2. A second scenario appears from the statements of President Macron and, particularly, Prime Minister Rutte, and is bolder in that it would entail a full-fledged separation of Western and Eastern Europe. Neither of the statements provide much detail on how exactly, or on the basis of which grounds, such controls would be instated. It is in any case clear that the exclusion of a state from the Schengen Area cannot be accomplished without a Treaty change, which would require unanimity. As the states targeted would not vote in favour of such a change, this option can be discarded immediately. The most probable course of action seems, instead, to be a continuation as well as a reinforcement of the controls that are currently already in place. However, as highlighted at the beginning of this note, these checks are already subject to charges of constituting unlawful behaviour. Their further expansion, both in time as well as in scope, would entail a (more) obvious violation of EU law. It then becomes unclear how they could be justified as a reaction to other states not upholding their EU law commitments.

Conditionality links between Schengen and the CEAS – more specifically the Dublin system – are not new. The question of whether and how to give these links practical effect when faced with problems in the CEAS is a more difficult one.

The reform effort should also be used as an opportunity to tackle a series of further outstanding questions.

Any scenario that seeks to strengthen functional links between Schengen and the CEAS also risks worsening the already apparent spillover of problems in the Dublin system into the Schengen zone, at the expense of the latter.

3. This leads to a third scenario that has repeatedly been suggested in the past and appears to be making a comeback in response to calls along the lines of those made by President Macron and Prime Minister Rutte; i.e. to move towards a 'Europe at different speeds'. This could be achieved by making use of the enhanced cooperation mechanism provided under Article 20 TEU. This article provides that at least nine member states are necessary to launch an enhanced cooperation which must also be authorised by the Council through a qualified majority vote. Such an enhanced cooperation would need to be adopted as a 'last resort', meaning that its objectives cannot be attained within a reasonable period by the Union as a whole. This scenario could, in various formats, provide for stronger links, including conditionality and connected safeguards between Schengen and Dublin through new rules which move beyond those currently in place. Again, the political feasibility of such mechanisms would need to be examined. Amongst others, as highlighted by some member state representatives – to the extent that such systems would also likely need to entail a stronger commitment from the part of Western member states to refugee responsibility sharing without the full cooperation of all member states – it may be a sensitive sell to domestic electorates.

THESE OBSERVATIONS RAISE THE FOLLOWING QUESTIONS:

- Should membership to the Schengen Area be made conditional on good governance in the context of the CEAS, and, in particular, the Dublin system? If so, how?

INITIAL SUGGESTIONS AND IDEAS:

4. Carefully considering the three scenarios listed above, including their respective limitations and the overarching risk that they may worsen the spillover of the Dublin crisis into the Schengen system.

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