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SCHENGEN AND THE REINTRODUCTION OF INTERNAL BORDER CONTROLS

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ABSTRACT

The Schengen Area, which currently comprises twenty-six countries, has represented one of the most far-reaching achievements in the process of European integration. Since 1995, controls at internal borders have been abolished and citizens have been granted the right of free movement of persons within the area.

Today, however, the future of Schengen seems to be at risk. Following the provisions of the Schengen Borders Code (SBC), several Member States have decided to reintroduce controls at its internal borders. In the context of the on-going refugee and migration crisis and the rise of terrorist threats, the EU is facing major challenges and has the arduous task of appropriately addressing them.

The aim of this study is to analyse the SBC's provisions under which such reintroductions can be carried out and to provide an understanding of the recent situations where such exceptional measures have been taken. Furthermore, we will take a close look at the role of the European Commission and finally discuss the actions that could help ease our current situation.

All in all, we will reveal the most relevant questions surrounding border management and reflect on the present as well as the future of the Schengen Area.

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TABLE OF ABBREVIATIONS

| | |
|-------------------|---|
| EU | European Union |
| SBC | Schengen Borders Code |
| EC | European Commission |
| ECSC | European Coal and Steel Community |
| EURATOM | European Atomic Energy Community |
| TEU | Treaty on European Union |
| SIC | Schengen Implementing Convention |
| SIS | Schengen Information System |
| TFEU | Treaty on the Functioning of the European Union |
| EEA | European Economic Area |
| EP | European Parliament |
| RPS | Regulatory Procedure Scrutiny |
| EASO | European Asylum Support Office |
| EUROPOL | European Police Office |
| COP ₂₁ | 2015 United Nations Climate Change Conference |
| EBCG | European Border and Coast Guard |
| FN | National Front (Front National) |
| UKIP | UK Independence Party |
| NPD | National Democratic Party of Germany |

1. INTRODUCTION

The Schengen system has played a fundamental role in the process of European integration. On a continent where nations once shed blood to defend their territories, today EU citizens share the right of freedom of movement. Ever since the Agreement was implemented in 1995, internal border controls have been abolished and the Schengen Area has constituted one of the Union's biggest achievements ever.

Nevertheless, the future of Schengen seems to be at stake. The massive arrival of immigrants and the threat of international terrorism raise many questions as to how to regain control over the present situation. It is at this point where Member States are faced with the dichotomy between freedom and security.

This paper seeks to analyse our current state of affairs from a legal perspective. More specifically, with regard to the reintroduction of internal border controls in the EU. We will initially provide a historical context of the European Union and then analyse the Schengen Borders Code and its successive amendments. In addition, we will identify the situations where Member States have resorted to exceptional measures and examine the European's Commission assessment with regard to such reintroductions.

To do so, we will interpret the SBC and understand its evolution within the framework of Europe's social developments. It must be mentioned that, as one would expect, this is a matter of topical interest which at the same time presents a significant challenge as it is essential to be fully abreast of the latest news and legislative developments. This is why we will take into account the most recent publications and findings from official EU bodies such as the EC as well as any relevant press releases on the subject. In addition, we will infer from interviews, law reviews and studies the opinion of different experts in the field. Finally, we will take a close look at the Member State's positions and also at the steps taken by the EU to address the outstanding challenges.

In light of the above facts and considerations we will finally discuss the impact of the recent events and developments in the whole Schengen idea. We will gather the findings in order to make a humble attempt to reveal what the trend looks like. More specifically, we will set forth the possible scenarios regarding the burning question of Europe's future border management.

2. THE SCHENGEN BORDERS CODE

2.1. An overview of the European Union

First of all, it is important to provide a historical introduction to have a better understanding of the European idea.

Europe is a community of different cultures which has shared many of the most influential economic, political and artistic movements throughout history. The core idea of European integration has been to find union in diversity whilst forging a common destiny. Today, trying to strike the right balance between respect for cultural diversity and the construction of a shared European spirit is at Europe's core challenges.

The EU was initially thought as an economic and political union of countries aiming at ending war between neighbours, especially after WWII. It was set up with the idea of building a peaceful, united and prosperous Europe. The first step towards a more united Europe was marked by the creation of the European Coal and Steel Community (ECSC) in 1951.

It was the Schuman Declaration presented by the French foreign minister Robert Schuman in 1950 that proposed the creation of the ECSC, whose founding members were France, West Germany, Italy, the Netherlands, Belgium and Luxembourg. A key quote of this historical proposal in the ECSC Treaty's Preamble reveals the inspiration of this complex process:

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”

The ECSC was conceived as the first of the three European Communities and launched an original process based on a belief in a common destiny and a long-term vision. In 1957 two treaties were signed in Rome that gave birth to the European Economic Community (EEC) and to the European Atomic Energy Community (EURATOM). Therefore, in 1958 the three European Communities were constituted.

Later on, UK, Denmark and Ireland (1973), Greece (1981), Portugal and Spain (1986) joined the process of European integration and in 1986 the Single European Act was signed with the objective of establishing a single market. Furthermore, with the fall of the Berlin Wall and the collapse of communism across Central and Eastern Europe, Europeans become closer neighbours.

The European Council reached an agreement in Maastricht which was finally adopted in 1992 as the Treaty on European Union (TEU) entering into force on 1 November 1993. The Maastricht Treaty, which has probably been the most important reform of the foundational Treaties created the EU based on three pillars: the European Communities, the Common and Foreign Security Policy and cooperation in the field of justice and home affairs.

During these years a Europe without frontiers was first conceived. A small village in Luxembourg gave its name to the “Schengen” model arising from the 1985 Schengen Agreement and the 1990 Schengen Implementing Convention (SIC) signed by Belgium, the Netherlands, Luxembourg, France and Germany. However, it did not fully and finally come into force, after serious difficulties, until 26 March 1995. The Schengen Area conferred the right of free movement of people and is widely regarded as one of the primary achievements of the EU.

More countries joined the system in further accessions; Italy (1990), Portugal and Spain (1991), Greece (1992), Austria (1995), Denmark, Finland, Sweden, Iceland and Norway (1996). It must be noted that the inclusion of non-EU Members was explained because these five States had been part of the Nordic Passport Union since 1958, an area of free movement of people.¹

The central element of the 1985 Schengen Agreement was the abolishment of internal border controls in lieu of a single external border as well as a common visa policy. This led to the adoption of compensatory measures aiming at reconciling freedom and security which we can find in the SIC. The set of rules and mechanisms constitute what is known as the “*Schengen acquis*” and basically refer to internal and external border crossing; police and judicial cooperation; the Schengen Information System (SIS); and the protection of personal data.

After 1993, within a new framework of a reborn and turbulent European continent, the EU was facing two important problems: *ad intra* of the EU, a very critical public opinion, not very understanding with the process of integration and keen on a comprehensive institutional reform; and, *ad extra*, ten or fifteen countries of Central and Eastern Europe wishing to integrate the EU.²

¹ MANGAS MARTÍN, Araceli, Liñán Noguerras, Diego J. (2014). *Instituciones y Derecho de la Unión Europea*, Madrid: Tecnos, p. 113

² *Ibid*, p. 40

The ambitious aim of abolishing border checks raised questions on how to monitor and control the movement of third country nationals and asylum seekers. This major issue was addressed in 1990 with the adoption of the Dublin Convention³ which did not become operational until complete ratification in 1997. The regulation established which Member State was to be responsible for the examination of any asylum application.

With the adoption of the Amsterdam Treaty (1997) and in line with a common Europe asylum system, Dublin II Regulation (2003) laid down more mechanisms and replaced the previous Convention. Dublin III (2013) introduced some substantive changes and new provisions that have enhanced efficiency and ensured more protection for applicants.

On the other hand, in 2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established.⁴ Its main goal is to ensure uniform and high level of control and surveillance which is a necessary corollary to the free movement of persons in the EU.

The EP and the Council adopted Regulation 562/2006⁵ on 15 March 2006, the also known as the Schengen Border Code (hereafter SBC) which completed and repealed provisions of the above mentioned SIC. The SBC established a community set of norms governing the movement of persons across borders that we will be discussed in greater detail later on.

During the first decade of the 21st Century more countries became part of the Union: Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Malta, Poland and Cyprus (2004), Bulgaria and Romania (2007) and finally Croatia in 2013. EU countries worked much more closely together to fight crime, especially after the September 11th attacks, and the financial crisis that hit the global economy in 2008 led to a closer economic cooperation.

Moreover, the Lisbon Treaty was signed by the EU Member States on 2007 and modified the Maastricht Treaty as well as the Rome Treaty, which was renamed to the Treaty on the Functioning of the European Union (TFEU).

³ European Union, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19.8.1997, p. 1–12

⁴ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1–11

⁵ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1–32

2.2. The Schengen Borders Code

The idea of a boundary model under International Law has a triple function; to provide a sovereignty limit, a control or checking place and also a frontier cooperation zone. The European integration experience, however, has led to a new boundary system where sovereignty limits are understood differently, with hot pursuit on land common regimes. Furthermore, the idea of boundaries as control places has been completely transformed due to the suppression of control and checking at internal borders. At the same time, Schengen Members have accepted a joint regulation of the crossing of external borders.⁶

The SBC, which has very recently been amended by Regulation 2016/399⁷, establishes the rules on the border control of persons crossing EU external borders and on the temporary reintroduction of border control at internal borders. The scope of the regulation includes any person crossing the external borders of all 28 EU countries⁸, except those of the UK and Ireland, and the internal borders of the Schengen Area⁹.

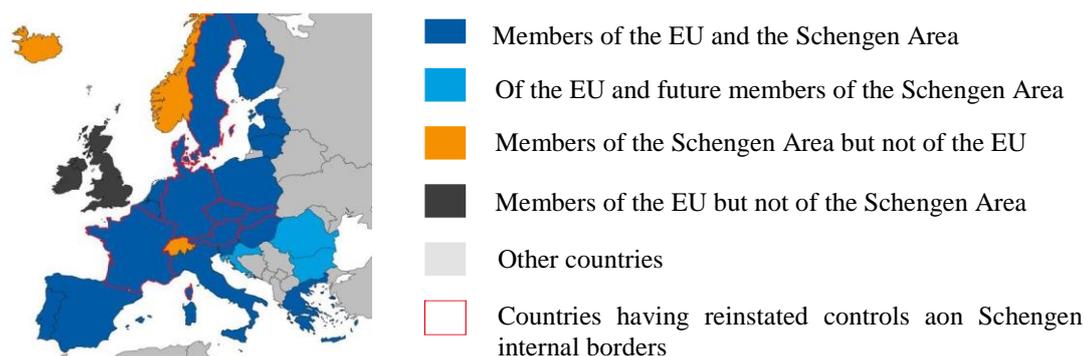


Figure 1. Re-establishing border controls in the Schengen Area. Source: adapted from France Stratégie, Aussilloux, Vincent, Le Hir, Boris. Accessed 30 April 2016, available at http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/the_economic_cost_of_rolling_back_schengen.pdf

It is worth noting that all four European Free Trade Association (EFTA) Member States – Iceland (2001), Norway (2001), Switzerland (2008) and Liechtenstein (2011) – have signed agreements on association with the Schengen Agreement in spite of not being part of the EU.

⁶ DEL VALLE GÁLVEZ, Alejandro (2002). “Las fronteras de la Unión – el modelo europeo de fronteras” *Revista de Derecho Comunitario Europeo*, No. 12, pp. 329-332, 340-341

⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L77, 23.3.2016, pp.1-52

⁸ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom

⁹ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland

In addition, Iceland, Norway and Liechtenstein as well as the EU countries are part of the European Economic Area (EEA) whereas Switzerland, even though it has not joined the EEA, it does have bilateral agreements with the EU allowing its participation in the internal market.

2.2.1. Note on external borders

External borders¹⁰ may only be crossed at border crossing points and during the fixed opening hours¹¹ and persons enjoying the Community right of free movement shall undergo a minimum check in order to establish their identities by means of a rapid and straightforward verification.¹² On the contrary, third-country nationals shall be subject to thorough checks which comprise the verification of the entry conditions¹³. If the conditions are not fulfilled and unless special grounds such as humanitarian reasons apply, entry will be refused.¹⁴

Border checks are carried out by border guards, who shall fully respect human dignity, take proportionate measures and not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹⁵

2.2.2. Internal borders and temporary reintroduction of border controls

On the other hand, internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.¹⁶ However, national police authorities can exercise their powers, also regarding internal border checks provided that this exercise does not have an equivalent effect to border checks¹⁷, as meant by the Court of Justice in the cases of Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10). Furthermore,

¹⁰ ‘external borders’ means (a) the common land borders, including river and lake borders, sea borders (b) the airports (c) sea, river and lake ports (SBC, *supra* note 7, art. 2 para. 2)

¹¹ SBC, *supra* note 7, art. 5 para. 2

¹² SBC, *supra* note 7, art. 8 para. 2

¹³ Entry conditions referred to stays not exceeding 90 days in any 180-day period. They must possess a valid travel document, a valid visa (if required), justify the purpose of his/her intended stay and have sufficient means of subsistence, not have an alert issued in the Schengen information system (SIS) for the purpose of refusing entry and not be considered a threat to public policy, internal security, public health or the international relations of EU countries (SBC, *supra* note 2, art. 6 para. 1)

¹⁴ SBC, *supra* note 7, art. 14

¹⁵ SBC, *supra* note 7, art. 6

¹⁶ SBC, *supra* note 7, art. 22

¹⁷ SBC, *supra* note 7, art. 23

Member States shall remove obstacles to traffic at road crossing-points at internal borders and be prepared to provide facilities for checks if internal borders are reintroduced.¹⁸

A Member State may exceptionally reintroduce border control at its internal borders (see Figure 2) when there is a serious threat to public policy or internal security for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days, until a maximum of 6 months.¹⁹ Internal borders shall only be reintroduced as a last resort in accordance with the established procedures.

First of all, the Member State shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to the threat taking into account both the impact to its public policy or internal security and the impact on free movement of persons.²⁰

According to Article 27 SBC, in order to temporarily reintroduce border control at internal borders, the Member State shall notify the other Member States and the Commission at latest four weeks before the planned reintroduction or within a shorter period if circumstances where still unknown at that time. The Member State shall supply: (a) the reasons for the reintroduction and detailing the events that constitute a serious threat to public policy or internal security (b) the scope of the reintroduction, specifying where border control is to be reintroduced (c) the names of the authorised crossing-points (d) the date and duration of the reintroduction (e) where appropriate, the measures to be taken by other Member States.

Following the notification from the Member State concerned, the EC may issue an opinion which shall be subject of consultations at least fifteen days before the date planned for the reintroduction. Consultations have a view to organising, where appropriate, mutual cooperation and to examining the proportionality of the measures.²¹ The decision to reintroduce border control at internal borders shall be taken in a transparent manner and the public informed in full thereof, unless there are overriding security reasons for not doing so.²²

The SBC establishes a specific procedure when there is a serious threat to public policy or internal security requiring immediate action. In this case, the Member State concerned may,

¹⁸ SBC, *supra* note 7, art. 24

¹⁹ SBC, *supra* note 7, art. 25 para. 1

²⁰ SBC, *supra* note 7, art. 26

²¹ SBC, *supra* note 7, art. 27 para. 4 and 5

²² SBC, *supra* note 7, art. 34

again, on an exceptional basis, immediately reintroduce border control at internal borders. In this case the period is limited for up to 10 days for renewable periods of up to 20 days and shall not exceed 2 months.²³

Article 29 SBC establishes a specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk. The Council, based on a proposal from the Commission (possible request by a Member State), may recommend that one or more Member States decides to reintroduce border control at all or at specific parts of their internal borders. This recommendation may operate as a last resort and as a measure to protect the common interests within the area without internal border control. Therefore, all other measures must be proved first to be ineffective in mitigating the serious threat identified. In this case, border control at internal borders may be reintroduces for a period of up to 6 months, however, that period may be prolonged, no more than three times, for a further period of up to 2 years if the exceptional circumstances persist.

Finally, article 31 *et seq.* of the Code contain provisions on: informing the EP of decisions on reintroduction controls; clarifying that the external borders rule will apply when internal border checks are reintroduced; requiring a report when internal border controls are lifted, outlining the operation of the internal checks and their effectiveness; requiring information to the public about reintroduced controls unless there are overriding security reasons to the contrary; and requiring the EU institutions and other Member States to respect the confidentiality of information submitted by a Member State as its request.²⁴

2.3. The importance of solidarity and mutual trust

The Schengen Area goes hand-in-hand with the notion of solidarity and mutual trust. These values are actually the founding and functional elements of the European Union ensuring that free movement of persons is upheld. Mutual trust between partners is especially important when controlling the entry into the common territory whereas solidarity mechanisms offset the burden that weighs mainly on the States situated in the EU's perimeter.²⁵

²³ SBC, *supra* note 7, art. 28

²⁴ PEERS, Steve (2012). *EU Justice and Home Affairs Law (3rd Edition)*, United States: Oxford University Press Inc., New York, p. 181

²⁵ PASCOUAU, Yves (2013) *Schengen and solidarity: the fragile balance between mutual trust and mistrust*. Accessed 8 March 2016, pp. 5-8 available at http://www.institutdelors.eu/media/schengen_solidarity_y.pascouau_ne-epc_july2012.pdf?pdf=ok

Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, stated in Schengen's 30th year commemoration that "the Schengen agreement has fundamentally transformed the European landscape. Removing the control at the borders between the Member States is one of the most outstanding achievements of European integration visible to every cross-border traveller. It would not have been possible without the mutual trust between the Member States. Mutual trust and close cooperation is something that we need today and I hope that this anniversary will mobilise us to join our efforts in addressing the common challenges not only in the Schengen cooperation, but in the entire area of migration."

On the other hand, Yves Pascouau, Director of Migration and Mobility Policies at the EPC, compares the balance between mutual trust and mistrust to radioactivity; the latter exists in a natural state and it is only when its intensity increases excessively that it becomes dangerous.²⁶ Araceli Mangas²⁷ mentions the importance of rely on the work of the police, especially that of the country where a non-European citizen first arrives and to trust in the good faith of each Member State when it applies EU law.

3. AMENDING THE SBC

3.1. The SBC's legal evolution

In this section we will describe in detail the different amendments of the Schengen Borders Code with special focus on the changes made as a result of migratory pressures in Europe.

Reg. 296/2008 (OJ 2008 L 97/60)²⁸ amended the rules in the Code as regards the implementing powers conferred on the Commission. Comitology rules²⁹ were modified in 2006 to establish a new regulatory procedure with scrutiny (RPS) which gave the EP and the Council extra scrutiny powers in the amendment of non-essential elements.

Reg. 81/2009 (OJ 2009 L 25/56)³⁰ amended the SBC as regards the use of the Visa Information System³¹ (VIS) which also provides for the use of the RPS procedure for the

²⁶ *Ibid.*

²⁷ MANGAS MARTÍN, Araceli, "*La libre circulación de personas: ¿Schengen a Revisión?*", Obra Social la Caixa (Barcelona), 18 January 2016.

²⁸ Amendments: art. 12(5), art. 32(2) and 33(4) SBC

²⁹ The way in which the EC exercises the implementing powers conferred by the EU legislator with the assistance of committees of representatives from the EU Member States

³⁰ Amendments: art. 7(3) SBC

³¹ VIS allows Schengen States to Exchange visa data in order to facilitate checks and the issuance of visas, prevent fighting abuses, protect travellers, help asylum applications and enhance security

adoption of most measures implementing it. Moreover, Reg. 810/2009 (OJ 2009 L 234/1) established a Community Code on Visas (Visa Code) laying the conditions for issuing a short stay visa for the Schengen Area. Finally, Reg. 265/2010 (OJ 2010 L 85/1)³² amended the provisions on movement of persons with long-stay visa issued by a Member State. A third-country national holding it should be allowed to travel to another Member States for three months in any six-month period under the same conditions as the holder of a residence permit.

A European political debate was raised in the wake of the Arab Spring, in April 2011. When several thousand Tunisian migrants arrived on the shores of Lampedusa, the Italian government asked for support from its European partners who did not reach the same assessment and in turn denied the request for support. The Italian government then decided to grant temporary residence permits for humanitarian issues to allow these refugees to travel into other Member States of the Schengen Area and, more specifically, to enter France³³.

France argued the lawfulness of the residence permits under the provisions of the SBC. The French authorities blocked several trains from Vintmille and established police controls at the Franco-Italian border for public security reasons. As a result of the dispute and following Berlusconi's and Sarkozy's requests to revise the Schengen Agreement, the Commission President Barroso promised that the issues raised would be examined.³⁴

The EC confirmed its willingness to reform Schengen and after two years of politically tense negotiations the idea materialised in the Schengen Governance Package (see section 3.2.). The aim was to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk without jeopardising the principle of free movement of persons.³⁵

The SBC was amended again by Reg. 656/2014 (OJ 2014 L 189/93), on the surveillance of external sea borders in the context of operational cooperation. More specifically, it introduces rules regarding the interception in territorial waters of EU Member States and in the high seas

³² Amendments: art. 18, art. 21, art. 25, art. 5(1)(4)

³³ European Policy Centre, PASCOUUAU, Yves (2013). *The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach*, p.1. Accessed 14 March 2016, available at http://www.epc.eu/documents/uploads/pub_4011_schengen_governance_package.pdf

³⁴ TRAYNOR, Ian (11 May 2011), *EU considers reinstating national border controls*, The Guardian. Accessed 22 March 2016, available at <http://www.theguardian.com/world/2011/may/01/eu-considers-reinstating-border-controls>

³⁵ Council of the European Union, *Council adopts the Schengen Governance legislative package*, 7 October 2013, 14441/13, PRESSE 400

as well as rules on search and rescue operations. Finally, it provides a duty to ensure the respect of fundamental rights and the compliance of principle of non-refoulement.³⁶

Finally, Reg. 2016/399 of 9 March 2016 has very recently established a Union Code on the rules governing the movement of persons.

3.2. The Schengen Governance Package³⁷

The Schengen Governance Package provided the following new general framework for the temporary reintroduction of border control at internal borders.

| | Serious threat to public policy or internal security | | Exceptional circumstances put the overall functioning of the area without internal border control at risk |
|--------------------------|--|--|--|
| Cases | Foreseeable threats (e.g. sporting, events, political demonstrations, political meetings) | Urgent cases (e.g. terrorist attack) | As a result of persistent serious deficiencies relating to external border control |
| General period | 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. Scope and duration shall not exceed what is strictly necessary to respond to the serious threat. | | |
| Period | If the serious threat persists beyond 30 days, the Member State may prolong border control at its internal border for renewable periods of up to 30 days for up which shall not exceed 6 months. | (1) for a limited period of up to 10 days (2) If the serious threat to public policy or internal security persists beyond 10 days, the Member State may decide to prolong the border control for renewable periods of up to 20 days (3) The total period shall not exceed 2 months | For a period up to 6 months, which may be prolonged, no more than three times, for further period of up to 6 months if the exceptional circumstances persist |
| Procedure | (1) Notify the other Member States and the Commission (4 weeks before the planned reintroduction or less than four weeks if unknown circumstance): (a) reasons (b) scope (c) authorised crossing-points (d) date and duration (e) measures taken by the other Member States (where appropriate) (2) Commission or Member State may issue an opinion with a view to organising mutual cooperation and examining proportionality (10 days before the planned reintroduction) | (1) The Member State may immediately reintroduce border control at internal borders (2) Notify Member States and the EC | (1) The Council may recommend that a Member State decides to reintroduce border control based on a proposal from the Commission (Member States may request the Commission) (2) Last resort and measure to protect common interests |
| Common provisions | (1) Inform EP and Council (2) Report on the reintroduction of border control at internal border (3) EC and Member State must Inform the public | | |

Figure 2. Provisions introduced by the Schengen Governance Package. allowing for the reintroduction of border controls at internal borders Source: adapted from the Schengen Borders Code

³⁶ Non-refoulement is a principle of international law, endorsed by the Charter of fundamental rights, according to which a person must not be returned to a place where there is a serious risk of death penalty, torture or inhuman or degrading treatment

³⁷ The package consisted of two regulations: Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances and Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (Council of the European Union, 2013a; Council of the European Union, 2013b).

In 2013, in the light of the above-mentioned circumstances, the Council adopted a regulation in the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. The amendment established a duty of the EC to render multiannual and annual evaluation programmes taking into account the recommendations made by Frontex. Evaluation reports will also be adopted by the Commission whereas the Council will adopt any necessary recommendations for remedial action. Moreover, the Member State concerned will be required to submit an action plan to remedy deficiencies and the Commission will monitor and report the situation until the action plan is fully implemented. Lastly, the EC will present a yearly summary report to the EP and Council on the evaluations carried out.

4. THE REINTRODUCTION OF INTERNAL BORDER CONTROLS IN THE SCHENGEN AREA

4.1. Internal border control into practice

4.1.1. Reintroduction of control at internal borders until 2015

As shown in Annex I, since the entry into force of the SBC in 2006, most cases of reintroduced control have been related to preventing and combating different types of crime in connection to high level meetings or major sport events. However, in the past months and also at present, many countries have reintroduced controls at internal borders as a consequence of high migratory flows and threats of terrorist attacks.

The Commission has been submitting biannual reports to the EP and to the Council on the functioning of the Schengen Area³⁸ since 2011. These reports give a basis for debate and decision-making and focus on the most significant developments and effects, including the measures taken by the Member States still at internal and external borders.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|--|---------------------------|--------------|----------------------|----------------|--|
| First Biannual Report <i>(1 November 2011-30 April 2012)</i> | 2 | France | 24/10-5/11 (18 days) | 12,5 | G-20 summit of Heads of State and Government (Cannes). At its internal borders with Italy. |
| | | Spain | 28/04-4/05 (7 days) | | Meeting of the European Central Bank (Barcelona). At its land border with France and at Barcelona and Girona airports. |

Figure 3. Reintroduction of controls at internal borders (Nov. 2011 - April 2012). Source: adapted from the First Biannual Report, COM (2012) 230 final

³⁸ European Commission, Communication from the Commission to the European Parliament and the Council, *Biannual report on the functioning of the Schengen area*, COM (2012) 230 final, COM (2012) 686 final, COM (2013) 326 final, COM (2013) 326 final, COM (2014) 292 final, COM (2014) 711 final, COM (2014) 236 final, COM (2015) 675 final

The First Biannual Report on the functioning of the Schengen Area points out that irregular border crossing increased due to developments in relevant third countries, in particular, the Arab Spring. As we can see above, during this period, control at the internal borders was reintroduced twice, both of them due to political or economic events.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|---|---------------------------|--------------|---------------------|----------------|--|
| Second Biannual Report (1 May 2012 - 31 October 2012) | 1 | Poland | 4/06-1/07 (27 days) | 27 | Euro 2012 Football Championships. At all internal borders. |

Figure 4. Reintroduction of controls at internal borders (May 2012 – Oct. 2012). Source: adapted from the Second Biannual Report, COM (2012) 686 final

The Second Biannual report notices a decrease in irregular border crossing but there is a hotspot for irregular migration into the EU between Greece and Turkey. Moreover, following the deteriorating humanitarian and security situation in Syria, there has been a significant increase of Syrians in detections of irregular border-crossings as well as irregular stays, primarily in Greece. The report already warned that any further deterioration of the situation in Syria would very likely to result in a further increased number of persons seeking refuge in neighbouring countries and, eventually, in EU Member States.

During that period, Poland reintroduced controls due to the EURO 2012 Football Championship whereas Spain's previous reintroduction continued until the beginning of May.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|---|---------------------------|--------------|-------------------|----------------|-----------------------------|
| Third Biannual Report (1 November 2012 - 30 April 2013) | 1 | Norway | 3-12/12 (10 days) | 10 | Nobel Peace Prize ceremony. |

Figure 5. Reintroduction of controls at internal borders (Nov. 2012 - April 2013). Source: adapted from the Third Biannual Report, COM (2013) 326 final

The Third Biannual Report on the functioning of the Schengen Area confirms the reduction of detections of irregular border crossings; however, there was an increase of detections at the Greek sea border with Turkey and Bulgarian land border with Turkey. The largest number of irregular migrants within the Schengen Area was found in Germany and Spain which were also the main countries of final destination. Yet, no reintroductions due to migratory pressures were established; only Norway notified the Commission that on the occasion of the Nobel Peace Prize ceremony it was to reintroduce control at the internal borders.

The Fourth Biannual Report (1 May – 31 October 2013) detected an increase of irregular border crossings, especially coming from Kosovo and Syria. However, no Member State reintroduced control during this period.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|---|---------------------------|--------------|-------------------|----------------|---|
| Fifth Biannual Report (1 November 2013 – 30 April 2014) | 2 | Poland | 8-23/11 (16 days) | 15,5 | 19th session of the Conference of the Parties to the UN Framework Convention on Climate Change, the 9th session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and the 39th Session of the Subsidiary Bodies in Warsaw. At all internal borders |
| | | Netherlands | 14-28/3 (15 days) | | Nuclear Security Summit (the Hague) |

Figure 6. Reintroduction of controls at internal borders (Nov. 2013 - April 2014). Source: adapted from the Fifth Biannual Report, COM(2014) 292 final

The Fifth Biannual Report observed a decrease of irregular border crossings. Again, reintroduction of temporary controls was observed only due to important meetings on Climate Change and Nuclear Security.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|--|---------------------------|--------------|-------------------|----------------|---------------------------|
| Sixth Biannual Report (1 May 2014 - 31 October 2014) | 3 | Belgium | 1-6/6 (6 days) | 5,67 | G7 Summit |
| | | Norway | 24-31/7 (8 days) | | Terrorist threat |
| | | Estonia | 31/8-3/9 (3 days) | | Visit of the US President |

Figure 7. Reintroduction of controls at internal borders (May 2014 – Oct. 2014). Source: adapted from the Sixth Biannual Report, COM(2014) 711 final

The Sixth Biannual Report pointed out that Europe has reached its peak of migration across the Mediterranean during the summer months and continued to claim lives. More specifically, there is a significant movement within the Schengen Area of persons arriving in Italy and seeking to go to other Member States, mainly coming from Syria and Eritrea. The average days of reintroductions were still low and none of them due to migration.

As regards to the Seventh Biannual report on the functioning of the Schengen Area (1 November 2014 - 30 April 2015), the number of detections of irregular crossings was the highest since data collection started in 2007 and the main nationalities remained to be the Syrians and Eritreans. Security threats posed by foreign terrorist fighters returning from Syria to the EU were addressed with the Schengen Handbook with regard to minimum thorough checks, general rules applicable to persons enjoying the Union right of free movement and rules relevant for controls at land and air borders. Again, no cases of temporarily reintroduction control at internal borders were reported.

4.1.2. Reintroduction of control at internal borders after 2015

The Eighth Report extended the reporting period until December 2015 in order to take into account, among others, the tragic events in Paris on 13 November and other important developments. We can observe in the table below that the number of reintroductions as well as the average duration had a sudden increase in the last year.

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|---|---------------------------|--------------|---|----------------|--|
| Eighth Biannual Report (1 May - 10 December 2015) | 5 | Germany | 16/5 - 15/6 (31 days); 13-22/09 (10 days); 23/09-12/10 (20 days); 13/10-1/11 (20 days); 2-13/11 (12 days) | 46,26 | G7 Summit (16/5-15/6). The rest reintroductions come from big influx of persons seeking international protection. At all borders with focus on Austria |
| | 4 | Austria | 16-25/9 (10 days); 26/9-15/10 (20 days); 16/10-4/11 (19 days); 5/11-15/11 (11 days) | | Big influx of persons seeking international protection. At all borders, focus on borders with Italy, Hungary, Slovenia and Slovakia. |
| | 2 | Slovenia | 17-26/9 (10 days); 27/9-16/10 (20 days) | | Big influx of persons seeking international protection. At all borders, focus on borders with Hungary. |
| | 1 | Hungary | 17-26/10 (10 days) | | Big influx of persons seeking international protection. Borders with Slovenia |
| | 1 | Malta | 9/11-31/12 (52 days) | | Conference on Migration and Commonwealth Heads of Government Meeting (Valetta). Terrorist threat and smuggling of illegal migrants. Air and sea passenger terminal. |
| | 1 | Sweden | 12/11/15-09/01/16 (59 days) | | Unprecedented influx of persons. At all borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden. |
| | 1 | France | 13/11-13/12/2015 (31 days) | | 21st UN Conference on Climate Change (30 Nov - 11 December). At all land and air borders. |
| | 1 | Germany | 14/11/2015-13/05/2016 (183 days) | | Continuous big influx of persons seeking international protection. At all borders, with special focus on Austria. |
| | 1 | Austria | 16/11/2015-16/05/2016 (184 days) | | Continuous big influx of persons seeking international protection. At all borders, with special focus on Slovenia, Hungary and Italy. The border can be crossed only at authorised border crossing points. |
| | 1 | Norway | 26/11/2015-15/01/2016 (51 days) | | Unexpected migratory flow. At all borders with focus on ports with ferry connections to Norway via internal borders. |
| | 1 | France | 14/12/2015-26/04/2016 (136 days) | | In relation to the emergency state as introduced further of Paris attacks. At internal land and air borders. |

Figure 8. Reintroduction of controls at internal borders (May 2015 – Dec. 2015). Source: adapted from the Eighth Biannual Report, COM (2015) 675 final and Frontex Risk Analysis 2016

In contrast to the years before, the main reason for the reintroductions carried out since mid-2015 has been the influx of migratory flows and the threat of terrorism. The average duration of such controls has had a sharp increase, going from 5,67 to 46,26 days. Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to art. 25 *et seq.* of the SBC have basically been due to foreseeable events constituting a serious threat to the internal security and public policy being thus allowed to reintroduce internal border controls for a period up to the foreseeable duration of the threat.

In the light of the information provided by the Eighth Biannual Report, we will now summarise the measures taken by the Member States at their internal and external borders during 2015 taking into account the following two circumstances:

A. The unprecedented number of migrants arriving in the Schengen Area

There has been a dramatic increase in the number of irregular migrants and applicants for international protection arriving in the EU. Consequently, Hungary decided to construct a fence along its external border with Serbia. This is not considered contrary to EU law provided that it complies with fundamental rights as well as those resulting from the EU asylum *acquis*, in particular the non-refoulement principle. Hungary also erected a fence border with Croatia, which is due to join the Schengen area, and a similar fence was also constructed between Slovenia and Croatia. It is not explicitly prohibited to build a fence at external Schengen borders; however, the Commission notes that such construction is inconsistent with the objective of future accession of Croatia to the Schengen Area.

B. An attempted terrorist attack on the Thalys train travelling from Amsterdam to Paris on 21 August 2015 and the multiple terrorist attacks in Paris on 13 November 2015

Terrorist attacks highlight the importance of detecting fraudulent documents and using all available information such as interagency databases or the SIS, which plays a central role in the sharing of information. Even if further measures have contributed to prevent terrorism, this problem seems to go beyond the Schengen *acquis* due to the fact that radicalisation can indeed take place even without one having left the Member State.

Having said this, we will now analyse the latest reintroduction of control at internal borders in the Schengen Area taking into account the Risk Analysis for 2016 carried out by Frontex.³⁹

| | NUMBER OF REINTRODUCTIONS | MEMBER STATE | DURATION | AVERAGE (DAYS) | REASONS |
|-------------|---------------------------|--------------|-----------------------------------|----------------|--|
| During 2016 | 1 | Denmark | 04/01/2016-03/03/2016 (60 days) | 83,6 | Unexpected migratory flows. At all internal borders with focus on ferries from Germany and land borders with Germany. |
| | 1 | Sweden | 10/01/2016-08/05/2016 (120 days) | | Unprecedented influx of persons. At all borders, with special focus on harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden. |
| | 1 | Norway | 15/01/2016-12/05/2016 (119 days) | | Continuous big influx of persons seeking international protection. At all borders with special focus on ports with ferry connections to Norway via internal borders. |
| | 1 | Denmark | 04/03/2016 - 03/05/2016 (60 days) | | Big influx of persons seeking international protection. At all internal borders, with focus on ferries from Germany and land border with Germany. |
| | 1 | Belgium | 23/02/2016-22/04/2016 (59 days) | | Border between the Province of West-Vlaanderen and France. |

Figure 9. Reintroduction of internal border controls in 2016. Source: adapted from EC data on Member States’ notifications of the temporary reintroduction of border control at internal borders, accessed 10 May 2016, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm

Firstly, it must be noted that Germany, Austria, Norway and France had all reintroduced controls at the end of 2015 and continued to so until the beginning of 2016 (see figure 8).

³⁹ Frontex (2016). *Risk Analysis for 2016*. Accessed 25 April 2016, available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

France reintroduced controls in relation to the emergency state as introduced further to Paris attacks whereas Germany and Austria reintroduced controls where the largest flow of persons without legal travel documents were arriving, meaning Slovenia, Italy, Hungary and Slovakia. Sweden also recently reintroduced border controls on its ferry connections and any migrant applying for asylum will now be systematically registered and fingerprinted.

Norway, also facing an increased migratory flows, reintroduced border controls to identify among the migrants those wanting to apply for asylum. It still has controls at internal borders due to the threat of big influx of persons seeking international protection, as well as Denmark, who reintroduced internal border control with particular focus on Germany.

On the other hand, Belgium expected influx of people seeking to reach the port area of Zeebrugge following the closure of migrant camps in the Nord-Pas-de-Calais region in France so it temporarily reintroduced border controls in the context of events requiring immediate action. Controls at internal borders still continue, especially after the terrorist attacks.

4.2. The role of the European Commission

Now that we have provided a general understanding of the legal and social context of border management, we will analyse the opinion of different experts regarding the EC's role.

In words of Pascouau (2013), the organisation of powers reflects the Commission's desire to re-establish its area of responsibility in the new institutional framework and within its role as guardian of the treaties. It must be said, however, that even if the EC coordinates the organization and implementation of the mechanism in close cooperation with Member States, the reintroduction of border control is actually a prerogative of the Member States. In this sense, the EC may issue an opinion with regard to the necessity of the measure and its proportionality but cannot veto such a decision if it is taken by a Member State.⁴⁰

As regards to the effects of the Schengen Governance Package, opinions differ. Pascouau (2013) thinks that it is an unequivocal shift towards an EU-led approach and a victory for the EC whilst Zaiotti (2013) argues that the whole package only offers symbolic and vague changes and the states will continue to be able to act discretionally. As for Peers (2013), he believes that the package is a compromise that does not shift power to the Commission significantly and that its impact will be very limited.

⁴⁰ European Commission (2016). *Temporary Reintroduction of Border Control*. Accessed 7 February 2016, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm

4.2.1. The Commission's assessment on Germany and Austria⁴¹

On 13 September 2015, Germany notified that it would reintroduce controls at its internal borders, with special focus on Austria, and asked twice for its prolongation. The decision was motivated by the extraordinary influx of persons entering Germany constituting a serious threat to internal security and public policy. According to the Member State, the reintroduction would therefore allow and appropriate assistance to the arriving of persons.

In general, the Commission agreed with Germany's arguments. However, it considered that the justification that also radicalised persons might be hiding among the bona fide asylum seekers would need to be further substantiated for it to constitute a serious threat to public policy and internal security.

Furthermore, the Commission stated that the decision had not impinged on the rights of persons seeking international protection. While in 2013 legislators agreed that migratory flows cannot per se justify such reintroduction, in the opinion of the Commission, the sheer number of persons entering Germany seeking international protection indeed led to a threat of public policy and internal security.

The available information provided by Germany justified the measures taken and were considered proportionate in view of streamlining of the registration procedure and reception of persons seeking international protection. In addition, the EC had not received any complaints from EU citizens about the way in which Germany was carrying out border controls.

On the other hand, on 15 September 2015, Austria notified that it would reintroduce controls at its internal borders, especially at its frontier with Hungary, Italy, Slovenia and Slovakia. The decision was motivated by the enormous migration stream to and through Austria, which threatened the internal security and public policy.

With respect to Austria, the Commission came to a similar conclusion as to the German one. It concluded that the initial reintroductions as well as the prolongations thereof were necessary and proportionate to the identified serious threats to the internal security and public policy and as such in compliance with the SBC.

⁴¹ COM(2015) 7100 final of 23 October 2015

4.2.2. Back to Schengen – A Roadmap

On 4 March 2016, the Commission presented a Roadmap (COM (2016) 120 final) of concrete steps needed to return order to the management of the EU's external and internal borders.

Schengen is one of the major achievements of European integration yet it has recently been shaken due to the largest refugee crisis since the Second World War. Serious deficiencies at the Union's external borders such as in Greece⁴² have resulted in a wave-through approach. The reaction to temporarily reintroduce internal border controls has placed in question the proper functioning of the Schengen area of free movement. Consequently, the European Council gave a clear mandate to restore the normal functioning of the Schengen Area.⁴³

From an economic perspective, the EC estimated that the full reestablishment of border controls would generate immediate direct costs for the EU economy in a range between €5 and €18 billion annually. There would many other costs such as those from the road haulage sector (€1.7-7.5 billion) and for the tourism sector (€1.2 billion), time loss for commuters and other travellers (€1.3 to €5.2 billion), administrative costs (€0.6 to 58 billion), etc.

Moreover, the Roadmap includes the recommendations issued by the EC and the Council to remedy serious deficiencies in external border management such as the identification, registration and fingerprinting of irregular migrants and sea border surveillance.

In order to stop the wave-through approach, countries must not issue unilateral decisions. There should be an agreed approach that takes into account EU law, in particular the Dublin Regulation. More specifically, Dublin transfers allow for instance to return asylum-seekers to the country of first entry into the EU. Furthermore, Member States should refuse entry at external border to third-country when the SBC requirements (Art. 6 SBC) are not fulfilled.

The current practice of internal border control has led to unilateral decisions instead of a coherent Union approach. Recent deficiencies in external border control caused by a lack of border surveillance and insufficient identification of irregular migrants have triggered secondary movements, thus, jeopardising the Schengen area as a whole.

According to the Roadmap back to Schengen and if the overall situation allows, the objective should be to lift all internal border controls within the Schengen area within six months from their introduction, namely, by mid-November 2016.

⁴² COM (2016) 450 of 2 February 2016

⁴³ Council of the European Union 2985/16 of 12 February 2016

5. SCHENGEN: PRESENT AND FUTURE

5.1. The situation in Europe today

Now that we have been able to ascertain that the current uncertainty surrounding the future of the EU comes from deep cracks in the last years, we will take a closer look at the key factors surrounding the understanding of our present context.

Economic difficulties

The global financial crisis seriously affected European economies and posed a risk to the European banking system. Greece became the epicentre of Europe's debt crisis and initiated a debate between those in favour of a tight monetary policy and fiscal discipline *versus* those calling for flexibility and greater political discretion. The tensions between Member States have certainly revealed the existence of diverging opinions within the EU.

During the last summer there were many concerns regarding the Greek exit of the Eurozone (dubbed "Grexit"), especially after the referendum on 5 July, where Greek voters rejected the bailout offer. One week later, the government of Syriza agreed to receive financial support in exchange for more austerity and economic reforms, thus enabling Greece to stay in the Eurozone. It must be said, however, that the crisis reflected serious divisions and is likely to have undermined to some extent the integrity of the Eurozone.

Migratory pressures

On the other hand, European governments are struggling to cope with the current migration and refugee crisis. People are fleeing conflict and poverty, especially in Syria, Iraq, Afghanistan and Africa and also in South Asia and some Western Balkans countries. In 2015, Member States reported the unprecedented number of more than 1.820.000 illegal border-crossings along the EU's external borders.⁴⁴

This is why on 27 May 2016, the Commission presented the first measures triggering an emergency response mechanism under Article 78(3) TFEU⁴⁵. This provision had never before been activated. It proposed to relocate 40.000 asylum-seekers coming from Italy and Greece

⁴⁴ Frontex (2016). *Risk Analysis for 2016*, p. 16. Accessed 25 April 2016, available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

⁴⁵ Art. 78(3) TFEU: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament"

to other Member States over two months based on a mandatory distribution key. On 9 September 2015, the Commission proposed a temporary relocation for a further 120.000 asylum seekers from Italy, Greece and Hungary over two years as well as a permanent relocation mechanism for all Member States. According to the EC as of 10 May 2016, 22 Member States have so far made 7.630 places (out of 160.000) available, about 4,77% of the promised total and only 1472 have been relocated.⁴⁶

Furthermore, on 10 August 2015, the EC approved a €2.4 billion aid over six years for countries dealing with high migratory flows of immigrants such as Italy and Greece. Shortly after, on 9 September 2015⁴⁷, the Commission proposed the establishment of a common EU list of safe countries of origins initially comprising Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro, Serbia and Turkey. This would enable fast-tracking of asylum applications coming from citizens of these countries.⁴⁸

Throughout the migration crisis it has become clear that the Schengen area without internal borders is only sustainable if the external borders are effectively secured and protected. This is why the EC adopted a proposal⁴⁹ for a Regulation to establish a European Border and Coast Guard (EBCG) aiming at replacing Frontex and at strengthening external border management.

Moreover, on 18 March 2016, following on from the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March EU-Turkey statement, the European Union and Turkey agreed that all new irregular migrants crossing from Turkey to Greece will be returned to Turkey. For every Syrian being returned to Turkey another Syrian will be resettled to the EU. In exchange, the EU will allocate €6 billion, lift visa restrictions on Turks travelling to Europe and speed up talks on Turkey's membership.⁵⁰

⁴⁶ European Commission, *Member States' Support to Emergency Relocation Mechanism*. Accessed 11 May 2016. Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf

⁴⁷ European Commission, *Proposal of the European Parliament and of the Council establishing and EU common list of safe countries of origin for the Purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection and amending Directive 2014/32/EU*, Brussels, 9 September 2015, COM (2015) 452 final

⁴⁸ European Parliament (2015). *Safe countries of origin Proposed common EU list*. Accessed 5 May 2016, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569008/EPRS_BRI\(2015\)569008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569008/EPRS_BRI(2015)569008_EN.pdf)

⁴⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*, Strasbourg, 15 December 2015, COM (2015) 671 final

⁵⁰ European Commission (2016). *EU-Turkey Agreement: Questions and Answers*. Accessed 5 May 2016, available at [http://europa.eu/rapid/press-release MEMO-16-963_en.htm](http://europa.eu/rapid/press-release_MEMO-16-963_en.htm)

The EC has recently presented proposals to reform the Dublin System which include, among others, corrective allocation mechanisms when a country is handling a disproportionate number of asylum applications as well as the option to temporarily not take part in the reallocation. In that case, it would have to make a solidarity contribution of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism, to the Member State that is reallocated the person instead.⁵¹

Security concerns

Terrorism has reached the heart of Europe and is having important consequences in the rights and freedoms of European citizens. The attacks in Paris in 2015 and in Brussels in March 2016 proved the on-going threat to Europe’s internal security. Moreover, as stated by the EC (COM(2016) 205 final), there is evidence that terrorists have used routes of irregular migration to enter the EU and then moved within the Schengen area undetected.

The lack of a strong and reliable border management has undermined the mutual trust on which the Schengen agreement is based on. It has become clear that the absence of internal borders in the Schengen area requires effectively secured and protected external borders.

Rise of euro-sceptic parties

Over the last years there has been a rise in radical populist and Eurosceptic parties leading towards inward-looking attitudes opposed to the idea of European integration. In the 2014 European Parliament elections, Eurosceptics were successful in France (FN) and in the UK (UKIP). The anti-immigrant Danish People’s Party won in Denmark, the far-right Jobbik came second in Hungary and Germany had its first neo-Nazi MEP (NPD). However, the four main pro-EU groups still control about 70% of

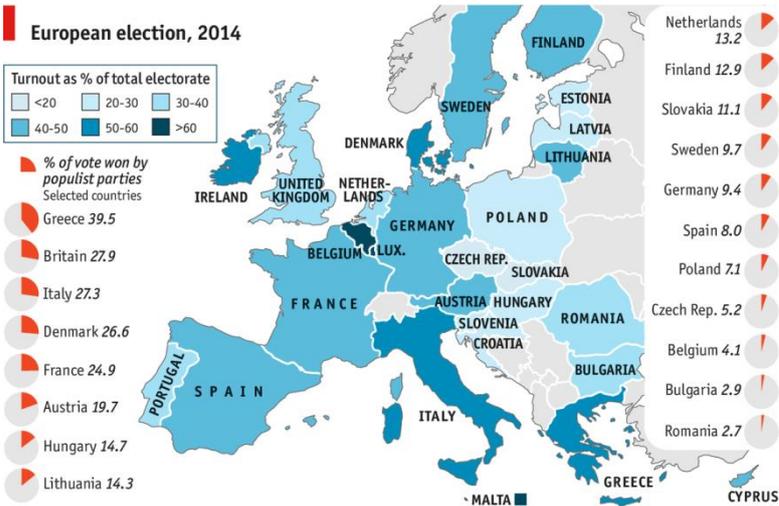


Figure 10. European Election 2014. Source: The Economist, 2014. Accessed 4 May 2014, available at <http://www.economist.com/news/europe/21603034-impact-rise-anti-establishment-parties-europe-and-abroad-eurosceptic-union>

⁵¹ European Commission (2016). *Towards a sustainable and fair Common European Asylum System*. Accessed 5 May 2016, available at http://europa.eu/rapid/press-release_IP-16-1620_en.htm

the EP’s seats. Many of these euro-sceptic parties have become important players at national level and have expressed their will to deeply reform or even leave the EU.

The UK Referendum

The UK is set to have a referendum on 23 June 2016 on whether or not to remain a member of the European Union. Even if the UK has never been part of the internal border-free Schengen Area and maintains its own border controls, Britain’s withdrawal could lead to a widespread loss of trust and have serious consequences in the future of the EU.

5.2.Expected development paths

In order to examine the current status as well as the expected futures, Frontex’s Risk Analysis for 2016⁵² provides seven different scenarios representing the most significant possible environments for border management in Europe (see Figure 11). In order to do so it has taken into account not only issues related to border management, but also its environment, meaning, international migration and cross-border crime, European actors and policies and general developments from economy, society and geopolitics.

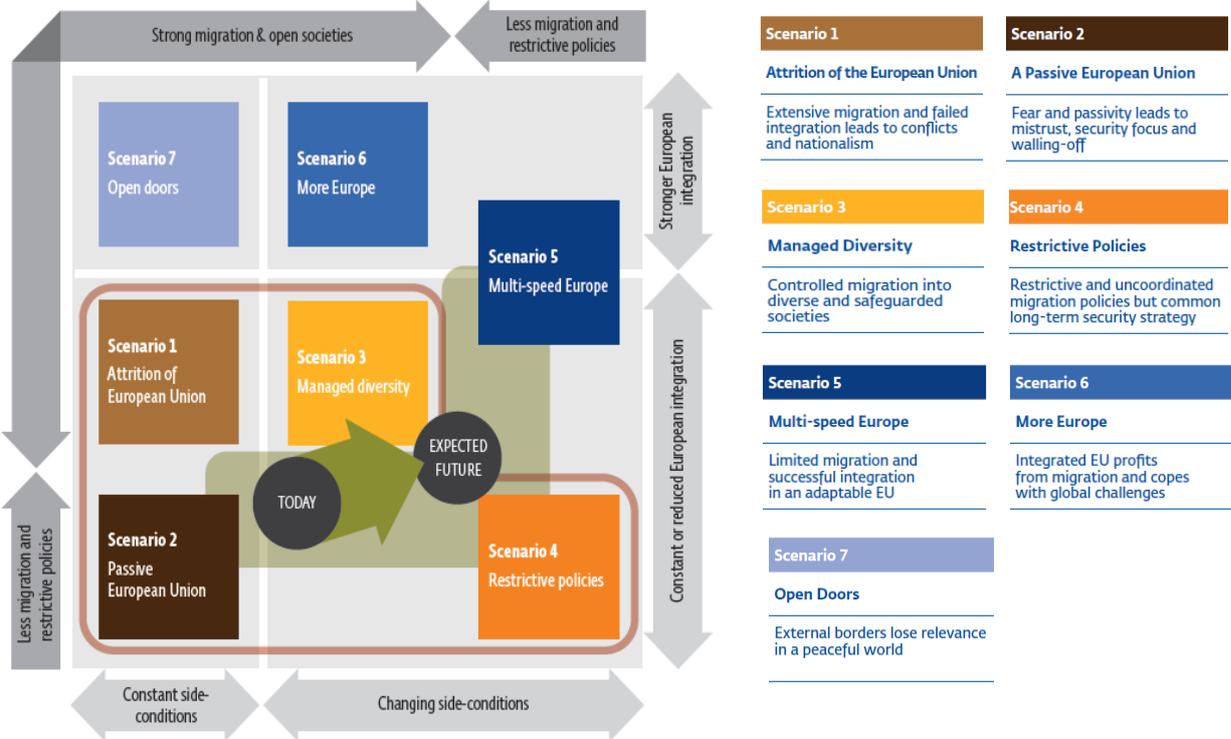


Figure 11. Scenario assessment: Expected Future. Source: adapted from Frontex Risk Analysis 2016

⁵² Supra note 39, pp. 54-59

Scenario 1: Attrition of the EU

Most countries focus on their economic interest, loose common EU identity and former agreements such as Schengen and Dublin fail. Migrants are not truly integrated due to cultural differences and that causes social conflicts and a critical perception of migration – but without important security issues. Member States manage their own borders and EU institutions are barely involved.

Scenario 2: A passive EU

The EU is politically and economically fragmented and has a low level of integration. Migration and asylum policies differ among countries and lead to more internal border controls but within the Schengen area. Global conflicts increase and external borders become a common interest with high priority on security.

Scenario 3: Managed diversity

International cooperation solves many conflicts and there is a positive perception of migration. The Dublin process is implemented and migration pressure stays manageable. However, terrorist activities threaten EU borders. Border control actions are taken by rather independent Members, who still have to communicate and collaborate on a very high level.

Scenario 4: Restrictive policies

Member States are far from the idea of an integrated federation but the global conflicts that are being faced as well as terrorist threats strengthen the wish for a common security policy. In general, Members cooperate bilaterally and efficiently.

Scenario 5: Multi-speed Europe

There is further globalisation and intensification of international conflicts and terrorism. The different views on the integration process in the EU leads to a “multi-speed Europe”: some create more integrated systems and others focus more on their own interests. As migration policies are restrictive, the small amount of educated migrants can easily be integrated. There is a European border and coast guard corps.

Scenario 6: More Europe

EU Member States cooperate and integration intensifies living the “European idea”. Migrants from different cultures are seen as enrichment and integrate eagerly. There is high pressure in

external borders so security is still a main topic, this is why there is a common border management and coast guard corps.

Scenario 7: More Europe

It is a peaceful world where conflicts can be solved and terrorism plays no significant role. Foreign policy is proactive with special focus on human rights, therefore migration policy is permissive and border management is not a significant topic. States act co-ordinately.

The expected future scenario

These seven scenarios have no assigned probability but provide a valuable food for thought. In the light of all the above considerations, I would like to summarise what I believe could be the environment in which border management will act in the future.

First of all, the economic crisis, particularly the Greek debt crisis, has had serious implications for the credibility of the entire EU project. However, the European Economic Forecast⁵³ on Greece shows some resilience in face of capital controls. Steady implementation of the Greek structural measures seems to support the rebound in confidence and bring positive growth and stronger fiscal results by the second half of 2016.

If the predictions are proved to be true this would mean that the European Union will have succeeded to some extent in overcoming the world's worst financial crisis since the Crash of 29. Yet, the Eurozone's governance will have to make greater efforts to minimise the severe consequences of the crisis, particularly regarding the most vulnerable in society. If a more robust economic growth is finally achieved, this would certainly help ease the rest of the challenges.

Secondly, the current state of affairs regarding migratory pressures and terrorism reflects an uncoordinated policy with more internal border controls than ever. I strongly believe in the creation of a European Border and Coast Guard and the intensification of information exchange to safeguard the principle of free movement of persons. A common long-term security strategy will strengthen European integration; however, some countries will still remain reluctant to take immigrants. The formula to buy their way out will most certainly give rise to critical views which I believe will end up in the creation of different foreign policies.

⁵³ European Commission (2016), *European Economic Forecast Winter 2016*

Forcing Member States to follow a common foreign policy might prove counterproductive, especially with regards to many Eastern European countries. If Europe is still willing to embrace diversity it should be able to understand that there are certain sensitive topics where member countries are not willing to give up their sovereignty, at least not yet. This is why in the short and medium run some countries will offer more integrated systems whilst some others will stick to their national interests. Europe should invest large efforts in promoting solidarity and hope that over the years the interests of all the countries will align.

In the meantime, cooperation in the management of external borders to fight terrorism and the massive arrival of illegal immigrants who are not in the need of international protection should bring countries closer. Euro-sceptic parties are not going to disappear all of the sudden but their presence will vary depending on the EU's management of the previous challenges.

Finally, I believe that Schengen is here to stay. The current patchwork of unilateral decisions regarding the reintroduction of internal border controls will eventually be substituted by a sound management of external borders. Exceptional reintroductions, especially in the case of terrorist attacks, will continue to exist; still a better coordination should help rebuild the broken trust between Schengen countries and lead to a more coordinated European policy regarding border management.

6. CONCLUSIONS

Today, Europe stands at a turning point and must rediscover itself firstly by looking back on its founding principles. Striking the balance between responsibility and solidarity must be the cornerstone of a renewed approach if we would like Schengen to survive.

Since 1995, the Schengen Area has been one of the most far-reaching components in the process of European integration. It has managed to abolish controls at internal borders provided that Member States cooperate and that security is guaranteed.

In the last months, we have seen that several EU Members have increasingly reintroduced controls at its internal borders and even prolonged them for the maximum periods contributing thus to the fall of a symbol. In fact, in line with Recommendation of the Council of 12 May 2016, Austria and Germany have in the last days prolonged their internal border controls until mid-November due to exceptional circumstances putting the overall functioning of the Schengen Area at risk.

According to the European Commission, countries have acted legally and in accordance with Articles 25 *et seq.* of the SBC, following a threat to public policy or internal security mainly due to high migratory flows and, in a few cases, the threat of terrorism. Furthermore, the Commission supports the idea that Member States currently carrying out internal border controls related to migration should continue doing so for a period of up to six months. Let us not forget, however, that these provisions must only apply as a last resort, when other measures are proved to be ineffective.

In addition, as stated by the European Parliament, migration and the crossing of external borders by a large number of third-country nationals should not, *per se*, be considered to be a threat to public policy or internal security. It seems to me that some countries have reintroduced controls overlooking the EP's mandate and in such a way that they are jeopardising the entire credibility of the Schengen Area. In spite of the amendments, the SBC has not prevented States from acting discretionally and it still remains unclear if the EU's evaluation mechanism really discourages disproportionate reintroductions.

Notwithstanding the foregoing, I am hopeful that such measures can paradoxically lead us to a road back to Schengen. The Commission already made it clear that their intention is to lift all internal border controls within six months from their introduction, namely, by mid-

November. To this extent it may actually be true that Schengen could be preserved precisely by applying Schengen.

On the other hand, it must be stressed that the answer to the multidimensional crisis that the EU is facing should be addressed not at national level but in close cooperation with the other Member States and following a common European approach. Unilateral decisions may temporarily protect one country in the short and even in the medium run, but our current challenges are indeed crying out for effective solutions guaranteeing prosperity in the long run.

In this sense, a European Border Coast Guard should be established to remedy serious deficiencies at the Union's borders. Also, the common EU list of safe countries could help prioritize the asylum applications of those in real need of international protection whereas the proposal to amend the Dublin system will help offset the burden of those countries at the EU's perimeter. Cooperation with Turkey, which is not free from criticism, will probably reduce pressure on external borders. Furthermore, the emergency refugee relocation system, which we understood that it has not yet been as effective as desired, it is in fact being implemented progressively; compared to the communication we analysed (10 May 2016), within 17 days (27 May 2016) two more countries have also joined efforts, 190 more places have been made and 277 more people have been reallocated.

Against the rise of nationalist parties creating hatred towards other human beings and most likely fearing the unknown, I would rather agree with François Crépeau when he states that "migration is most often a courageous dignity-seeking journey".⁵⁴ Instead of sealing our borders, we should invest more efforts in reinforcing security at external borders while preserving free movement and complying with international protection obligations.

To give us food for thought on the subject, I would finally like to bring up the theory of the Prisoners' dilemma. Today, the EU may seem to be trapped in a game where its leaders are taking very different positions with regard both to border management and to migration policies. It is worth remembering that the optimal strategy requires participants not only agreeing but also enforcing a common framework which I very much wish for the good of Schengen and the EU's future.

⁵⁴ CRÉPEAU, François, "*Migrant smuggling is over-criminalised*", Workshop on smuggling and trafficking (New York), 2 October 2013. Accessed 15 May 2016, available at <http://www.ohchr.org/Documents/Issues/SRMigrants/Speech/StatementPGAWorkshopSmuggling.doc>

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ANNEX I: Member State's notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 *et seq.* of the SBC until 2015⁵⁵

| | Duration of the reintroduction | Reasons |
|--------------------|---------------------------------------|---|
| Estonia | 31/8-3/9/2014 | Visit of the US President |
| Norway | 24-31/7/2014 | terrorist threat |
| Belgium | 01/06/2014 | G7 Summit |
| Netherlands | 14-28/3/2014 | Netherlands on 14-28 March 2014 Nuclear Security Summit in the Hague |
| Poland | 8-23/11/2013 | 19th session of the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC), the 9th session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and the 39th Session of the Subsidiary Bodies in Warsaw (11-22/11/2013). All internal borders |
| Norway | 3-12/12/2012 | Nobel Peace Prize ceremony in Oslo (10/12/2012) |
| Poland | 4/6/2012-01/07/2012 | Euro 2012 Football Championships (8/6-1/7/2012). All internal borders |
| Spain | 2-4/5/2012 | Meeting of the Governing Council of the European Central Bank in Barcelona |
| France | 24/10/2011-05/11/2011 | G-20 meeting in Cannes (03-04/11/2011) |
| Sweden | 22/07/2011, 23h00-23/07/2011, 09h00 | Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011 |
| Norway | 22/07/2011, 17h23-25/07/2011, 17h00 | Bomb explosion in Oslo and shooting on the island Utøya on 22/07/2011 |
| Austria | 04/06/- 09/06/2011 | World Economic Forum (07/06/-09/06/2011) |
| Portugal | 16/11-20/11/2010 | NATO Summit in Lisbon (19/11/-20/11) |
| Latvia | 24/05-01/06/2010 | NATO Parliamentary Assembly in Riga (28/05-01/06/2010). |
| France | 28/05-02/06/2010 | Franco-African Summit in Nice (31/05-01/06/2010). |
| Estonia | 17-23/04/2010 | Informal meeting of NATO Foreign Ministers in Tallinn (22- 23/04/2010). |
| Malta | 5-18/04/2010 | Visit of Pope Benedict XVI (17-18/04/2010) |
| Denmark | 1-18/12/2009 | UN Climate Change Conference in Copenhagen (7- 18/12/2009). DK-DE and DK-SE borders |
| Norway | 27/11/2009– 12/12/2009 | Nobel Peace Prize Ceremony in Oslo (10/12/2009). |
| France | 27/09/2009 | 50th Anniversary of ETA. FR-ES land borders, BCP border complex from Hendaye to Armeugy (14 border crossing points). |
| Spain | 26-27/09/2009 | Celebration of 'Basque Warrior day' in the Basque Country and Navarra (ES) and in Pyrénées-Orientales (FR). ES-FR land borders in the provinces of Guipuzcoa and Navarra |
| France | 19/09/2009, 13h — 19:40 | Demonstration by Batasuna in Bayonne. Five FR-ES border crossing points (highway A63, St Jacques international bridge, Béohobie international bridge, Hendaye station, port of Hendaye) |
| Italy | 28/06/2009–15/07/2009 | G8 Summit in L'Aquila (10-12/7/2009). Land, air and sea borders |
| France | 30/03/2009– 05/04/2009 | NATO Summit in Strasbourg (3-4/4/2009). Land and air borders with BE, LU, DE, CH, IT and ES |
| Germany | 20/03/2009– 05/04/2009 | NATO Summit in Strasbourg, Baden-Baden and Kehl (3- 4/4/2009). Land, air and sea borders |
| Iceland | 05-07/03/2009 | Visit of <i>MC Hells Angels</i> to the Icelandic Motorcycle club in Reykjavik. Air borders (16 flights checked from SE, DK, NL, FR, DE, and NO) |
| Finland | 24/11/2008–05/12/2008 | Meeting of Council of Ministers of OSCE in Helsinki (4- 5/12/2008). Controls mainly at Helsinki-Vantaa airport and at ports of Helsinki and Turku |
| France | 27/09/2008, 08h — 18:45 | Demonstration on 27 September at 16:00 in Bayonne, supervised by Batasuna. Five FR-ES border crossing points (Hendaye: highway A63, St Jacques international bridge, Béohobie international bridge, Hendaye station, port of Hendaye) |
| Austria | 02/06/2008– 01/07/2008 | European Football Championship EURO 2008, AT — CH (7/6-29/6/2008). Land and air borders |
| Iceland | 2–3/11/2007 | Participation of <i>MC Hells Angels</i> at the inauguration of the Icelandic Motorcycle club in Reykjavik (1-4/11/2007). Air borders (14 flights checked from SE, DK, FI, DE and NO) |
| Germany | 25/5–9/06/2007 | G8 Summit in Heiligendamm/Mecklenburg-Western Pomerania (6-8/6/2007). Land, air and sea borders |
| France | 12–16/02/2007 | Conference of Heads of States of Africa and France in Cannes (13-16/2/2007). FR-IT border (detailed information provided in the notification) |
| Finland | 13–29/11/ 2006 | EUROMED meeting in Tampere. Controls mainly at Helsinki-Vantaa, Turku and Tampere-Pirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders |
| Finland | 9–21/10/2006 | Informal meeting of Heads of States and Government in Lahti. Controls mainly at Helsinki-Vantaa, Turku and Tampere- Pirkkala airports and the ports of Helsinki, Hanko and Turku, FI-SE and FI-NO land borders |
| France | 21/10/2006, 08h — 20:00 | Youth Days of radical young Basques in Saint-Pée-sur- Nivelle and demonstration. organised in Bayonne by the support committee of Philippe Bidart. FR-ES land border (border crossing point on the highway A63 in Biriattou, St Jacques bridge, Béohobie bridge, Hendaye station) |

⁵⁵ European Commission (2016). *Member State's notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 et seq of the Schengen Borders Code*. Adapted from, accessed 15 May 2016, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm