

# 7. REINSTATEMENT OF INTERNAL BORDER CONTROLS IN THE SCHENGEN AREA CONFLICT, SYMBOLISM AND INSTITUTIONAL DYNAMICS

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## 1. Introduction

This Chapter addresses Schengen, focusing in particular on the re-installment of internal border controls by Member States. Since 2015, internal border controls have been reinstalled more than 80 times, with Member States justifying these measures on account of secondary movements of migrants, the threat of terrorism and the situation at the external borders of the EU. Currently, Norway, Denmark, Sweden, France, Germany and Austria have reinstalled internal border controls, either at all internal borders or at specific points such as particular ferry crossings.<sup>1</sup> Many of the current

1 Norway (period from 12 November 2019 - 12 May 2020, Terrorist threats, secondary movements; ports with ferry connections with Denmark, Germany and Sweden); Sweden (period from 12 November 2019 - 12 May 2020, Terrorist threats, shortcomings at the external borders; to be determined but may concern all internal borders); Denmark (period from 12 November 2019 - 12 May 2020, Terrorist threats, organized criminality from Sweden; land border with Germany and with Sweden, ferry connections to Germany and to Sweden); Germany (period from 12 November 2019 - 12 May 2020, Secondary movements, situation at the external borders; land border with Austria;

re-instalments have been in place for a long time, their legal basis alternating between the grounds mentioned in Articles 25, 28 and 29 of the Schengen Borders Code (SBC).<sup>2</sup>

These provisions provide for the *temporary* re-installment of border control either in case of a serious threat to public policy or internal security in a Member State (Articles 25 and 28), or in case of serious deficiencies in the external border management of a Member State which put the overall functioning of the area without internal border control at risk (Article 29). In both cases, such measures are subject to strict conditions, mainly related to their proportionality and necessity. Moreover, the permitted duration of these measures is limited: In cases of foreseeable events posing a serious threat to public policy or internal security, internal border controls may not exceed a maximum of six months (Article 25), in cases requiring immediate action that period is two months (Article 28). In situations where the serious threat to public policy or internal security is related to deficiencies in the management of the external borders, internal border controls may not exceed a period of two years (Article 29).

As some of the current re-instalments have switched legal bases each time their maximum duration had expired, questions arise regarding their lawfulness. Along similar lines, concerns have been raised regarding the proportionality and necessity of the re-instalments, which are allegedly not well argued by the Member States in their notifications to the Commission. The claim by the Commission that it reviews the notifications carefully therefore seems difficult to substantiate.<sup>3</sup> These legal complexities need to be addressed carefully, especially seeing that the Commission has

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Austria (period from 12 November 2019 - 12 May 2020, Secondary movements, risk related to terrorists and organized crime, situation at the external borders; land borders with Hungary and with Slovenia; France (period from 31 October 2019 - 30 April 2020, Persistent terrorist threat, upcoming high profile political event in Paris, secondary movements; all internal borders) See [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)

3 EU Observer 12 December 2019, "Revealed: Little Evidence to Justify Internal Border Checks", at <https://euobserver.com/investigations/146897>

recently put forward a proposal for amending the SBC.<sup>4</sup>

Nevertheless, the primary aim of this contribution is not to answer questions regarding the legality of the current re-installments. Instead I will try to zoom out a little bit from the precise procedures and legal requirements for introducing border control as laid down in the SBC, and reflect on the significance of the absence of internal border control for the EU, highlighting its character as simultaneously highly symbolical and deeply functional. I argue that placing too much emphasis on its symbolic dimension, as is often done by the Parliament and the Commission, obscures from sight the changing connotations of territorial borders and border control in contemporary Europe, and has the unintended effect of over-privileging economic interests to the detriment of the protection of those individuals that are mostly affected by changing 'border practices'.

A similar outcome can be seen in the case law on internal border control by the Court of Justice of the EU. The Court, by insisting upon a traditional conception of border control, also attaches great weight to the very tangibility of territorial fault lines, therewith refusing to acknowledge that border control and surveillance have undergone fundamental shifts during the last twenty years. Ironically however, it is precisely Schengen that has facilitated such shifts in border control. Schengen is profoundly two-faced: the portrayal of its symbolic dimension by the Commission and Parliament is complemented by a pragmatic approach and instrumental use by the Member States.

To make this argument I will first discuss the symbolism of Schengen as foregrounded by the Parliament and Commission when they address the absence of internal border control. I will then turn to Schengen's pragmatism as seen in Member States policies – a pragmatism which upon a closer look is firmly linked

4 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders. COM(2017) 571 final, 27 September 2017. Although the Parliament has confirmed its position on the proposal and voted to open inter-institutional negotiations, the Council has not yet taken a position.

to the symbolism of a resilient national border. Current tensions result from the irreconcilability of both approaches. In my conclusions I claim that such irreconcilability does not need to be problematic because conflict is inherent in politics and can be productive. A precondition for such productivity however is that the manifestation of conflict goes beyond contesting views on a symbolism that is modelled on experiences from the past, but it should include opposing views on how Europe can address contemporary global challenges such as economic and social inequality, the regulation of migration, and threats to human security.

## **2. Schengen as Europe's Greatest Achievement: A Very Tangible Symbolism**

Schengen as the area without internal border control has consistently been portrayed as one of Europe's greatest achievements, most notably by the Commission and the Parliament. In official documents by these institutions, a forceful but concise reminder insisting on the great significance of a borderless Europe is generally followed by a substantial discussion on how to strengthen Schengen, and bring about more accountability and transparency. What kind of achievement Schengen precisely represents is almost never made explicit, apart from references to the individual rights of free movement and the popularity that borderless travel enjoys with European citizens.

Unsurprisingly then, such superficial appeals to the significance of Schengen will not result in a productive confrontation of the European institutions with those Member States that reintroduce internal border control: the rights to free movement of persons, goods and services in itself are not negated through the introduction of internal border control.<sup>5</sup> Moreover, the very fact that these governments are democratically elected and generally enjoy at least some popular support for their border control pol-

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5 That free movement and the absence of internal border control are not identical is also apparent from the phenomenon of differentiated integration in this area – some Member States are part of the internal market but do not participate in Schengen.

icies turns the popularity argument into a mere contestation of facts, not of values or visions.

However, while the concrete achievement of Schengen may be the ease of travelling a borderless Europe for the individual citizen, borderless Europe obviously stands for something far larger in a continent that has been defined by centuries of violent struggle over territorial borders. Against the historical rationale of European integration – the prevention of interstate war within Europe – it makes sense to present a borderless Europe as a monumental triumph. In such a narrative, re-installment of internal border controls, especially when done on a large and extended scale, signifies the beginning of the end of the European ideal. What is problematic here is that, while no-one would contest the importance of historical awareness, unreflexive appeals to Schengen as Europe's greatest achievement obscure the fact that the meaning of territorial borders has changed over the years.

Thus, in contemporary Europe, interstate war over territorial fault lines between Member States is unlikely, but intense disagreement over how the border relates to national identity and national security can have profoundly destabilising effects. Insisting on Schengen's symbolism without explicitly linking its significance to the contemporary meaning and functioning of borders then impedes the development of a meaningful discussion about conflicting visions of Europe.

A borderless Europe which is conceptually anchored to the tangibility of territorial borders, without updating that vision so that it may better align with the political reality of contemporary border practices, can also be seen in the case law of the Court of Justice. Thus, while controls at the internal borders are not allowed under article 67 TFEU and Article 20 SBC, the latter instrument does not prohibit checks *within* national territory, provided that their effects are not equivalent to border checks. Article 21 SBC specifies that such equivalent effect is absent if these checks do not have border control as an objective; if they are based on general police information regarding possible threats to public security

and aim to combat cross-border crime; if they are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; or if they are carried out on the basis of spot-checks. The Court has maintained a very 'territorial' interpretation of the concept of border control, when assessing whether 1) a measure could be designated as border control, or 2) whether it had an equivalent effect. Thus, if checks are carried out, not 'at borders' or 'when the border is crossed', but *inside* the territory of a Member State, those checks do not amount to prohibited border control under Article 20 SBC.<sup>6</sup> This is even when the duty to carry out checks (imposed by national law on private companies) "is intended to ensure that foreign nationals satisfy the conditions [laid down national law] for crossing the border" and if "those checks are triggered by the crossing of the internal border."<sup>7</sup>

This very narrow interpretation to Article 20 of the SBC does not do justice to contemporary practices where border control is increasingly outsourced, either through privatisation or extra-territorialisation (Rijpma 2018). With regard to measures having an equivalent effect, the Court has held that a power which is exercised in a frontier area "in order to detect persons whose presence is unlawful and aim to deter illegal immigration"<sup>8</sup> or "to check compliance with the obligation to hold, carry and present identity papers"<sup>9</sup> pursues objectives that are different from border control. Here the Court discloses a similarly limited understanding of the function of contemporary border control (Cornelisse, 2014), one which does not take account of the fact that security checks and surveillance more generally have taken over the function of the traditional border.

This view on the function of border control is even more striking when regarded in light of Council Implementing Decision (EU) 2017/246, in which the Council has explicitly encour-

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6 Case C-412/17, *Touring Tours and Travel*, ECLI:EU:C:2018:1005.

7 See AG Bot in his opinion to *Touring Tours and Travel*, ECLI:EU:C:2018:671, para 85.

8 C278/12 PPU, *Adil*, EU:C:2012:508.

9 Case C188/10 and C189/10, *Melki and Abdeli*, EU:C:2010:363.

aged the Member States “to assess whether police checks would not achieve the same results as temporary internal border controls, before introducing or prolonging such controls.”<sup>10</sup> The legal interpretation of border control by the Court of Justice fits with a political portrayal of Schengen as Europe’s greatest achievement, in that they both make it difficult to address, in the political and legal sphere, that “the promise of a borderless Europe applies only to a privileged group of bona fide travellers and not to those who are seen as the crimmigrant ‘other’” (Aas, 2011; Van der Woude and Van der Leun, 2017, at 41).

### 3. Schengen’s Pragmatism: Flanking Measures and Economic Interests

Schengen cooperation itself has also contributed greatly to changes in border practices, for example precisely through outsourcing border control, or through the use of modern technologies that conflate the distinction between crime control and border control. Many of these changed border practices have a disparate racial, religious or social impact.<sup>11</sup> This perspective on Schengen cooperation also brings another, much more pragmatic side of Schengen to the fore: its instrumental use by Member States in order to attain certain policy objectives.

Schengen’s pragmatism is exemplified first and foremost by its economic rationale: the economic benefits of the absence of internal border control are significant and stretch far beyond a positive impact on the transport sector (European Parliament 2019). The very origins of a borderless Europe can be traced back to economics: the Saarbrücken agreement came into being as a reaction to protests by lorry drivers who blocked the Franco-German border because they were upset about the long waiting

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10 Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (OJ L 36, 11.2.2017, p. 59)

11 See Den Heijer (2018) on visa policies.

times. The economic foundations for Schengen explain the vision of the Court on what constitutes border control discussed above – such controls are prohibited once they interfere with the smooth travel of economically active citizens and providers of services. ‘Scattered security checks’ (Atger, 2008) based on risk technology generally do not have this effect.

While economic incentives thus pushed for the abolishment of internal borders in the early eighties, the larger political implications of such a project were apparent from the outset: abolishing internal border controls would *presuppose* amongst other things “the gradual application of a common policy on third country citizens” (Adonnino Report, 1985). However, further cooperation with regard to what were originally meant as ‘compensatory measures’ was soon driven by a very different rationale: national concerns over rising immigration by third-country nationals, especially after the fall of the Berlin Wall. The result was that before long the ‘flanking’ measures had acquired a logic of their own. And while supranationalisation could arguably have served as some sort of correction mechanism, insisting on a coherent policy on immigration and asylum for an area without internal borders, the intergovernmental character of Schengen cooperation made sure that states and their governments considered little more than their own national interest in protecting their national borders (Cornelisse, 2014).

The lack of attention for the way in which flanking measures should relate to the proper functioning of a Europe without internal borders has resulted in laws and policies that have no concern for the “structural inequalities and asymmetric shocks”<sup>12</sup> that characterise Schengen (Cornelisse, 2014). Structural inequalities are caused by the considerable variation amongst the Member States regarding their geographical location: not all of them have external land or sea borders, and amongst those who do, considerable differences exist in the feasibility of guarding them ade-

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12 Hinarejos uses these terms to discuss the challenges facing the European Monetary Union (Hinarejos, 2013).



quately against unwanted immigration. Asymmetric shocks are shocks that affect some Member States, but not all -the current situation in Greece providing a particularly apt illustration of this. Asymmetric shocks are obviously related to the concept of structural inequalities, in that disparities with regard to geographical particularities make the occurrence of these asymmetric shocks more likely. The Schengen system, where structural inequalities and asymmetric shocks are the order of the day, should have some sort of mechanism to deal with them.

This idea is reflected in Article 80 TFEU, which requires that EU policies on border checks, immigration and asylum are governed by the principle of solidarity and the fair sharing of responsibility. However, since 2015 most efforts at supranationalising Europe's response to the so-called refugee crisis have failed, not in the least because of "mobilisation of national identities by right-wing populist parties" (Börzel and Risse, 2018). Besides, previous legal measures adopted in the area of asylum, most prominently the Dublin Regulation, even exacerbate inequalities between Member States. In the absence of an effective supranational mechanism to deal with structural inequalities and asymmetric shocks, national responses such as re-installment of internal border control are an entirely predictable response.<sup>13</sup> As long as the roots of the crisis are not addressed, devising ever more stringent procedures, conditions and time limits for such measures – even the introduction of supranational oversight over internal border control – remains a mere fight against symptoms.

This is even more so when measures of re-installment remain marginally motivated and are never subject to scrutiny by a court, also because in this policy field the Commission rather acts a mediator between Member States, and not as guarantor of the

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13 A good illustration of such self-evidence can be found in a statements such as by a Danish minister of integration in 2016: "I think we should prolong border control. There is still an uncertain situation in southern Europe, where thousands of refugees and migrants are coming ashore in Sicily. That can create pressure on Danish borders." See <https://www.thelocal.no/20161013/norway-eu-must-accept-extended-border-controls>.

Treaties (Guild et al, 2016). It would be interesting to see how the Court of Justice (or national courts)<sup>14</sup> would assess the proportionality and necessity of re-instalment: in light of the specific characteristics of EU law, these courts would inevitably need to rule on the seriousness of the security and public order threats. Moreover, courts would be required to elaborate upon the relationship between re-instalment of border control and alternative measures, therewith making explicit what Member States are purportedly protecting with internal border control. A mere insistence on the function of border control as firmly linked to the tangibility of territorial borders, or on the symbolic implications of re-instalment cannot take the place of such a legal assessment.<sup>15</sup>

#### 4. Conclusion

The portrayal of Schengen as Europe's greatest achievement is deeply linked to Europe's past as a continent defined by violent conflict over territorial borders. But the symbolism of a borderless Europe is in dire need of modernization to be able to engage in a productive conflict over opposing visions of Europe. The insistence on Schengen's symbolism and the occasional emphasis on its perceived economic benefits in the political arena are a weak counterforce to the link made by right-wing populism between national identity, security and the necessity of border control, and they obscure the actual workings of the contemporary border.

Credible proposals regarding the regulation of re-instalment of internal border control can therefore not remain limited to the devising of more stringent procedures and increased supranational oversight if they do not simultaneously recognise the specific forms of violence that contemporary borders give rise to. Such proposals need to be based upon explicit alternatives regarding

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14 To my knowledge there are no national legal challenges to the reinstatement of border controls, although such challenges could easily be brought on the basis of EU law (direct effect and primacy).

15 In any case, internal border control does not turn the internal border in all respects into an external border. See Case C-444/17, *Arib*, ECLI:EU:C:2019:220.

the relationship between borders, identity and security. In other words, revising the Schengen Borders Code cannot remain a technical exercise the details of which are only understandable to a select group of experts and subsequently sold to the public as the strengthening of Europe's biggest achievement – for such legislation to be sustainable it should be preceded by a confrontation of competing visions on Europe and its policies regarding global justice, human mobility, and human security.<sup>16</sup>

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16 My perception of conflict as productive and inherent to politics builds upon the concept of agonistic pluralism formulated by Chantal Mouffe (Mouffe, 1999).

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