

An Assessment of the Commission's 2011 Schengen Governance Package

Preventing abuse by EU member states of freedom of movement?

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Abstract

The Schengen system has been at the centre of sharp controversy throughout 2011 and the early months of 2012 arising from attempts by several member state governments to challenge the right to the free movement of persons and the abolition of internal border checks. The speech delivered by Nicolas Sarkozy early this month (March 2012), as part of the French presidential campaign, in which he threatened to suspend France's participation in Schengen illustrates this phenomenon. This paper examines the European Commission's response to the Schengen controversies, namely the Schengen Governance Package published in September 2011 and currently under negotiation in Council and the European Parliament. It assesses the scope and added value of the Package's two new legislative proposals (a new Schengen evaluation mechanism and revised rules for restating internal border checks) by looking at the origins and features of the debate surrounding liberty of circulation in the Schengen area. The paper addresses the following questions: first, are these new rules necessary and appropriate to effectively respond to unlawful security derogations and restrictions to liberty of circulation? Second, would their adoption provide an effective response to current and future political tensions and national governments' policies against free movement, such as those evidenced in 2011 and 2012 and for them to expand to other member states? And finally, is the Schengen Governance Package well designed to safeguard the free movement of persons, or is it rather oriented towards further strengthening the security apparatus of Schengen?

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1. Introduction

2011 and 2012 have witnessed sharp controversies around Schengen and the free movement of persons. Phrases like ‘Schengen under threat’ have spread out by the media and in expert political discussions in response to several member states’ discourses and policies – such as the well-known Franco-Italian affair of spring 2011 – putting at strain freedom of movement and the abolition of internal border checks in the Schengen area. These events started in a period of severe financial instability across Europe, unrest and conflict in North Africa during the first half of 2011 and severe challenges by member states like Greece in their asylum protection systems. In combination, these developments have tested Europe’s foundations and revealed unfinished elements in the European integration machinery.

The response by the Directorate General for Home Affairs (DG Home) of the European Commission was to revisit the Schengen legal regime by putting forward new proposals under the so-called Schengen Governance Package in September 2011.¹ The Package comprises two inter-linked initiatives dealing respectively with the establishment of a new evaluation and monitoring mechanism to verify member states’ application of the Schengen *acquis*,² and revised rules on the temporary reintroduction of internal border controls.³ Both have received a cold welcome inside the Council rooms, with several member states’ delegations raising reservations on the outreach of the envisaged ‘Union-led approach’ in both measures (i.e. the Commission’s decisional power), which has been considered to encroach upon their national sovereignty.⁴ This has been accompanied by a number of negative opinions submitted by national parliaments on the compatibility between the proposals and the principle of

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¹ Commission Communication, “Schengen Governance – Strengthening the area without internal border controls”, COM(2011)561, 16.9.2011, Brussels.

² Commission Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, COM(2011)559, 16.9.2011, Brussels.

³ Commission Proposal for a Regulation 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, COM(2011)560, 16.9.2011, Brussels.

⁴ “EU countries say ‘No’ to commission powers on border control”, *EUobserver.com*, 13 September 2011 (<http://euobserver.com/22/113606>).

subsidiarity.⁵ The choice of legal basis has been equally contested,⁶ which further illustrates the high degree of institutional struggles characterising these issues at EU level. The negotiations on the proposals are ongoing inside the Council but little progress has been achieved so far on their text. The last Justice and Home Affairs (JHA) meeting held under the auspices of the Danish Presidency of the EU adopted Conclusions on “*guidelines for the strengthening of political governance in Schengen cooperation*”, which primarily aimed at conferring the decisional power or ‘political guidance’ on Schengen, not to the Commission, but rather to the Council Mixed (Schengen) Committee. The latter brings together EU member states and Schengen associated states’ Ministries of Interior.⁷

The negotiations also arrive at a moment when challenges to freedom of movement continue to proliferate in EU member states and there is a widespread public perception of Schengen increasingly under siege. In a campaign speech delivered in Villepinte on March 11th as part of the 2012 French presidential elections,⁸ Sarkozy threatened to suspend France’s participation in the Schengen Agreements if the current rules are not soon revised in order to better respond to irregular immigration and not to “*leave the management of migration flows in the sole hands of technocrats and tribunals*”.⁹ The Dutch government confirmed its intention to place video-surveillance measures on the roads at its borders with Belgium and Germany to fight “*illegal immigration and illegal residence in the Netherlands*”, which have equally opened questions as regards their compatibility with free mobility principles.¹⁰ These past and recent events raise a number of questions calling for a closer reflection and examination of the added value and main dilemmas facing the European Commission’s Schengen Governance Package. Two sets of questions in particular are explored in this paper:

- Are these new rules necessary and appropriate to effectively responding to unlawful security derogations and limitations to liberty of circulation? Would their adoption provide an effective response to current and future political tensions and national governments’ policies restricting free movement such as those evidenced in 2011 and the early months of 2012?

⁵ France, the Netherlands, Portugal, Slovakia and Sweden have all issued negative decisions (see <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20110560.do#dossier-COD20110242>).

⁶ See Council of the EU, 18196/1/11, Brussels, 9 December 2011. “Interior Ministers divided over Internal Border Controls” *EUobserver.com*, 13 December 2011 (<http://euobserver.com/22/114604>). See also “*Schengen reform: Presidency convinces MEPs to embark on negotiations*”, Manon Malhère, 9/2/2012, *EUropolitics* (<http://www.europolitics.info/presidency-convinces-meps-to-embark-on-negotiations-art325681-10.html>).

⁷ This mainly refers to the ‘political governance’ by the Council itself to guide Schengen cooperation. In this regard, see Council Conclusions regarding guidelines for the strengthening of political governance in the Schengen cooperation, 3151st Justice and Home Affairs Council Meeting, Brussels, 8 March 2012.

⁸ See <http://fressoiz.blog.lemonde.fr/2012/03/11/apres-hollande-sarkozy-veut-changer-leurope-pour-sauver-la-france> The speech is available at http://www.u-m-p.org/sites/default/files/fichiers_joints/articles/11_03_discours_villepinte.pdf

⁹ See also <http://fressoiz.blog.lemonde.fr/2012/03/11/apres-hollande-sarkozy-veut-changer-leurope-pour-sauver-la-france> Refer also to <http://www.euractiv.fr/chantage-politique-nicolas-sarkozy-schengen-article> He argued that a member state failing to comply with its obligation to control the common external borders should be sanctioned and that the decision for allowing entry into French territory is the sole expression of the political will decided by national sovereignty.

¹⁰ “Netherlands defends border control project”, *EUobserver.com*, 3/1/2012 (<http://euobserver.com/22/114751>).

- Is the Schengen Governance Package well designed to safeguard the free movement of persons, or is it rather oriented towards further strengthening the security side of the Schengen apparatus?

This paper addresses these issues by first looking back at the roots of the 2011-12 Schengen controversies. Our analysis will serve as a basis for gaining a better understanding of the scope and deficits facing the new Commission's initiatives. We argue that the effectiveness and value-added tests of the Schengen Governance Package for safeguarding freedom of movement are confronted by two major challenges: first, its nationalistic, intergovernmental and populist origins and driving forces, and second the prevailing focus on reinvigorating the Schengen security governance system, which would still allow, and potentially expand, member states' options to apply exceptions to free circulation, and enlarge the grounds permitting its suspension at EU level in cases of persistent serious deficiencies by an evaluated member state in the conduct of common external border controls. The final section of the paper offers the conclusions of our analysis and proposes several recommendations to the European institutions for better safeguarding freedom of movement as the fundamental spirit of Schengen.

2. A glance back to the origins

The background to the Schengen controversy reveals key hints for any critical appraisal of the Commission's 2011 Package. Its origins can be found in the Franco-Italian affair of spring 2011, which provoked a diplomatic row between the French and Italian governments and led to subsequent reactions by other member states and European institutions' representatives. In short, the case went as follows. In response to human movements resulting from instability and violence in North Africa, and due to the impossibility to return those people to Libya, the Italian government decided in April 2011 to issue resident permits for humanitarian reasons to "*citizens of North African states*" allowing them to exercise an automatic right of 'freedom of movement' to other member states, and in particular to France.¹¹

The decision provoked the French authorities to reintroduce internal border controls between the two countries, which resulted in the blocking of trains and pushing back of hundreds of immigrants and NGO representatives to Italian territory, a practice that was viewed with shock in a 'borderless' Europe.¹² The legality of the French reintroduction of internal border controls and the Italian residence permits were subject to heated discussions, a majority of which questioned their compatibility with EU law (Basilien-Gainche, 2011). Surprisingly, a Press Release was issued by Commissioner Malmstrom on 25 July 2011 "*on the compliance of Italian and French measures with EU law*" concluding:

From a formal point of view steps taken by Italian and French authorities have been in compliance with EU law. However, (the Commissioner continued) I regret that the spirit of the Schengen rules has not been fully respected....¹³

¹¹ DPCM del 5 aprile 2011 – Protezione temporanea, *Gazzetta Ufficiale*, n. 81 dell'8 aprile 2011. See also Decreto Del Presidente Del Consiglio Dei Ministri, 7 aprile 2011, Dichiarazione dello stato di emergenza umanitaria nel territorio del Nord Africa per consentire un efficace contrasto all'eccezionale afflusso di cittadini extracomunitari nel territorio nazionale, *Gazzetta*, n. 83 del 11 aprile 2011 (<http://www.gazzettaufficiale.biz/atti/2011/20110083/11A04894.htm>).

¹² A. Coppola, "French Border Police Block Italian Trains", *Corriere della Sera*, 18 April 2011 (<http://www.corriere.it/International/english/articoli/2011/04/18/coppola-french-block-italian-migrants-trains.html>).

¹³ The Press Release continued:

... while the steps taken by Italy regarding the issuing of residence permits and travel documents to North-African migrants irregularly present on its territory has not been in breach of EU law,

It is intriguing that the Commission decided to publish such a sensitive (and long-awaited) analysis during the summer break, when a majority of interested actors were on holidays. Most importantly, perhaps, the output of its scrutiny on the legality of both national practices was even more unexpected. A CEPS paper published in the aftermath of the Franco-Italian events titled “*A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*” demonstrated that the grounds were sound for contesting the lawfulness of the French and Italian measures and practices (Carrera et al., 2011). Serious doubts were raised regarding the French government’s compliance with the procedural requirements foreseen in the Schengen Borders Code (SBC)¹⁴ and applicable to any member state wishing to reintroduce in ‘exceptional circumstances’ internal border checks. The relationship between the French measures and the principle of proportionality was also an issue of concern, as it was widely accepted that the volume of Tunisian immigrants at stake could hardly be considered to constitute any ‘threat’ to national public policy and internal security, neither requiring ‘urgent or emergency action’ by the member states involved. The CEPS paper concluded that both the French and the Italian governments’ reactions contravened the EU general principles of proportionality, loyal and sincere cooperation and solidarity envisaged in the Treaties.

That notwithstanding, politics appear to have played a more decisive role in the course and final outcome of the affair. The Commission decided not to pursue infringement proceedings against France or Italy. Instead it followed the wishes expressed by the two national governments leaders to launch an amendment revisiting the current Schengen legal regime. A joint letter between Berlusconi and Sarkozy was sent to José Manuel Barroso and Herman Van Rompuy as an output of the Italian-French Summit of 26 April 2011 in Rome, where it appears that “*strong convergence*” was achieved between the two governments after the previous bilateral conflict.¹⁵ The letter requested the need to examine

... new measures to reinforce security in Schengen ... (such as) ... the possibility to re-establish internal border controls in case of exceptional difficulties in the management of common external borders.

The impact was immediate in the Commission’s work. In his response, Barroso confirmed that the reinforcement of the Schengen rules was being considered by the Commission and that new measures would be presented soon.¹⁶ It also signalled that:

... the reintroduction of internal border controls is one possibility amongst others, which under the condition of being subject to specific and clearly determined criteria, can constitute an element for strengthening the governance of Schengen.

In May 2011, the Commission published a Communication on Migration COM(2011)248 confirming its plan to present a new proposal for a “*coordinated Community-based response in*

there is scope for clarifying the approach at EU level...our analysis confirms that police checks carried out by the French authorities remained *within the limits compatible with the Schengen Borders Code*...it cannot be concluded that France would have carried out systematic checks in the internal border zone with Italy during the past months. (Emphasis added) (see <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/538&type=HTML>).

¹⁴ Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.4.2006.

¹⁵ <http://www.esteri.it/MAE/EN/Sala Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110426-ItaliaFrancia.htm?LANG=EN> “Sarkozy, Berlusconi to propose Schengen ‘upgrade’”, *Euractiv.com*, 26 April 2011 (<http://www.euractiv.com/en/future-eu/sarkozy-berlusconi-propose-schengen-upgrade-news-504292>).

¹⁶ The letters to Sarkozy and Berlusconi are available at http://ec.europa.eu/commission_2010-2014/president/news/letters/2011/05/20110502_letters_1_en.htm

critical situations” for the reintroduction of internal border checks.¹⁷ The answer to the Franco-Italian letter issued by the President of the European Council, Van Rompuy, of 11 May 2011 took a slightly different direction from Barroso’s, as it recalled the importance for preserving the Schengen *acquis* and that the existing rules on free movement of persons are equally applied by all the member states.¹⁸ Similarly to the Commission’s response, however, Van Rompuy confirmed the necessity to reopen a reflection for improving current rules to suspend temporarily the application of the Schengen system in exceptional and well-defined situations. Van Rompuy’s letter paved the way for the discussions that took place in the Justice and Home Affairs (JHA) Council meeting of 9-10 June 2011,¹⁹ and the subsequent European Council meeting of 23-24 June 2011, where the need to introduce a mechanism was emphasised:

to respond to *exceptional circumstances* putting the overall functioning of Schengen cooperation at risk...as a very last resort....a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation....²⁰ (emphasis added)

The Commission published the Schengen Governance Package in mid-September 2011, whose scope, main components and value added are analysed in the next section. It is first necessary, however, to point out that the quarrels over Schengen did not stop with the Franco-Italian affair. The above-mentioned speech of Sarkozy in the campaign for the 2012 French presidential elections mentioning the possibility to suspend French participation in the Schengen Agreements if the rules are not revised sends a clear signal on the continuation of this tendency. The challenges to Schengen have also proliferated across other member states’ governments agendas. The first example came with the announcement by Denmark in May 2011 to

¹⁷ The Communication stated:

for introducing a mechanism ensuring a “*coordinated Union-level response*” and ... to allow the Union to handle situations where either a Member State is not fulfilling its obligations to control its section of the external border, or where a particular portion of the external border comes under unexpected and heavy pressure due to external events. A *coordinated Community-based response* by the Union in critical situations would undoubtedly increase trust among Member States. *It would also reduce recourse to unilateral initiatives by Member States to temporarily reintroduce internal border controls* or to intensify police checks in internal border regions...Such a mechanism may therefore need to be introduced, *allowing for a decision at the European level* defining which Member States would exceptionally reintroduce internal border control and for how long. The mechanism should be used *as a last resort in truly critical situations*, until other (emergency) measures have been taken to stabilise the situation at the relevant external border section either at European level, in a spirit of solidarity, and/or at national level, to better comply with the common rules. (Emphasis added).

¹⁸ The letter is retrievable at

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/fr/ec/121944.pdf

¹⁹ Council of the European Union, Council Conclusions on Borders, Migration and Asylum: Stocktaking and the Way Forward, 3096th Justice and Home Affairs Council Meeting, Luxembourg. The Conclusions stated:

The Council recalls that *Member States are ultimately responsible for the proper implementation of the Schengen acquis*. In this framework, the Council recalls the presentation of the Commission’s Communication on Migration of 4 May 2011, which explores the possibility of an EU mechanism for the temporary reintroduction of border controls at the internal borders, as a measure of last resort in order to face exceptional situations. The Council welcomes the Commission’s intention to reflect on the further development of Schengen cooperation and invites it to present its proposal. (Emphasis added).

²⁰ Paragraph 22 of the European Council meeting Conclusions of 23-24 June 2011.

permanently reintroduce internal customs controls “to fight against crime”,²¹ which was subsequently abandoned in October 2011 with the election of the new government (Hobbing, 2010). The shadows of extreme-right populism (reinstating border checks in exchange for support by the Danish People’s Party, *Dansk Folkeparti* (DF) on pension reform) were, here also, amongst the main impelling forces behind the proposed security measures. More recently, the Dutch government (supported by the populist ‘Party for Freedom’, *Partij voor de Vrijheid*, PVV) made public its intention to place video-surveillance measures at its borders with Belgium and Germany in order to “check the registration of certain vehicles with a view to curtailing illegal immigration and illegal residence in the Netherlands”. A test phase of this project has been already set up since January 2012 in several border points.²²

3. Unpacking the package: Scope and added value

The *carte de visite* of the revision of Schengen came in the form of a Communication entitled “Schengen Governance – strengthening the area without internal border control”, COM(2011) 561 (hereinafter the Schengen Governance Communication).²³ The package outlined in the Communication featured two different, yet interlinked, legal components: one establishing an evaluation mechanism of member states’ application of the Schengen *acquis*, and another providing common rules on the temporary reintroduction of internal border controls. Moreover, there were other additional (non-legislative) initiatives related in particular to common guidelines for the interpretation of existing rules on travel documents and residence permits and political steering of Schengen cooperation.

3.1 Reviewing the proposals

3.1.1 A New Schengen evaluation mechanism

The first feature in the package of measures relates to the creation of a new Schengen evaluation and monitoring mechanism for verifying member states’ implementation of the Schengen *acquis*.²⁴ It constitutes a revisited version of a previous Commission proposal dating back to 2010 which emerged from discussions held since 1999 between the Commission and member states, as well as several expert meetings, and which focused on the need to make the existing Schengen evaluation mechanism carried out by the Schengen Evaluation Working Group (SCH-EVAL) in the Council “more efficient, transparent and consistent”.²⁵ The current Schengen evaluation mechanism constitutes an intergovernmental (member states-driven) system of peer review, with the Commission participating only as ‘observer’ and the European Parliament not at all.

²¹ The Commission expressed concerns about the legality of the announced measures on May 13th (see <http://blogs.ec.europa.eu/malmstrom/danish-measures-might-be-in-breach-of-eu-law>). A team of Commission experts was sent in July to examine the legality of the Danish measures (see <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/504&format=HTML&aged=0&language=EN&guiLanguage=en>).

²² The project is expected to be fully operational by summer 2012.

²³ Commission Communication, Schengen governance – strengthening the area without internal border control, COM(2011) 561, 16.9.2011, Brussels.

²⁴ Commission Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, COM(2011)559, 16.9.2011, Brussels.

²⁵ European Commission, Proposal for a Regulation on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2010)624, 16.11.2010, Brussels.

The 2010 Commission proposal had already identified a number of weaknesses in the current Schengen evaluation mechanism of the *acquis* which called for its modification. All in all, the transparency, impartiality, identification and remedy (follow-up) of potential deficiencies were considered to be amongst the main deficits calling for new rules.²⁶ One of the main innovative features of the 2010 evaluation system, which is still present in its 2011 successor, was the possibility to conduct announced or unannounced on-site (fact-finding) visits by teams of member states and Commission experts appointed by the Commission and the sending of questionnaires.²⁷ Agreement amongst member states' representatives inside the Council on the proposal was difficult to reach since its presentation in November 2010, with the shifting of the evaluation competences and responsibility from the member states to the European Commission constituting – already by then – one of the main points of contention and disagreement amongst the delegations in the Council.

What are the most relevant variances in the scope and components between the 2010 and 2011 Commission initiatives? While the 2010 version foresaw a substantial role for the Commission in the implementation of the evaluation mechanism, the 2011 initiative went a step even further. It provides for a stronger 'Union-led approach' where the Commission is not only responsible for the implementation and evaluation powers of the initiative,²⁸ but also for the decision on the specific measures to be adopted in cases of serious deficiencies by a member state while carrying out external border control or return procedures.

The 2011 version incorporates two new provisions providing concrete measures that the Commission could request to the evaluated member state in cases where serious deficiencies persist as a result of an evaluation. These go far beyond the previously envisaged provision whereby the Commission was only entitled 'to inform' the Council and the European Parliament.²⁹ The Commission could now request the member state to implement measures as far-reaching as closing a specific border-crossing point for a limited period of time until the

²⁶ In particular the following factors were identified:

First, its inadequacy and lack of clarity as regards the rules on consistency and frequency of evaluations, without the possibility of 'unannounced on-site visits';

Second, the lack of a method for 'priority-setting' based on risk analysis;

Third, ensuring high quality expertise during the evaluation exercise so that the experts taking part in the evaluation show an adequate level of legal knowledge and practical expertise; and

Fourth, weaknesses in the follow-up and post-evaluation to the recommendations made after the on-site visits and the measures taken to address identified deficiencies and the timeframe within which they need to be remedied.

²⁷ On the basis of the information and findings gathered, the Commission would draft an evaluation report analysing the main aspects, listing any shortcomings or weaknesses and putting forward specific recommendations for remedying the action as well as deadlines for their implementation to be achieved by the evaluated member state. See Article 13 of the proposal. The provision also establishes in paragraph 1.b:

In the case of announced on-site visits, the report shall be drawn up by the team during the visit. The Commission official shall take overall responsibility for drafting the report and ensuring its integrity and quality. In case of disagreement, the team shall endeavor to reach a compromise. Dissenting opinions may be included in the report.

²⁸ This would be exercised through 'comitology'. See Recital 8 and Article 3.1 of the Proposal.

²⁹ Article 13.7 of the 2010 proposal stated that if these visits would still reveal "*a serious deficiency having a significant impact on the overall security of one or more Member States*", the Commission would need to inform the Council and the European Parliament "*as soon as possible*".

weaknesses are corrected, or deploying so-called ‘European Border Guard Teams’ under the auspices of Frontex (the Warsaw-based EU external borders agency).³⁰

One of the most controversial ingredients inside the 2011 proposal is Article 15. This provision now also foresees the possibility to reintroduce “*as a measure of last resort*” internal border checks with the evaluated member state if the Commission considers that the situation still persists after a period of time since the final evaluation report concluded that it was “*seriously neglecting its obligation to carry out external border control or return procedures*”.³¹ In response to certain critical voices, Commissioner Malmström declared in a speech entitled “The importance of safeguarding Schengen” delivered in the European Parliament:

Such a measure should not, however, be seen as a sanction against that member state, or an attempt to exclude it from the Schengen area, even temporarily. Rather, it should be seen as a temporary measure to enable it to focus all its efforts on tackling the causes of the deficiency.³²

It is also interesting to note the central role conferred by the new proposal to EU home affairs agencies (mainly Frontex, but also Europol) in three main aspects: First, technical support and practical assistance; Second, conduction of risk analysis on “*account of migration pressure*” and “*priorities for (Schengen) evaluation*”;³³ and third, their participation as ‘observers’ in ‘on-site (fact-finding) visits’.

3.1.2 Revising the Rules for the Temporary Reintroduction of Internal Border Controls

The Schengen Governance Package came along with a parallel instrument proposing new rules on the temporary reintroduction of border controls at the internal borders, COM(2011) 560.³⁴ It aims at establishing a new EU coordinated mechanism ensuring a ‘Union-level response’ for the reintroduction of internal border controls, which, according to the act, “*should be based on a decision proposed and adopted by the Commission*”. Two situations would justify, according to the initiative, the necessity of applying exceptions to the freedom of movement and the lifting of internal border checks, as described below.

³⁰ Regulation No 1168/2011 of the European Parliament and Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22.11.2011. According to Council Doc. 5754/12, Brussels, 8 February 2012,

Several Member States delegations expressed concerns as regards the transfer of powers/competences from the Member States (sovereignty issue). The Commission explained that while the request was binding, it was up to the evaluated Member States to implement the request (no automatic execution).

³¹ Recital 14 of the proposal states:

As a measure of last resort, and insofar as the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level, the possibility to reintroduce border control at internal borders to the extent and for the duration necessary to mitigate the adverse consequences flowing from the deficiencies should be provided for.

³² Europa Press Releases, Cecilia Malmström, European Commissioner responsible for Home Affairs, “*The importance of safeguarding Schengen*”, Speech 12/78, 8/2/2012.

³³ Article 6 states that “*the Commission may at any time request Frontex to submit to it a risk analysis making recommendations for evaluations to be implemented in the form of unannounced on-site visits*”.

³⁴ Commission Proposal for a Regulation 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, COM(2011)560, 16.9.2011, Brussels.

First, a serious threat to public policy or internal security, which could include a “sudden and unexpected inflow of third country nationals at a part of an external border and considered to constitute a threat to public policy or internal security at the Union and/or national level”. In words of the Commission:

The situation might arise where a large number of third country nationals cross the external border of one or more member states. This might result in an unexpected and significant increase in secondary movements of third country nationals found to be irregularly staying in the territory of another member state or States.³⁵

Second, as a response to a member state's persistent failure to adequately protect a part of the EU's external border when the Commission finds that the serious deficiencies identified by the Schengen evaluation and monitoring mechanism would still persist, and “*insofar as these deficiencies constitute a serious threat to public policy or internal security at the Union or national level*”. The specific procedure for these cases would consist of a period of no more than six months, which could be prolonged for another six months if the weaknesses are not remedied.³⁶

The Commission would be placed at the heart of the decision-making procedures surrounding the reintroduction of controls at internal borders. When a member state would consider that internal borders control should be reintroduced, it should submit a request to the Commission at the latest six weeks before specifying the reasons, the scope, timeframe and names of authorised crossing points.³⁷ Such a request could be also submitted jointly by several member states. This information should be transmitted (at the same time) to the member states and the European Parliament. The Commission would take the final decision on the re-introduction of internal border checks, which in view of the proposal would be taken by ‘comitology’.³⁸ That notwithstanding, in those cases requiring “*immediate action*”, the member state concerned would be allowed to “*exceptionally and immediately re-introduce border control at internal borders, for a limited period of no more than five days*”.³⁹ Finally, the proposal includes a number of criteria determining the lawfulness of reintroducing internal border checks, in particular the need to assess:

the extent to which such a measure is likely to *adequately remedy* the threat to public policy or internal security at the Union or national level, and shall assess the *proportionality* of the measure to that threat.⁴⁰ (Emphasis added).

³⁵ Commission Schengen Governance Communication, page 11.

³⁶ See Article 26 of the proposal. It also says: “*No more than three such prolongations will be possible*”.

³⁷ Article 24 of the proposal.

³⁸ See Article 8 of the Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 16 February 2011.

³⁹ Article 25.2 continues:

The Member State reintroducing border control at internal borders shall at the same time notify the other Member States and the Commission accordingly, and shall supply the information referred to in Article 24.1 and the reasons that justify the use of this procedure. The Commission may consult the other Member States immediately upon receipt of the notification.

⁴⁰ See Article 23a, which specifies the considerations that shall be taken into account when carrying out that assessment. In particular,

First, impact of any threats to public policy or internal security at the Union or national level (including terrorism and organised crime);

Second, the availability of technical or financial support measures, including assistance by Frontex, Europol, EASO;

3.1.3 Other additional measures: Guidelines and political steering

Along with the previously outlined legislative measures, and in response to past debates on the legality of the Italian residence permits for humanitarian purposes granting an automatic right of free movement in the scope of the 2011 Franco-Italian affair, the package also announced the Commission's intention to present common European Guidelines "*to ensure a coherent implementation of the Schengen rules*". This process, which was launched with an expert meeting in July 2011, aims at identifying shortcomings and areas where there might be need for further clarification on the Schengen *acquis*, in particular in the area of issuing travel documents and residence permits.⁴¹

Furthermore, the Schengen Governance Communication pointed out the Commission's plans to initiate a "*more regular and structured political dialogue*" amongst the various EU institutions and present a biannual overview on the functioning of Schengen to the European Parliament and the Council which would aim at an increased "*political steering*" of developments in the Schengen area.⁴² The Commission expects to present the first biannual report by May 2012. The political steering of Schengen cooperation has in fact been one of the main items of the Schengen Governance Package that has attracted the attention of the Danish Presidency of the EU, and some progress has already been achieved. As mentioned, the JHA Council meeting of 8 March 2012 adopted Conclusions "*regarding guidelines for the strengthening of political governance in the Schengen cooperation*".⁴³ The Conclusions can be considered primarily as intending to move the ownership over the political steering on the "*correct and efficient functioning*" of the Schengen regime out of the hands of the Commission and towards the member states, i.e. the Council Mixed (Schengen) Committee. The latter is composed by representatives of the Ministries of Interior of the Schengen member states (including the associate non-EU countries). According to the Council, such political and strategic discussions would take place once during each Presidency and "*where appropriate*" be based on the above-mentioned Commission biannual reports. The Commission's first report to be issued in May this year will constitute the basis for debate in the Mixed Committee at Ministerial level in June 2012.⁴⁴

The European Parliament (EP) Draft Report on the Proposal COM(2011)560⁴⁵ of February 2012 underlined the importance for the European Commission to draw up guidelines aimed at ensuring a coherent interpretation of Schengen rules by providing "clear indicators to facilitate

Third, the impact of any serious deficiencies identified by the evaluation or monitoring mechanism; Fourth, the likely impact of such a measure on free movement within the area without internal border controls.

See also Annex 2 of the Schengen Governance Communication.

⁴¹ Schengen Governance Communication, p. 3.

⁴² *Ibid.*, p. 7.

⁴³ Council Conclusions regarding guidelines for the strengthening of political governance in the Schengen cooperation, 3151st Justice and Home Affairs Council Meeting, Brussels, 8 March 2012.

⁴⁴ The Conclusions offer specific guidelines for the Commission to follow in its reports, which would be expected to present an overview of "*identified weakness and/or threats that could affect the functioning of the Schengen area in the short term ... in order for the Council to consider preventive actions*". Moreover, the Conclusions continue, the overview provided in the report should point out issues which the Commission considers to be most relevant for the political and strategic discussion. Refer to Point 6 of the Conclusions.

⁴⁵ European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2011)0560 – C7-0248/2011 – 2011/0242(COD)), Rapporteur: Renate Weber, 17.2.2012.

the assessment of threats to public policy and national security".⁴⁶ In order to increase the dialogue between the EU institutions and ensure "*greater transparency and accountability*", it also called the Commission to present an Annual Report "*on the functioning of the area without internal border controls*" to the Council and the European Parliament, which would also include a full list of decisions to reintroduce internal border checks during the year covered.⁴⁷ In the EP opinion, "*This should provide the basis for an annual debate in the European Parliament and in the Council and contribute to the strengthening of political guidance and cooperation in the Schengen area*".⁴⁸

3.2 Testing the Added Value

The actual necessity (*the why*) to reopen and amend current Schengen rules with new proposals and the way in which (*the how*) the decision has been taken by the Commission – without prior consultation with civil society and other interested parties – have been questioned on different fronts since the inception of the Schengen Governance Package.⁴⁹ Border law constitutes a domain of EU competence offering an extensive set of rules and standards. Schengen was subject to a highly dynamic policy-making process since its inception, culminating in 2006 with the adoption of the Community Code on the rules governing the movement of persons across the borders (the Schengen Borders Code, SBC). The SBC provides for a codified set of harmonised rules and procedures applying to the crossing of the EU external borders and to the temporary re-introduction of internal border checks (Guild, 2006).⁵⁰ This paper explores two central questions in assessing the added value of the 2011 Commission initiatives in terms of safeguarding the individual's right to free movement: First, was the Schengen system really in need of new rules? Second, would the Schengen Governance Package prevent future attempts by national governments to contravene an individual's right to free movement, as witnessed in 2011 and the beginning of 2012?

3.2.1 Internal border checks

The SBC foresees specific provisions for member states to re-install internal border controls. This possibility had been used since the mid-1990s more than 70 times by national governments in circumstances like large-scale sporting events or international political meetings, political demonstrations, ceremonies of 'national importance' (e.g. royal weddings) and alleged 'terrorist threats'. There have been however few instances where internal border controls have been re-established in an attempt to restrict irregular immigration (Carrera et al., 2011; Groenendijk, 2004).⁵¹

⁴⁶ Refer to Amendment 5a and Article 23a.3.

⁴⁷ Refer to new Article 29 (Accountability).

⁴⁸ Refer to Amendment 7b.

⁴⁹ See for instance, European Citizen Action Service (ECAS), "Hands off our right to move freely around the Union!", 9.5.2011 (<http://www.ecas-citizens.eu/content/view/393/379>) and ECAS, "Schengen: ECAS concerns not only about what could be decided, but also how", 14.9.2011 (<http://www.ecas-citizens.eu/content/view/378/362>).

⁵⁰ Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.4.2006.

⁵¹ For a full list of such actions, see Appendix 1 of Carrera et al. (2011). By way of illustration, this was the case in 1999, when France reinstated internal border checks at its border with Italy to prevent Albanians and Italians from crossing to participate in a demonstration in support of undocumented immigrants in Paris.

The rules are as follows: Any member state wishing to re-establish internal border checks is required to notify its counterparts and the Commission “*without delay*” about the reintroduction of internal border checks “*requiring urgent action*” and to offer “*the reasons justifying the use of this procedure*”.⁵² The member state is required to justify the proportionality of the measures by providing information on the events considered to constitute “*a serious threat to public policy or internal security*”, the scope of the security measures to respond to them and the location of authorised crossing points, as well as its date and duration.⁵³ The EP needs to be informed “*as soon as possible of the measures taken*”.⁵⁴ These criteria are to a very large extent identical to those included in the new 2011 Commission proposal examined in the previous section of this paper. So what’s new in the Schengen Governance Package?

If adopted, decisions on the temporary re-introduction of internal border controls would follow an ‘EU-based approach’, which has been understood by the Commission as granting itself the main voice when giving the green light to the temporary suspension of the freedom of movement. That notwithstanding, would that new EU-centric approach solve cases such as the Franco-Italian affair or unlawful suspensions to free movement? The new EU-based mechanism would ensure that decisions to restate internal border checks in order to deal with “*foreseeable events*” would not continue to be ‘unilateral’ in nature, under the sole responsibility of the national government at hand. The Commission would have the authority to ultimately determine the necessity of the exception. Moreover, the mechanism would allow for a new possibility to coordinate two or more member states willing to collectively reintroduce internal border checks. The proposal further clarifies and develops the criteria for the internal border checks to be justified, by putting an emphasis on the need to comply with the proportionality principle and to ensure the adequacy of the measure to remedy “*the threat*”.⁵⁵

As mentioned in section 2.1 above, however, for those “*cases requiring immediate action*”, the mechanism would still continue to offer member states the opportunity to reintroduce internal border controls following a specific (urgent) procedure on the basis of considerations of public policy or internal security. In comparison to the present system of Article 25 SBC, the new version of this provision has narrowed down the use of the same option by insisting on the need for the threat to be “*serious*” in nature, limiting the period of application to a maximum of five days and conferring the power to decide on the prolongation of the border control at internal borders (if the ‘serious threat’ is deemed to persist) by the Commission.⁵⁶ We welcome the attempt in the Commission 2001 proposal to limit the ‘unilateralism’ and lack of transparency and accountability that has characterised the implementation of the SBC rules for temporarily reintroducing internal border controls. The narrowing down of possibilities for national

⁵² Articles 25-29 of the SBC.

⁵³ According to Art. 24 of the SBC, “*Member States may even prolong border control at internal borders after having notified the Commission and the other member states*”. See also Art. 26 of the SBC.

⁵⁴ See Art. 27 of the SBC. Moreover, according to Art. 29 of the SBC, the national authorities are required to present a report on the reintroduction of the border controls before the European Parliament, the Council and the Commission outlining “*the operation of the checks and the effectiveness of the reintroduction of border control[s]*”.

⁵⁵ See the new Article 23a of the proposal.

⁵⁶ The new Article 25.3 reads as follows:

If the serious threat to public policy or internal national security persists beyond the period provided for in paragraph 1, the Commission shall decide on the prolongation of the border control at internal borders. Given the need to take immediate action after the expiry of the period provided for in paragraph 1, which constitutes an imperative ground of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 33a(3).

governments to suspend free movement along with the clarification of the requirements to be respected by the member state(s) concerned (including that of proportionality) can only but play in favour of the principles of legal certainty and loyal cooperation.

That notwithstanding, the main criteria to be followed by the member state to substantiate the legitimacy of restricting free mobility are however to a large extent identical in nature and scope to those currently existing in the SBC. Also, we reiterate that the 2011 initiative still leaves wide room of discretion to national authorities for applying temporary derogations in cases of “*serious threat to public policy or internal security*”, where “*immediate*” reintroduction of internal checks is foreseen. Both the compliance with the procedural criteria/guarantees and the ‘too liberal’ use made by some governments of the term “emergency for public policy and internal security purposes” requiring urgent action have been precisely the ones at stake in France’s 2011 re-introduction of internal border checks with Italy. This was in fact the official justification given by countries like France to re-instate internal border checks, even though it was found that the affair could not be considered a threat to public policy or internal security, nor was there any ‘state of emergency’ calling for exceptional measures suspending free movement. It remains therefore unclear how the new EU mechanism would discourage similar attempts in the future.

Careful consideration and monitoring will need to be given in any case during the course of negotiations in the Council of Ministers and the sort of mutations that the original Commission proposal will undergo after member states’ inputs and agreements. Clearly, as we will develop in more detail later in this paper, the expectations of those member states most directly involved in the Schengen controversies to see their degree of discretion extended when applying security exceptions to freedom of movement are not consistent with the ‘more Europe’ approach with which the Commission has impregnated the new 2011 proposal. It is nonetheless to be hoped that the reopening of the SBC will not create opportunities for lowering the bar in existing European standards and common requirements applying to the temporary re-introduction of border controls in favour of member states’ national security predicaments and political agendas. Some remarks in Commissioner Malmström’s speech delivered before the European Parliament in a recent conference on Upholding Freedom of Movement: An Improved Schengen Governance give cause for concern.

I should add that it is a misreading of our proposal to conclude that the Commission is *challenging member states' competence in security matters*...Of course, I am well aware that this aspect of the proposal has met with opposition from many member states, and the Council Working Party – under the chairmanship of Denmark – is currently exploring possible adjustments. We are engaged in those discussions, and are prepared to show *some flexibility*, provided that our key objective is still met, namely ensuring *the necessity and proportionality* of any measures taken to reintroduce internal border controls. (Emphasis added)⁵⁷

3.2.2 Evaluation and the legal basis debate

The idea behind the revision of the Schengen evaluation mechanism has attracted fewer detractors than its accompanying rules for reinstating border checks. The need to improve the scrutiny and accountability of the correct application of the *acquis* by national authorities have long been the subject of discussion. For some time, a widespread consensus prevailed at EU level on its necessity, but the necessity of closer scrutiny of the Schengen *acquis* has now been reaffirmed as a consequence of the challenging situations witnessed in some member states such

⁵⁷ Europa Press Releases, Cecilia Malmström, European Commissioner responsible for Home Affairs, *The importance of safeguarding Schengen*, Speech 12/78, 8/2/2012.

as Greece at times of duly implementing the common EU asylum law and Schengen regulations at times of controlling the common external borders. The main issue here has been the knowledge gap on the ways in which the *acquis* is being applied by relevant national authorities across the various external borders and of the standards making that implementation effective and consistent (Carrera, 2010).

This was already acknowledged by the Final Report of the Working Group X, “Freedom, Security and Justice” of the European Convention,⁵⁸ which, with a view to finding ways to improve member states’ implementation of the *acquis*, and the maintenance of high standards in policy areas where the principle of mutual recognition of decisions lays at the core of EU policies (such as the Schengen regime), put forward concrete recommendations “*to enhance the efficiency of implementation of the obligations undertaken by the member states within the Union*”.⁵⁹ One of these recommendations was the need to improve the monitoring of the practical implementation of the Schengen *acquis* and to improve mechanisms of mutual evaluation or peer review. The Final Report of the Group emphasised that “*high standards not only must be attained, but also must be maintained*”. It was then understood that such an evaluation would be mainly carried out by member states’ authorities “*with the participation of the Commission through procedures guaranteeing objectivity and independence*”, while keeping the European Parliament and national parliaments ‘duly informed’ of the results of the peer review.

One of the most tangible outputs of Working Group X’s recommendations was the current Article 70 of the Treaty on the Functioning of the European Union (TFEU) (previously Article iii-260 of the Constitutional Treaty), which expressly foresees the possibility for the Union to adopt legislative measures to conduct “*objective*” and “*impartial*” evaluations of the implementation of the Union policies, such as policies governing border checks. This was then taken forward by the 2009 Stockholm Programme, the third multi-annual programme on the EU’s Area of Freedom, Security and Justice,⁶⁰ in which the European Council invited the Commission to present proposals on the basis of Article 70 TFEU including an evaluation mechanism based on a system of peer-evaluation where “*the Council should, in principle, have a leading role in the evaluation process, and in particular its follow up*”.⁶¹

The background and preparatory works of the evaluation-related debates may clarify the tensions that have subsequently emerged between the European Commission and the member states on the ‘EU-centred’ focus of the 2010 and 2011 versions of the Schengen evaluation mechanism, and on the adequacy of the legal basis of the 2011 new proposal. As explained in section 2.1, the Schengen Governance Package advocates a fundamental shift in responsibility in the implementation, follow-up and corrective measures to be adopted in the scope of the

⁵⁸ The European Convention, Final Report of Working Group X, “Freedom, Security and Justice”, CONV 426/02, Brussels, 2 December 2002.

⁵⁹ The Working Group concluded that in those cases where breaches of Member States’ obligations resulting from EU law occur, the Commission “*should play its role as Treaty guardian and that it should be competent to introduce infringement proceedings before the European Court of Justice*”. Recourse to legal control through the infringement procedure, and the central role of the European Commission, was deemed to be adequate.

⁶⁰ Council of the EU, The Stockholm Programme: An Open and Secure Europe serving and protecting Citizens, 5731/10, Brussels, 3 March 2010.

⁶¹ The Stockholm Programme also stressed that:

... an evaluation mechanism based on the well-established system of peer-evaluation. Evaluation should be carried out periodically, should include an efficient follow-up system, and should facilitate better understanding of national systems in order to identify best practice and obstacles to cooperation.

Schengen evaluation mechanism. The European Commission would hold also here the main leadership and decisional power.

Recent comments regarding the legal basis of the initiative have constituted yet another tangible expression of disagreement over the need for 'more Europe' (understood as 'more Commission') in border check policies. The European Commission decided to use as legal basis Article 77.2.e TFEU, which provides for the adoption of measures abolishing internal border controls as the final objective in an area of free movement of persons in the EU. Yet, some voices alluded to the debate in the European Convention and the way in which Working Group X's recommendations materialised in the contours of the Treaty of Lisbon, which appeared to be all conducive for Article 70 TFEU to be used instead as the legal foundations of the measure (Pascouau, 2012). However, in the Commission's view:

Evaluation and monitoring of the correct application of these measures therefore serves the ultimate policy objective of maintaining the area free of border control at internal borders. Measures aimed at mitigating the adverse impact of persistent serious deficiencies in a member state's application of the Schengen *acquis*,..., likewise serve to further the attainment of this ultimate objective.⁶²

One of the most important practical implications of using Article 77.2.e, instead of Article 70, was to ensure the involvement of the European Parliament as co-legislator in the scope of the ordinary (formerly called co-decision) legislative procedure. The procedure envisaged in Article 70 TFEU would have actually meant a direct exclusion of its role and input during the negotiations of the mechanism.⁶³ In its Resolution of 7 July 2011 on "*changes to Schengen*",⁶⁴ the EP stressed in this regard that:

... any attempt to move away from Article 77 TFEU as the proper legal basis for all measures in this field will be considered to be a deviation from the EU Treaties, and *reserves the right to use all available legal remedies if necessary*. (emphasis added)

The Danish Presidency decided in the beginning of February 2012 not to follow the request of a large majority of member states, on the basis of an opinion issued by the Council Legal Service concluding that the correct legal basis should be Article 70 TFEU,⁶⁵ in order to vote the change of the legal basis and instead started dialogue with the EP on the Schengen Governance Package. The negotiations have therefore continued under the current legal basis arrangements, i.e. Article 77.2 TFEU. True, those questioning the appropriateness of this choice have argued that Article 70 TFEU was the provision originally devised during the debates preceding the Lisbon Treaty for the adoption of evaluation systems focusing on the correct application of Union policies by member states, and that the Commission should have modified accordingly the legal basis. However, there are two main arguments in favour of the current legal basis.

The first one relates to the interlinking between the evaluation mechanism and the EU-based option to temporarily suspend freedom of movement, which indeed constitutes one of the most crucial new components of the Schengen Governance Package. One could argue that the Commission's decision to closely link the results of member states' evaluation with the policy objective of maintaining and/or derogating free internal border control might justify the use of

⁶² Page 4 of the Commission proposal COM(2011)559.

⁶³ According to Article 70 TFEU, the procedure for adopting a legislative measure on evaluation would be the sole responsibility of the Council on the basis of a proposal by the European Commission.

⁶⁴ European Parliament, Resolution on changes to Schengen, 7 July 2011, P7-TA(2011)0336.

⁶⁵ Council of the EU, Opinion of the Legal Service, 10148/11, Brussels, 13 May 2011. A similar opinion by the Legal Service had been given on the 2010 version of the Commission proposal on a new Schengen evaluation mechanism.

Article 77 TFEU. Indeed, one of the main aspects attracting more debate in the Schengen evaluation mechanism revision has been the monitoring role that the Commission has attributed to itself in the interface of the scope application of the two Schengen Governance proposals. This specifically concerns new Articles 14 and 15 of the proposal, which as described above, stipulate on the one hand a number of substantive specific measures/actions that the Commission could request the evaluated member state to implement, and on the other its power to decide on the reintroduction of internal border checks as a result of a negative evaluation of a member state presenting persistent serious deficiencies when conducting external borders checks.⁶⁶

There is another, perhaps sounder argument against the exclusive adequacy of Article 70 TFEU as the legal foundation for the new version of the Schengen evaluation and monitoring mechanism. This provision makes express reference to the adoption of evaluation of those Union policies where, in particular, the principle of mutual recognition still applies (Battjes et al., 2012). This usually corresponds with domains where legislative harmonisation is not the primary aim because national (member states) interests and the autonomy of domestic legal orders prevail over those of the Union. It would be therefore possible to contend that this is not the case in what concerns Schengen, as these aspects are now clearly subjected to Chapter 25 of Title V of the TFEU and foreseen in a common codified corpus of legislation, the SBC. The entry into force of the SBC has indeed meant that member states are no longer ‘free’ but are under clear legal obligations to apply a harmonised set of EU rules on external border controls and surveillance, which remain under the guardianship of the Commission and ultimately the Court of Justice.

Indeed, while the discussions and recommendations of Working Group X provided the background to Article 70 TFEU, the overall legal and policy framework of the European external border system has been fundamentally transformed since 2002. The European Integrated Border Management (IBM) of external borders debate had not even started (Hobbing, 2006), Frontex had not been set up and the importance of a ‘Community-based solution’ for this field, now envisaged by the SBC, was clearly not yet perceptible or taken into account by the Convention participants (Bertozzi, 2008). It is therefore far from evident how any potential legal challenge before the Court of Justice in Luxembourg on the legal basis would deal with this debate.

It is questionable, however, whether it was such a good strategy for the Commission to inter-link so closely the two proposals – one driven by the Franco-Italian request to re-write the Schengen rules on the exceptions to free movement, and the other presenting a longstanding and much-awaited consensus about the need to improve current evaluation and scrutiny of all member states’ implementation of EU border law. The answer to this question might become clearer after we consider the challenges that the Schengen Governance Package faces.

4. Challenges to the Schengen Governance Package

Two main factors affect the Package’s added value and effectiveness:

- First, the nationalistic roots, driven by an attempt by some EU member states to ‘renationalise’ or return to intergovernmentalism in EU internal border checks and free mobility policies,

⁶⁶ However, when looking at the above mentioned Council Document 5754/12 of 8 February 2012 it appears that several Member States delegations proposed to move both Articles 14 and 15 of the Proposal COM(2011)559 to the Schengen Borders Code and new Article 13 of the Proposal COM(2011)560 final.

- Second, the prevailing focus on reinforcing Schengen governance understood as ‘more security’ through new rules aimed at establishing a more ‘EU-based’ mechanism which would still allow – and potentially expand – member states’ options to reintroduce internal border checks in cases requiring “*immediate action*”, and EU-level suspensions of ‘border-free Schengen’ in cases of persistent serious deficiencies by evaluated member states in external border controls.

4.1 Nationalism

The origins of the 2011 Schengen controversies can be traced to a resurgence of nationalism, which has materialised in a wave of member state resistance to comply with EU rules on the absence of internal border controls enshrined in the SBC, and to be loyal to the authority granted to European institutions, in particular the European Commission, to guarantee compliance with their legal obligations to respect free mobility rights as arising from the Treaties, secondary legislation and the jurisprudence of the Court of Justice.

The SBC provides a set of procedural requirements, including a necessity and proportionality test, applying to any member state’s decision to reinstate internal border checks. Compliance with these requirements was the issue at stake in cases such as the 2011 Franco-Italian affair, and remains open in measures such as those recently adopted by the Dutch government. Instead of applying the SBC, certain national governments have advocated, or even demanded, relevant EU authorities to revisit Schengen to “*reinforce security*”, understood as injecting a new wave of (re)intergovernmentalism into the system that would allow them to regain or ‘re-nationalise’ powers conferred on the EU around issues of mobility and rights of individuals on the move. Hence, member states would have more domestic flexibility in deciding to suspend the freedom of movement of persons for reasons of public policy or internal security.

The 2011 Franco-Italian affair, and the subsequent national practices in Denmark and the Netherlands, have revealed striking struggles around the constitution of authority in Europe over borders, mobility and citizenship-related policies. The Schengen controversies have brought to light how contested the question still is as regards *who* has the power to decide on the scope of application of freedom of movement and EU border law, and (when necessary) to exercise discipline when deviations or unlawful derogations occur. The sensitivity and hesitation expressed by a majority of member states during Council discussions on the Union-led (European Commission-centred) approach inspiring the Schengen Governance Package illustrate tensions that few would expect at this stage in the history of European integration.

Populism has constituted another factor of concern accompanying the kind of nationalism serving as the background to the Schengen controversies. These have coincided with the adoption by a number of European leaders of agendas and views attributable to domestic extreme-right political parties. Alarming ‘anti-immigration’ political messages artificially linking human mobility (from outside and inside the Schengen area) with insecurity and cross-border criminality, and framing it as a threat to national security have often served as the political justification to apply derogations to free movement. This was particularly the case in the spring of 2011, when the Italian and French governments expressed the need to apply restrictive policy responses to control and limit the entry of immigrants and asylum-seekers resulting from revolutions and war in North Africa.

This nationalist and populist logic has constituted the impetus behind the revision of the Schengen legal system and the Governance Package, and is now amongst the most important peril to its added value. Was it really necessary to enact new rules? It is not clear the extent to which the new system would address the root causes of the Schengen debate and prevent future abuses of EU law and free movement. The main issue underlying the Schengen controversies

was not the lack of rules, or their clarity, for ensuring the proportionality and necessity of a national decision for reintroducing internal border checks. It was rather that these provisions were not properly complied with by some member states nor enforced by the European Commission! As previously argued (Carrera et al., 2011), therefore, the Commission should not have followed up the Franco-Italian demands by proposing a revision of the SBC.

Against this background, the cool response given to the Commission's Package by a majority of member states is far from surprising. Of course, the nationalistic agendas of the member states involved in these affairs have directly collided with the more 'Union-led' approach driving the new initiatives, where the Commission has granted itself a central role both in the evaluation of the Schengen *acquis* and in reinstating internal border checks. While the Commission might have taken this as an opportunity to take advantage of the situation and reinvigorate its own powers in these areas, the reopening of the negotiations on existing legal standards might lead to unexpected results. The generalised climate amongst EU member states is one in which ensuring their political leadership or 'steering' in the evaluation of Schengen, keeping their prerogatives over what constitutes a threat to public policy and internal security and lowering – or (de)accentuating – current European law guarantees for reintroducing internal border checks are likely to be the preferred policy option.

4.2 More security, more freedom? The Schengen insecurity governance dilemma

The second challenge affecting the Schengen Governance Package is an underlying presumption at EU official levels that reinforcing security is necessary for safeguarding freedom – what we call the Schengen insecurity governance dilemma. This presumption dates back to the origins of Schengen cooperation in the late 1980s, to consider that free movement can only be enjoyed *if* 'flanking' or 'compensatory' security measures are effectively put into place. Yet, is more security really going to ensure more liberty of circulation? The Schengen controversies in France, Denmark and the Netherlands exemplify the dilemma surrounding the answer to that question: more security (i.e. more border controls and surveillance and public policy exceptions to the abolition of internal border checks and free circulation) renders more insecurity from the perspective of European fundamental rights and freedoms of the individual. The balance metaphor between freedom and security leads too often to a rather unbalanced picture where liberty (in this case related to the right of free circulation) is often sacrificed at the expense of populist and disproportionate readings of national security policy and interests.

Still, strengthening 'the management' of the Schengen area has become one of the main objectives of the Governance Package. Safeguarding free movement has moved out from the centre of attention, towards the periphery where it needs to be waived or 'balanced against' a series of security measures and derogations. The key question at stake is no longer the extent to which the freedom of movement could be more effectively protected against nationalistic and intergovernmental plots, but rather the extent to which there could be 'more Europe' (*in concreto* more DG Home and EU security agencies like Frontex) in the management of the security apparatus of Schengen and the decisional power in applying exceptions to that freedom. This would be accompanied by broadened circumstances allowing for the suspension of free mobility in accordance with EU border law. The Commission's initiatives would expand the options currently envisaged by the SBC for suspending, this time at EU level, free mobility as a consequence of an evaluation that found a member state seriously neglecting its obligations in control common external borders. The security rationale driving the 'coordinated European approach' proposed by the Commission Package emerges with clarity when looking at its main objective, which focuses on coping

...effectively with strains which may be placed on (the Schengen area) by weaknesses at its external borders or by *external factors beyond its control*. The union response must address these diverse challenges *while safeguarding the citizen's right to free movement...* A coordinated EU-based response...would address situations where a member state faces *a serious short-term, largely localised, threat to public policy or internal security*, as well as situations with *wider and longer-term situations*. The case for such a coordinated European approach is all the more compelling where a section of the external border comes *under unexpected and heavy pressure*, or where a member state has been persistently failing to control its section of the external border.⁶⁷ (Emphasis added)

DG Home seems to be particularly concerned about governance deficits at external border controls and 'situations' posing unexpected and heavy pressures on the internal security of member states and the EU. As explained in the previous section of this paper, while the need to ensure a better evaluation of Schengen has been around for long and it has now become more pressing in light of the dramatic situation in EU member states such as Greece as regards access to asylum, reception and detention conditions, the facts and issues backing up the Schengen controversies have little to do with these factors. None of the national practices putting pressure on the free movement of persons related to such situations, not even the situation in Italy in the first half of 2011. There is therefore a mismatch between the origins of the Schengen affairs and the strategy finally adopted by the Commission, which fails to tackle the main issues in question. These refer not so much to the quality, clarity or soundness of the Schengen governance system *per se*, but rather to member states' incorrect application of security-related clauses and derogations to its founding spirit – the freedom of movement as a fundamental right and a general principle of EU law – and challenges to the Commission's authority to enforce EU legislation against disobedient national governments.

Furthermore, the Commission's plan to ensure 'more Europe' in the evaluation of the Schengen *acquis* and the temporary re-introduction of internal border controls may finally lead to outputs further favouring the 'insecuritisation' of human mobility. The rules and principles regulating the re-introduction of internal border checks and security exceptions to free movement were already part of the SBC body, as clarified in section 2.2.1 above. The reopening of negotiations on existing norms and guarantees might actually offer the possibility to certain national governments to widen the exceptional situations in which the temporary suspension of free mobility had been deemed to be justified, and which have lately mainly concerned claims on (anti)immigration.

During the high-level official discussions following the formal adoption of the Schengen Borders Package,⁶⁸ the Commission has reiterated on several occasions that the new rules envisaged for re-introducing internal border checks should not expand the exceptional criteria justifying the re-introduction of controls and, more specifically, nor for 'migration' to be used as one of these grounds to be used by national governments, or EU instances. Paradoxically, however, the Commission initiatives expressly offer this possibility in detail. Annex 2 of the Schengen Governance Communication identifies those situations "*in which temporary re-introduction of internal border controls might be contemplated*" and includes amongst those events with "*a potentially wide impact in the short or longer-term*" the crossing by a large

⁶⁷ Schengen Governance Communication, p. 2 and p.5

⁶⁸ Commissioner Malmström insisted that "*I cannot emphasise strongly enough that these proposed changes must not be seen as in any way 'lowering the bar' for the reintroduction of border controls at internal frontiers, or allowing migration per se to justify resorting to such measures...*". Speech/12/78, The Importance of Safeguarding Schengen.

number of third country nationals of the external border of one or more member states. In view of the Commission:

This might result in unexpected and significant secondary movements of third country nationals found to be staying irregularly in the territory of other member states. In such a situation, and insofar as the circumstances would be such as to constitute *a serious threat to public policy or to internal security at the Union or national level*, the temporary reintroduction of some internal border controls might be considered as a last resort...the crossing of the external border of a *large number* of third-country nationals might, in certain circumstances, justify the immediate re-introduction of some internal border controls for a period of time, in order to ensure that the necessary measures can promptly be taken to safeguard public policy and internal security at the Union or national level. (Emphasis added).

This is also confirmed by Recital 5 of the legislative proposal COM(2011)560.⁶⁹ The above-mentioned EP draft resolution on the Commission's initiative has been particularly critical about this aspect and has proposed an amendment to the proposal according to which "*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.*"⁷⁰

It cannot pass unnoticed the contradiction in the Commission's position when acknowledging the possibility to conceive migration as a serious and urgent threat to national security and public policy of the member states and the Union in contrast with the debates that took place during the 2011 Franco-Italian affair, where there was a widespread consensus (including by DG Home) that the 'migratory' situation in Italy, and even less so in France, could not be conceived in any event as "*large*" or as a serious threat to public policy or internal security for any of the countries concerned.⁷¹ This, along with the fact that the Commission decided not to open infringement proceedings against France for a disproportionate reinstating of internal border checks with Italy, may lead us to conclude that the Governance Package could encourage national governments to continue using similar unfounded discourses and securitarian policies

⁶⁹ Recital 5 of the proposed Regulation stipulates that

The situations can arise where a large numbers of third country nationals cross the external border of one or more Member States. This might result in an unexpected and significant increase in secondary movements of third country nationals found to be irregularly staying in the territory of another Member State or States. Taking into account the number of Member States affected by such an unexpected and significant increase in secondary movements, and the overall impact of this increase on the migratory situation in the Union or in an individual Member State, it may be considered necessary to temporarily reintroduce border control at internal borders where the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level. The crossing of the external border of a large number of third-country nationals might, in exceptional circumstances, justify the immediate reintroduction of some internal border controls, if such a measure is needed to safeguard public policy and internal security at the Union or national level from a serious and urgent threat.

⁷⁰ See amendment 3 of Recital 5 of the proposal. European Parliament, Draft Report on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2011)0560 – C7-0248/2011 – 2011/0242(COD)), Rapporteur: Renate Weber, 17.2.2012.

⁷¹ Statement by Commissioner Malmström following her visit to Tunisia, in the European Commission Midday Press Briefing of 1 April 2011 (<http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=177156>). See also V. Pop, "Franco-Italian row over Tunisian migrants escalates", *EUobserver.com*, 18 April 2011 (<http://euobserver.com/?aid=32199>).

framing migration as an internal insecurity threat legitimising the suspension of free mobility and their obligations under the SBC and EU free movement law.

In any event it is necessary to repeat that the Commission initiative would still grant member states the option to unilaterally reinstate border controls in cases where “*immediate action*” would be deemed necessary on the basis of “*public policy and national security*” considerations and as “*a last resort*”. Indeed, as the Schengen Governance Communication COM(2011)561 emphasises, “*a serious threat to public policy or to internal security will remain the only grounds for the reintroduction of internal border controls*”. The exact limits of notions of “*serious threat*”, “*public policy and internal security*”, “*immediate action*” and “*as a last resort*” have not been addressed in detail by the Package. While it is true that member states have a certain margin of appreciation when determining ‘what’ constitutes a threat to public policy and internal security, they are far from being free to put into practice any interpretation of these notions and exceptions. A strong proportionality and non-discrimination tests, as comprehensively developed by the Court of Justice’s jurisprudence and envisaged by EU law,⁷² applies to the legitimacy of any practices restricting European rights and freedoms of individuals on the move. Unfortunately, it is not clear how the Schengen Governance Package, and references linking immigration or “*significant and unexpected movements*” as exceptional situations justifying their application, may help improve the *status quo* and prevent future member states’ challenges to freedom of movement.

The contribution of the Commission’s Package in the securitisation of human mobility is further illustrated by the new role conferred by the proposals to EU home affairs agencies in the new Schengen governance system as outlined in section 3.1 above. This is the case for instance in the provision of information for the decision to be taken at EU level to reintroduce internal border checks, as envisaged by the new Article 23a of the Proposal COM(2011) 560 on the temporary re-introduction of border controls at the internal borders. This provision stipulates that when deciding on the temporary reintroduction of border controls the Commission, or in cases of “*immediate action*” still the member state(s) concerned, may use “*information*” provided by actors like Frontex or Europol for justifying or verifying the adequacy and necessity of the decision. By doing so, the Schengen Governance Package grants a potentially decisive and new role to these security agencies (not originally foreseen in their original mandates) in the decisions to reintroduce border control and suspend free movement. A similar situation arises in Article 6 of the Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011)559,⁷³ which confers the responsibility to Frontex to carry out annually a risk

⁷² Refer for instance to Article 27 of the Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29 April 2004. See also Recital 7 and Article 6 of the SBC. The latter also states in recital 15:

Member States should also have the possibility of temporarily reintroducing border control at internal borders in the event of a serious threat to their public policy or internal security. The conditions and procedures for doing so should be laid down, so as to ensure that any such measure is *exceptional and that the principle of proportionality is respected*. The scope and duration of any temporary reintroduction of border control at internal borders should be restricted to *the bare minimum needed* to respond to that threat. (Emphasis added)

⁷³ See also new Recital 13 of the initiative. Article 6 reads:

By not later than 30 September each year, Frontex shall submit to the Commission a risk analysis taking into account migratory pressure and making recommendations for priorities for evaluations in the next year. The recommendations shall refer to specific sections of the external borders and to specific border crossing-points to be evaluated in the next year under the multiannual programme. The Commission shall make this risk analysis available to the Member States.

analysis taking into account “*migratory pressure*” and putting forward recommendations for priorities in evaluations of member states and unannounced (on-site) visits. Information provided by Europol will be also taken into consideration in this context.⁷⁴ The new competences attributed to Frontex and Europol, however, have not been accompanied by the provision of the necessary guarantees for ensuring the legal and democratic accountability about the quality, soundness and objectivity of the information and risk analysis to be carried out by these actors, which all too often have been criticised for being based on confidential information and remain non-disclosed (secret) to impartial scrutiny (Carrera et al., 2011), and therefore allowing for a too large degree of discretion when limiting free movement.

Perhaps more worryingly, the Schengen Governance Package could expand the possibilities to reintroduce internal border checks or suspend free movement at EU level. Articles 15 of the proposal COM(2011)559 and 26 of COM(2011)560 foresee the possibility to re-introduce internal border checks where the Commission finds that serious deficiencies related to external border controls or return procedures persist in an evaluated member state. This idea has found an immediate welcome among certain member states’ representatives and takes us back to the Sarkozy-Berlusconi letter of April 2011 mentioned in section 2 above. The much-debated recent speech delivered by Sarkozy at Villepinte on 11 March this year referring to the possibility for suspending France’s participation in Schengen could be actually seen as an allusion to the debates surrounding this possibility at EU level. Moreover, Germany, France, UK, Austria, the Netherlands, Belgium and Sweden have recently issued a common letter threatening to reinstate “*emergency internal border controls*” if Greece does not better secure its border with Turkey.⁷⁵ In a document titled “*Common responses to current challenges of secondary mixed migration flows*”, the delegations of these same member states have agreed on the need for further action

to ensure a correct application of the agreed *acquis* at the EU-borders and to mitigate the immediate pressures on them, in particular at the Greek-Turkish border with a stronger implementation and monitoring of the Greece Schengen and asylum action plans as well as more efficient cooperation with Turkey on those issues (and) establishing a safeguard clause for truly critical situations where a member state is no longer able to comply with its obligations under the Schengen rules and respond to exceptional circumstances.⁷⁶

In addition, the document expressly underlines as a “proposed measure” the “respect of national sovereignty to decide to reintroduce event-triggered border checks at their internal borders when there is a serious threat to public policy or internal security”, which sends a clear signal of the

2. By the same deadline as stated in paragraph 1, Frontex shall submit to the Commission a separate risk analysis making recommendations for priorities for evaluations to be implemented in the form of unannounced on-site visits in the next year. These recommendations may concern any region or specific area and shall contain a list of at least ten specific sections of the external borders and ten specific border crossing-points. The Commission may at any time request Frontex to submit to it a risk analysis making recommendations for evaluations to be implemented in the form of unannounced on-site visits.

⁷⁴ See Article 8 of the proposal.

⁷⁵ ECRE Weekly Bulletin, “Seven EU countries put pressure on Greece to secure its borders”, 16 March 2012.

⁷⁶ Council of the EU, Common responses to current challenges by Member States most affected by secondary mixed migration flows, 7431/12, Brussels, 9 March 2012. Refer also to Council of the EU, Road map to ensure coherent EU response to continued migratory pressures, 7262/12, Brussels, 8 March 2012.

current member states' opposition to any 'EU-led' mechanism in this domain, as proposed by the Commission in its proposal COM(2011) 560.⁷⁷

There has been a wide consensus on the need to further improve the Schengen evaluation mechanism and impartially scrutinise member states' daily applications of the SBC, especially by those states with common external borders such as (yet not only) Greece. What is new in the current state of policy debates following up the 2011 Schengen Governance Package is the possibility to sanction those member states by suspending the abolition of internal border checks. The possibility to link an unsatisfactory application of the Schengen *acquis* by one member state and the suspension of freedom of movement for nationals of that state and third country nationals holding similar EU rights is however problematic both in nature and effects. It most importantly leads to the penalisation of the person's rights to free movement due to the incapacity of their home state to stand up and respect common European standards of border control cooperation. The freedom of movement principle would be therefore derogated due to the failure by the state to deliver the expected level of security in external border checks. The question may be raised as to the extent to which this is 'the least onerous policy option' available in the context of the Schengen evaluation when considering the far-reaching negative repercussions that such a measure would exert over the fundamental right of freedom of movement of nationals of that member state concerned as well as their Union citizenship. Moreover, the priority given to "preventing" so-called "mixed migration flows" (including not only undocumented immigrants but also asylum-seekers) could place EU and member states' human rights obligations at tension with their legal commitments foreseen in international and EU asylum and refugee laws.

5. Conclusions and Recommendations

Freedom of movement has been subject to sharp tests by several Schengen member states' governments and politicians throughout 2011 and the beginning of 2012. While some political and media reactions might have overreacted to the actual nature of these events, it is true that they have most importantly revealed the fragility of fundamental principles and European rights of individuals residing at the core of European integration. This paper has examined the European Commission's 2011 Schengen Governance Package, which constitutes one of the main policy responses at EU level to face past and recent Schengen-related controversies posing a threat to freedom of movement. It has done so by first looking back at the origins and distinguishing features of the free movement-related debates. These allow us to examine several questions: First, the actual necessity for new rules revising the current Schengen legal regime as envisaged in the Schengen Borders Code (SBC) and the Schengen evaluation mechanism, and second, the extent to which the Schengen Governance Package is well equipped to better safeguard freedom of movement and prevent member states abuses and unlawful interferences to the latter. It has been argued that the answers to those questions are profoundly affected by two factors: on the one hand, the nationalistic, intergovernmental and populist origins laying behind the scenes of these proposals; and on the other, the overwhelming priority given to strengthening the Schengen security governance apparatus by expanding the situations where the abolition of internal border checks could be temporarily suspended.

The Schengen debates have been first characterised by a prevailing logic of nationalism whereby some member states governments have been transparently disobedient in complying with their commitments stemming from European law on mobility, border controls and

⁷⁷ The document states that "*The Member States have the political responsibility for maintaining public order and protecting internal security, without excluding improvements in the monitoring*". See page 9 of Council of the EU, 7431/12.

European citizenship politics and regulations. This resistance has been substantiated with a strategy of '(re)intergovernmentalism' primarily designed at regaining power or 'renationalising' the decisional power on the application and/or suspension of liberty of movement. The discussions have visualised direct challenges to the authority of European institutions in their roles of guaranteeing and interpreting EU law and supervising member states' compliance with their legal obligations to respect free mobility and Union citizenship mobility rights, in particular those held by third country nationals. These struggles have demonstrated how contested the question still is as regards *who* holds the authority to decide on internal and external border control-related policies in the Union, independently of what the letter in European law might formally tell us about it. Another factor has been the populist background of these events, which have presented a xenophobic and discriminatory tone against migration and human mobility, inspired by extreme-right national political parties' discourses and agendas, which have been adopted by 'mainstream' European political leaders.

The nationalistic roots of the Schengen affairs constitute not only a dilemma for EU policy-makers in devising appropriate policy responses to these and future events presenting a similar nature. They equally display major perils to the added value of the Schengen Governance Package and the need for amending the rules of the game in Schengen. The main issue underlying the Schengen controversies was indeed not so much the lack of 'governance' in the system or of rules for ensuring the proportionality and necessity of a member state decision for re-introducing internal border checks and derogating free movement. What was really at stake was that common provisions and procedural guarantees embracing freedom of movement were not duly and equally respected by all the member states; nor were they properly enforced by European institutions, in particular the Commission. Indeed, the Commission has so far chosen to take a deferential approach by not launching formal infringement proceedings against any of these member states, despite sufficient legal grounds to do so.

Instead, by following up the intergovernmental call raised in spring 2011 by the French and Italian governments "*to reinforce security*" and re-write existing Schengen security rules on the re-establishment of internal border checks, the Commission might have put more at risk the freedom of movement elements of Schengen and made room for future nationalistic resistance and interference to free mobility. As illustrated in this paper, the current climate amongst a majority of member states' representatives is one where the preservation of internal security competences, the widening of exceptions for suspending free mobility in the Schengen area and the insecuritisation of mobility predominate. A primary concern to be carefully monitored during the negotiations and final output of the legislative Package is therefore that the revision of the current Schengen rules inside the Council should by no means lead to any lowering of existing standards and guarantees foreseen in European border law on the temporary re-introduction of internal border controls and the suspension of free movement.

Our concerns are further heightened by the realisation that, paradoxically, the main outstanding issues at the heart of the Schengen disputes have not been given priority by the Schengen Governance Package. The new proposals have shifted their focus of attention from safeguarding free movement of persons to the need to ensure 'more security' in the governance or management of the Schengen system. One could therefore argue that DG Home Affairs of the Commission has implicitly agreed with the main grounds of contention that characterised the Franco-Italian affair of spring 2011; first, the existence of an 'exceptional threat' potentially related to the phenomenon of immigration (so-called 'migratory pressures') at Schengen Europe's external borders calling for imminent or urgent exceptions to common European freedoms of free circulation, and second, the need to consider the suspension of these same freedoms in cases where a member state is considered to be failing in the fulfilment of its obligations in controlling the common external borders in line with the Schengen *acquis*.

The second factor affecting the added value of the Schengen Governance Package is its underlying presumption according to which freedom of circulation can only be ensured when there is a high degree of security of the State and the Union. This conceptual premise leads however to a fundamental policy dilemma. As exemplified in the 2011 and 2012 Schengen events, more security (i.e. more border controls and public policy suspensions to the abolition of internal border checks), might in fact lead to more insecurity from the perspective of the fundamental right of free movement of individuals. The Commission's attempt to move beyond the current 'unilateral' decision-making characterising the decision to reinstate internal border checks is to be welcomed. However, the Schengen Governance Package does not offer any concrete strategies to prevent current and future plots against free mobility and fundamental rights, but it has rather chosen to complement the existing governance system with a more 'Union-led approach', understood as having 'more Commission' in the power to suspend freedom of movement.

Yet, the proposed revision of the SBC would still allow member states to apply similar exceptions in cases where urgent action would be deemed necessary on the basis of public policy and internal security. The Package would also potentially expand the number of situations justifying the temporary re-introduction of internal border checks to include more prominently third country nationals and so-called 'secondary mixed migration flows' (including both undocumented immigrants and asylum seekers), and confidential risk analysis framing migration and asylum as insecurity to be carried out by EU Home Affairs Agencies such as Frontex and Europol, as one of these warranted grounds. As the EP has rightly argued, the crossing of external borders by non-EU nationals should not be framed as a 'threat' to public policy and internal security justifying the suspension of liberty of circulation.

Further, the Commission proposals would equally broaden the circumstances allowing for the suspension of free mobility in accordance with EU border law. They would expand the options currently envisaged by the SBC for suspending, this time at EU level, free mobility as a consequence of an evaluation finding a member state to be seriously neglecting its legal obligations in controlling the common EU external borders. The link between evaluation and the re-introduction of internal border checks envisaged in the Schengen Governance Package proposals is in our view of particular concern. The Commission should not have so closely interlinked the long-standing previous EU debate about the need to improve the independent and impartial evaluation of member states' implementation of the Schengen *acquis* and the provision and guarantees envisaged in the SBC, along with the new discussions on EU policy responses to solve and prevent member states' misuses and abuses of EU rules and guarantees when applying temporary restrictions to free movement of Union citizens and third country nationals.

Indeed, while the priority to further improve the objectivity and quality of the evaluation of the practical implementation of the Schengen *acquis* and EU border law is very much welcomed, careful attention should be paid to ensure a higher degree of legal, democratic and judicial accountability and transparency as to the actual ways in which the general Schengen security rules (including those consisting of exceptions to a control-free area) are being applied by member states' authorities as well as actors such as Frontex, and the extent to which they meet common administrative (rule of law) guarantees and affect the fundamental rights of individuals subject to these controls. Further, the penalisation of member states considered not to be fulfilling their obligations under the Schengen governance system would mean the sanctioning, in last instance, of their nationals and residents, who would not be able to exercise their freedom of movement and citizenship rights. Individuals should not be the ones ultimately penalised, by the suspension of their rights and freedoms, as a consequence of their national government's incapacity to meet the envisaged Schengen standards for the correct and consistent

implementation of the Schengen *acquis* and their obligations to carry out external border controls. The possibility to suspend free movement as a result of a negative evaluation of a member state should be therefore deleted from the proposals.

5.1 Recommendations

The Schengen Governance Package should have put freedom of movement, and not the security of the member states and the Union, at the centre of the new legislative initiatives. The European institutions should send a clear message to all member states governments about the need for them to fully and strictly comply with their acquired legal obligations in EU law, in particular those constituting fundamental Community requirements. No grounds for complacency, or political leverage, should be shown in those cases where key EU principles, freedoms and rights envisaged in the EU Charter of Fundamental Rights are at stake. Events and political discussions such as those witnessed during the last year and a half, perhaps most importantly, call for deeper reflection and innovative thinking for improving and reinforcing current enforcement procedures provided in EU law that could better guarantee a depoliticised and more objective response by the Commission in future cases of alleged breaches by a member state of common European rules. This would be particularly important for cases, such as the ones examined in this paper, that impact key Union political principles and fundamental rights of individuals such as the free movement of persons.

The Schengen Governance Package should be complemented by provisions foreseeing a specific set of safeguard measures to be applied in those cases where a decision to temporarily reintroduce internal border controls has deep repercussions over freedom of movement. The nature and effects of any measures restating border checks and suspending free movement should be immediately subject to careful monitoring by an independent fundamental rights supervisor which could work under the mandate of the European Union's Agency for Fundamental Rights (FRA). The supervisor(s) could be sent to the national arena(s) where the measures would be taken. This should go along with the granting of new powers to the FRA for it to carry out independent evaluations of the implementation of European law having close links and direct repercussions over fundamental rights and freedoms of individuals envisaged in the EU Charter of Fundamental Rights, which would include the SBC and the EU *acquis* on external border crossings (Carrera, 2010).

In those cases where the fundamental rights supervisor(s) would find evidence of a potential disproportionate derogation and interference with the substance of free mobility rights and freedoms of EU nationals and/or third country nationals, the Commission would be required to launch a temporary freezing procedure of the internal border control measures allegedly in conflict with fundamental rights until their legality would be determined by the Court of Justice in Luxembourg (Carrera & Faure Atger, 2010). This would be accompanied by the development of a procedure similar to the Rule 39 procedure currently applied in the European Court of Human Rights in Strasbourg, which would allow the Luxembourg Court to adopt interim measures where there is an imminent risk of irreparable damage to fundamental rights by a state party and carry out accelerated legal proceedings (Carrera, 2011).⁷⁸

⁷⁸ A similar idea was advanced in the European Parliament, Report on the Situation of Fundamental Rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI), A7-0344/2010, Rapporteur: Kinga Gal, 1 December 2010, para. 40 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0344+0+DOC+XML+V0//EN&language=EN>). See also Opinion of the European Economic and Social Committee on the Communication on migration COM(2011) 248 final, SOC/418, Brussels, 9 June 2011.

In addition to these sets of safeguards, the Schengen system and its evaluation mechanism should feature the figure of a new border monitor (independent from the Commission and Frontex), who together with the fundamental rights supervisor, would carry out (announced and announced) on-site visits at national level and impartially monitor the activities of national border control authorities and Frontex in light of the rules and guarantees envisaged in the SBC. The border monitor, which could be set up as part of the European Ombudsman,⁷⁹ would be responsible for starting any disciplinary measures against border control law enforcement authorities for failing to properly apply the SBC or for other misconduct (for instance disproportionate behaviour) while carrying out their activities. They could also guarantee the practical effectiveness of remedies and guarantees in the SBC (Carrera, 2010).

⁷⁹ European Ombudsman, Own initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations, 06.03.2012. <http://www.statewatch.org/news/2012/mar/eu-ombuds-frontex-inquiry.pdf>

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