



Arrivals



Depart

SCHENGEN DEVELOPMENTS

2011 – 2014

A Collection of EPC papers

To mark the 30th anniversary of the Schengen Agreement, the EPC has put together a special collection of EPC papers on Schengen's developments between 2011 and 2014. Signed by France, Germany, Belgium, the Netherlands and Luxembourg on 14 June 1985, the Schengen Agreement has paved the way for the development of one of the EU's most symbolic achievements: the freedom of movement without internal border checks. Although the agreement has been one of the EU's biggest successes, the Schengen story has not always been a *'long fleuve tranquille'*, particularly in recent years. This year's anniversary offers the opportunity to revisit the latest developments in the Schengen cooperation and look back at the accomplishments of this landmark agreement.

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Migratory flows from North Africa: challenges for the EU

Yves Pascouau and Sheena McLoughlin

The movement towards democracy, which started in Tunisia and Egypt, is spreading to other countries of the region, from Libya to Yemen, from Bahrain to Algeria. It is accompanied by people returning to their home country or fleeing instable situations, particularly in the case of Libya. These movements are not limited to the region, but concern also EU Member States as the arrival of more than 5,000 Tunisians onto the shores of Lampedusa has shown. Such unprecedented flows and the fear of an even larger number of migrants outline three challenges the EU and its Member States have to cope with: the capacity to protect their borders, the capacity to respect the human rights of those fleeing persecution, and the capacity to exercise solidarity.

Member States have already proven their capacity to react when it comes to securing their borders. Now they will also have to demonstrate their ability to respect human rights when managing massive migration flows from the south. With regard to solidarity, their commitment remains for now mainly financial as the minimal Justice and Home Affairs (JHA) Council conclusions of 25 February seem to confirm. Hence additional actions might be adopted at the extraordinary meeting of the European Council on 11 March.

Protection of borders

The arrival of more than 5,000 people on Italian coasts triggered two initial reactions from Europe's leaders. The first concerns the visit of high-level officials to the region to discuss security issues: beginning with Italy's Minister of Interior Roberto Maroni's visit to Tunisia, followed by a visit from High Representative Catherine Ashton. The second reaction concerns the adoption of a set of measures at EU level in order to cope with this situation. In order to help Italy - and potentially other southern EU countries - manage the unexpected inflow of migrants, the EU has focussed primarily on border control. Two types of measures have so far been discussed by the Commission and the JHA Council. First, a joint Frontex operation called Hermes was launched on 20 February. This operation brings together Member States' naval and aerial resources and experts in order to patrol, detect and prevent illegal border crossings. Second, financial assistance is to be made available to Member States on the basis of the European Border Fund.

Respect of Human Rights

However, border control should not undermine the obligation of the EU and its Member States to respect human rights. Hence, Italy and others affected by the movement of people from North Africa should ensure that asylum seekers are entitled to access asylum procedures. This implies the capacity to determine which migrants are in need of international protection and which are not, and to avoid any 'push back'. By being able to manage mixed flows, the EU and its members will demonstrate their ability to strike the balance between the protection of the state and the protection of individuals.

With regard to asylum seekers, the EU has proposed to mobilise the European Refugee Fund in order to help Italy cover costs resulting from the examination of asylum applications. Such support may concern *inter alia* accommodation structures, material aid and health care as well as legal aid or language assistance and other costs related to the procedure. In addition, the Commissioner in charge of Home Affairs, Cecilia Malmström, hinted at the possibility of asking the recently created European Asylum Support Office (EASO) to send teams to assist national

authorities with regard to the examination of asylum requests. However, this announcement, made on 15 February before MEPs during the Strasbourg Plenary session, will be hard to achieve rapidly as the EASO will only be fully operational from June 2011.

Exercise of solidarity

Solidarity entails first of all the capacity of the EU and its members to support third countries facing difficult, not to say dramatic situations. This is particularly the case for Tunisia since the wave of democracy swept to Libya. As Libya's leader refuses to surrender, subsequent conflicts occur in large parts of the country. Hence, and according to UNHCR, thousands of people are fleeing to Tunisia. The latter has already received immediate financial support from the EU. As announced by Catherine Ashton in Tunis, the country will receive €17 million immediately and €258 million from now until 2013. But, the ongoing flow of migrants to Tunisia - more than 10,000 on some days - demands additional EU support. On 3 March, the Commission decided to increase EU support to €30 million in order to cope with the humanitarian needs.

Coping with immediate needs does not prevent also planning midterm actions. Commissioner Malmström indicated in February that EU assistance would target development efforts to support income and jobs in Tunisia. Such action should also include the possibility for Tunisians to come legally to the EU. In other words, Commissioner Malmström has put legal migration issues on the future agenda of relations between the EU and Tunisia. This was emphasised by José Manuel Barroso, President of the Commission, who recalled during a press conference early in March the need to encourage mobility in order to contribute to open societies. Hence, he envisaged the possibility of offering, under certain conditions, a mobility partnership and visa facilitation regime for countries of the region. This is an encouraging sign of openness for future relations.

Solidarity also implies the support of all EU countries with Member States that are situated geographically on the frontline. At present, Italy and other southern EU countries have indicated that they would be in favour of a redistribution of asylum seekers among all EU Member States. Few have so far voiced their support for such an idea. The EU has also decided to allocate an emergency fund of €25 million. But, should the number of migrants arriving onto EU shores grow drastically, more radical solutions might be necessary. Indeed, it might be appropriate to make use of the never-before-used EU Directive on temporary protection adopted in 2001. This directive provides immediate and temporary protection in the event of mass influx or imminent mass influx of displaced persons and where Member States asylum systems are at risk of dysfunction. Making use of this directive will prove Member States' solidarity and willingness to respect the human rights of persons seeking international protection.

Beyond these challenges, events in north Africa call for a rethinking of the EU's external policy in the field of migration, taking into account the scope and content of the policy, including legal migration schemes, and countries with which agreements are signed.

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Schengen area under pressure: controversial responses and worrying signs

Yves Pascouau

Hopes deriving from the "Arab Spring" have been accompanied by concerns of how to manage migration flows. This question has quickly become extremely contentious and, to a certain extent, it has overshadowed the reality taking place in Tunisia and Egypt, where new political systems based on democracy are being created, and the extremely worrying situations in Libya and Syria.

Since the beginning of the popular revolutions in North Africa, frightening scenarios including that of a "biblical exodus" have been heralded by some European leaders. Despite wild overestimations of new arrivals and political rhetoric some responses to the situation have been taken. At European level, financial and operational support is being provided to both sides of the Mediterranean. Responses at national level have been more questionable as Italy and France have begun a strange and unclear game, the latest development of which is the signature of a joint letter by Silvio Berlusconi and Nicolas Sarkozy asking for the modification of Schengen rules. These developments need analysis to better understand Schengen's functioning and demonstrate that the proposed modifications might severely undermine the whole philosophy of the system.

Political gestures and legal confusion

Faced with the arrival of around 25,000 Tunisians and not satisfied with the support from the EU and other Member States, Italy decided to grant temporary residence permits and travel documents to migrants who were transferred from Lampedusa to the Italian mainland. Such a decision, from the perspective of the Italian authorities, would allow the permits holders to move freely within the Schengen area, and presumably to France. But it is not certain that such a decision is in line with Schengen rules.

Under the Schengen system, Member States are responsible for the entry and residence of third country nationals on their territory. Taking into account the purpose of the stay and their financial and other means, those who fulfil the conditions are granted a short-stay visa or residence permit entitling them to move within the Schengen area. This possibility exists precisely because these persons are residing legally and have appropriate means, such as tourists or workers. In order to ensure a proper functioning of the system, Member States communicate to the Commission a list of residence permits allowing their holders to move within the area. In certain circumstances however, third country nationals do not fulfil the necessary conditions but are nevertheless granted a residence permit for humanitarian reasons. In this situation, the residence permit is only valid for the territory of the Member State that issued it and not for the entire Schengen area.

In the Italian case, it is unclear whether the residence permits and travel documents issued in the last few weeks belong to the list of residence permits communicated to the Commission or are "humanitarian" residence permits. This difference is important, as in the first scenario, migrants are entitled to move within the area, subject to limited internal checks rather than systematic internal border checks, such as being asked to prove they have sufficient resources. In the second scenario, migrants who hold a 'humanitarian' permit are not entitled to move and can be sent back to Italy. The matter in the Italian-French situation is that a grey zone is attached to the legal nature of the Italian permits.

There are two additional points: first, by issuing the temporary/humanitarian permits Italy has implemented obligations deriving from the EU's 2008 "Return Directive", which obliges national authorities faced with an irregular migrant to either expel the person or to grant the person a legal status. Second, after the arrival of some 3,500 Tunisians in France, the reaction of the French authorities has been to study the possibility of restoring internal border checks. Is this reaction proportionate when Tunisian and Egyptian authorities, with the help of the UNHCR and the IOM, have kept their borders open in order to cope with more than 600,000 people fleeing war in Libya? In the final analysis, this looks like a fool's game fuelled by national policy considerations.

Joint letter, old tools and mutual mistrust

After weeks of tension and controversial responses, Italy and France sent a joint letter to Van Rompuy and Barroso to present their common views on actions to be taken or reinforced at EU level. They mainly rely on old tools and methods. The "new partnership" is conditional on cooperation in the fight against irregular migration and enhanced solidarity between Member States based on existing schemes and rules. Most controversial is the proposal to reinforce security within the Schengen area. Alongside the usual calls for reinforcing Frontex's mandate and resources, both leaders call for more collective discipline and cohesion at all protection stages of common external borders. This would firstly take the form of a modification and reinforcement of the Schengen evaluation system involving more closely Member States' experts, the Frontex Agency and other agencies acting in the field of justice and home affairs. This move does not bode well for further enlargement of the Schengen area to Bulgaria and Romania. It would secondly introduce the possibility of restoring internal border controls in the case of 'exceptional difficulties'. In the joint press conference, Sarkozy and Berlusconi made it clear that they want to modify the Schengen safety clause to make the conditions for restoring internal border controls easier. Such a proposal implies a revision of the Schengen Border Code that would require a proposal from the Commission and be subject to co-decision. It will be interesting to analyse the content of the Commission's response to this idea.

If the modification of the Schengen rules is adopted, according to Sarkozy and Berlusconi's wishes, this will lead to a complete reversal of the Schengen philosophy. Since its inception, the Schengen system has been based on mutual trust between members. Each party had confidence in the border controls operated by its neighbour to the extent that the only possibility for restoring internal border controls was based on a serious threat to public order and internal security. This does not seem to be the case for a country with a population of 60 million receiving 25,000 foreigners. The Italian-French idea seems to suggest a broadening and softening of Schengen rules to restore internal border control due, not only to a threat to public order, but also in yet-to-be-defined exceptional circumstances. In such a situation, which could correspond to the situation where an EU member State fails to secure its borders due to exceptional difficulties, Member States could presumably be allowed to restore internal border controls, and, in other words, protect themselves behind their own borders. As a consequence, the driving force of this proposal does not rely on mutual trust and solidarity but rather on mutual distrust. In this regard, the Italian-French proposal would constitute a complete reversal of the philosophy underlying the Schengen system.

Alongside these EU internal political and legal considerations, the main signal the EU and Member States are sending to our southern neighbours is focused on border controls, be they exercised at the external or the internal border. Is this the new partnership we want to build?

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Schengen area under pressure # 2: the Commission recalls the EU nature of the Schengen system

Yves Pascouau

The joint letter sent to EU officials by Nicolas Sarkozy and Silvio Berlusconi asking *inter alia* for a modification of Schengen rules has been considered as an attack on one of the EU's greatest achievements. This request warranted a response from the European Commission, which came in a Communication on Migration issued on 4 May. The response is a rejection of the attempts by Italy and France to "renationalise" some parts of the Schengen system. Instead, the European Commission recalls the European nature of the system and proposes modifications based on EU mechanisms.

An attempt to "renationalise" the Schengen system

The Italian-French letter must be considered in an overall context and seen as the expression of a trend taking place in several Member States where mutual distrust and temptation to withdraw constitute strong political lines. This is the case in several Member States which have to struggle with or please nationalist parties and therefore develop stricter immigration policies. These national trends have a significant impact on dialogue and negotiations at EU level. This is one reason why focus on migration issues since the beginning of the "Arab Spring" has been so important.

The Italian-French proposal to restore internal border checks has to be considered not only as a sign of mutual distrust but also as an attempt to "renationalise" a vital element of the Schengen system. Indeed, the joint proposal calls for a modification of the safety clause. But this clause leaves wide margins of appreciation to Member States. For instance, where Member States plan to reintroduce border checks for public order matters, they only have to inform the Commission which issues an opinion and not a decision on such a proposal. Hence, in asking to develop the safety clause, Italy and France wish to enlarge the possibility of reintroducing border checks within a framework that secures their margins of manoeuvre and their sovereignty.

The announcement of the Italian-French joint letter in a widely covered press conference gave strong support to the initiative and accordingly put a lot of pressure on EU institutions. The highest pressure was applied to the Commission as the Italian-French proposal would require a modification of the Schengen Border Code and consequently a formal legislative proposal. The Commission could have chosen to ignore the proposal, arguing that such a modification was not on its agenda and that current provisions are sufficient to cope with the situation. Alternatively, it could have acceded to the Italian-French proposal, revealing signs of weakness as a consequence. In the end, the option chosen by the Commission was to respond to the Italian-French letter in a way that secures the EU approach.

A response to strengthen the EU approach

In the Communication issued on 4 May, the Commission opens the possibility of modifying Schengen rules regarding internal border checks. The scheme presented by the Commission, under the heading "Schengen governance", is based on the idea that Schengen is a community achievement and must remain as such. In this regard, the Commission avoids any prospect of renationalisation of the Schengen system and even proposed further integration into EU law.

This concerns firstly the monitoring of the implementation of Schengen rules by Member States. Currently, the implementation of Schengen rules is monitored by Member States themselves and on the basis of planned on-the-spot inspections. More than two years ago, the Commission introduced a proposal to revise these rules. It proposed to establish a system of monitoring organised at EU level and comprising unexpected on-the-spot inspections. Up to now, Member States have not approved the proposal. Incorrect implementation of Schengen rules at EU external borders should not therefore come as a surprise, as this is the responsibility of Member States.

The second proposal concerns the possibility of restoring internal border checks in certain circumstances. Such a proposal was not planned at all by the Commission, either in the implementation report issued in October 2010, or in the proposal to modify the Schengen Border Code published in March 2011. Until the Italian-French letter, the only question of relevance was related to the limitation of internal border checks. In this regard, the joint letter has had the effect of changing the Commission's position. The Commission proposes to enlarge the possibilities of restoring internal border checks in two situations: where a Member State is not fulfilling its obligations to control a section of external borders, and where the external border comes under unexpected and heavy pressure due to external events. The crux of the matter is to define whether this proposal is relevant according to existing rules.

A distinction must be made between the current procedure allowing the reintroduction of internal border checks and the one proposed, because their roots and regime are largely different. Current rules allow Member States to restore internal border checks in case of "serious threat to public order or internal security" and place them at the centre of the process. Indeed, Member States are the most well placed to determine where serious threats to public order may occur. In this regard, the Schengen Border Code allows them to restore border controls either for foreseeable events or in an emergency. Here, Member States are at the starting point of the procedure because public order remains mainly a national issue.

The situation is totally different in the case of failure to fulfil Schengen's obligations and unexpected and heavy pressure at external borders. Management of external borders is an EU issue and any difficulty arising in this field should be dealt with at EU level. The mechanism presented by the Commission rightly follows this path. Where a Member State encounters difficulties in managing its external borders, the ability of other Member States to restore internal border checks is to be decided at EU level. Indeed, before approving such a limitation on free movement, the EU can activate all measures and supports available to help the Member State facing difficulties. This could for example take the form of financial support, the deployment of a Rapid Border Intervention Team (RABIT) or the deployment of national experts on the ground. It is "only at last resort [and] in truly critical situations" that a decision to restore internal border checks may be authorised. In other words, where alternative solutions have been unsuccessful or where the pressure on the external border is too high to cope with the situation, the decision to re-establish internal border checks may be taken. Such a decision should define which Member State is entitled to reintroduce internal checks and for how long. As a result this system would limit recourse to unilateral measures and consequent limitations on free movement in the Schengen area. With this position, the Commission preserves the distinction between public order, which remains principally a national issue, and management of external borders, which is an EU issue and deserves an EU-based answer.

In enhancing the EU's role in the management of external borders, this mechanism will contribute to bringing more objectivity. According to the State concerned and the actions and support awarded, EU institutions will be able to determine on an objective basis whether or not 25,000 migrants arriving in a Member State constitutes a manageable situation, and thus be able to take appropriate measures. This will also avoid unilateral and unfounded expressions of distrust.

A legislative proposal containing the Commission's suggestions will now be issued and it will be a matter for the Council and the European Parliament to adopt or reject it.

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Internal border controls in the Schengen area: much ado about nothing?

Yves Pascouau

Among other topics, the reintroduction of internal border controls in the Schengen area was very high on the European Council's June Agenda. The issue has been discussed intensely by EU leaders and the results are far from what was expected by those who initiated the discussion. The Council agreed to establish a mechanism to restore internal border checks but its implementation remains uncertain.

A contentious issue

Following their quarrel about the management of migrants coming from Tunisia, Presidents Sarkozy and Berlusconi sent a joint letter to the Presidents of the European Council and Commission asking them to examine the possibility of restoring internal borders checks in case of exceptional difficulties in the management of external borders.

On this basis, the Commission presented in a communication the outline of a mechanism allowing the reintroduction of border controls. Broadly speaking, such an action would be possible in two situations: where a Member State does not fulfill its obligations to control external borders or where the external border of an EU country is under unexpected and heavy pressure. The Commission added that the decision to reintroduce controls should be taken as a last resort and at EU level.

This mechanism was not unanimously accepted by Member States. Some considered that the decision to reintroduce border checks was a national responsibility and should not be grounded on a community-based mechanism. Others pointed out that the reintroduction of border checks in case of unexpected and heavy pressure is not fair because such a situation does not fall within their responsibility. Indeed, events occurring in Libya or Syria and leading to movement of persons are not EU countries' fault.

In a short period of time, the question relating to the mechanism to restore internal border checks became one of the most contentious points negotiated during the European Council. This is understandable, because beyond the definition of conditions related to the implementation of the mechanism the principle of freedom of movement in the Schengen area was endangered. Conclusions adopted during the summit fortunately limit this threat by the way the mechanism is framed.

Framing the mechanism

The mechanism for reintroducing internal border checks is based on a two-pronged approach.

First, where a Member State is facing heavy pressure at its external border, a series of measures should be implemented in order to assist the EU country concerned. Council conclusions underline that these measures could include "inspections, visits, and technical and financial support, as well as assistance, coordination and intervention from Frontex". In other words, the mechanism plans, at first hand, progressive and coordinated assistance rather than sanctions.

It is only as a "very last resort", then, that reintroduction of internal border controls could be decided. But here, the European Council enumerates a series of additional conditions. Restoration of border checks is exceptional and should intervene "in a truly critical situation" i.e. where a

Member State “is no longer able to comply with its obligations under the Schengen rules”. In other words, where the country concerned is not able to control its external borders. In such a situation however, the decision to restore border checks is taken “on the basis of specified objective criteria and a common evaluation, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases”.

To sum up, the Summit Conclusions strongly framed the possibility of re-establishing internal border controls, which are made possible as a very last resort on the basis of specified objective criteria and following a common evaluation. *A priori*, the perspective of a reintroduction of internal border checks in the Schengen area looks rather thin.

Forthcoming negotiations and uncertain outcomes

Alongside this assessment, it is not entirely sure that the mechanism will be put in place. Indeed, additional conditions set by the European Council open the door to numerous questions and details that still remain unanswered and unresolved. For instance, how will the “specified objective criteria” be defined? Will they be numerous and exhaustive? What degree of precision or margins of appreciation will they have or leave to Member States? What does “common assessment” mean? Does that concern an assessment provided by Member States, the Commission or an agency such as Frontex? Which authority will decide the reintroduction of internal border checks? The Commission, or Member States? Finally, what does the sentence “taking into account the need to be able to react in urgent cases” mean?

It seems evident, therefore, that while the European Council has in some ways closed the debate about the modification of Schengen rules in framing the conditions to be fulfilled to implement the mechanisms it has, on the other hand, opened an uncertain discussion regarding the content of these conditions. The forthcoming legislative process could be long and tricky.

It will be up to the Commission to present a proposal in September that takes on board parameters defined by the European Council as well as options that please the majority of Member States. This will be a hard task, as EU governments are already opposed on several grounds. For instance, regarding the authority competent to decide the reintroduction of internal border controls, France and Germany wish this mechanism to remain in the hands of governments, whereas others consider that it should fall within the realm of EU institutions. It is therefore not certain that the Commission will find the right balance and that Member States will agree on the proposal. Moreover, the position of the European Parliament on this question remains unknown. Discussion among the Council and the European Parliament may prove very difficult, particularly if the principle of freedom of movement is perceived to be under attack. As a possible consequence, the process could become even more complex. Future discussions could be tough, with the ‘devil in the details’.

In the end, and whenever a text is finally adopted, the practical reintroduction of such controls remains uncertain. Indeed, the vast majority of Member States have dismantled premises and other means necessary to organise proper border controls. Such actions could therefore be difficult, not to say impossible to organise in practice.

Much ado about nothing?

Summing up, one can wonder whether the story is “much ado about nothing”. From a technical point of view, perhaps. Indeed, the outcome of forthcoming negotiations is very uncertain. There is no certainty that the legislative process would lead to a modification of the Schengen rules and even if it did, there is no certainty that it could be implemented according to the strict conditions outlined in the European Council Conclusions. From a conceptual point of view, however, there is a lot to be concerned about. The possibility of limiting and dismantling free movement has been voiced and accepted. Hence, whatever the outcome of the story, this constitutes in itself a worrying perspective that deserves debate and monitoring.

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The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock

Yves Pascouau

One of the immediate effects of the Arab Spring was the launch of intense discussions about 'Schengen governance'. While the package of proposals presented by the European Commission has opened a new debate regarding the possibility of reintroducing internal border checks, it has revived an 'old' proposal to make evaluating the implementation of Schengen rules more efficient. But discussions on the latter are blocked due to a problem related to the legal basis, which has a significant impact on the European Parliament's (EP) participation - or lack of participation - in the process.

BACKGROUND

Two types of evaluation mechanism

Evaluation is an integral part of the Schengen system and is based on two driving mechanisms. The first evaluates the ability of Member States to join the Schengen area. It aims to verify whether an applicant country is correctly implementing the rules in order to lift internal border checks. This mechanism is commonly described as the 'putting-into-effect' mechanism.

The second mechanism is applied once a Member State has been admitted to the Schengen area. It assesses whether the Schengen *acquis* is being implemented correctly. This 'implementation mechanism' seeks to reinforce mutual trust, which is the basis of the cooperation that ensures free movement of people in the Schengen area.

Both types of evaluation were initially carried out on an intergovernmental basis. At the outset, evaluations were managed by a standing committee composed of Member-State representatives. After the entry into force of the Treaty of Amsterdam, these tasks were transferred to the Schengen Evaluation Working Group within the Council.

Proposals to modify the Schengen evaluation mechanism

In March 2009, the Commission presented a proposal to modify the Schengen evaluation mechanism. It

sought to move away from the intergovernmental approach by entrusting the Commission with the tasks carried out by the Schengen Evaluation Working Group regarding the implementation mechanism.

This was justified, on the one hand, by the integration of the Schengen *acquis* into the EU framework, especially with regard to areas falling within the first pillar and, on the other, by the need to make the evaluation mechanism more efficient, in particular regarding the implementation phase. This proposal was rejected by the EP, since the procedure was not based on co-decision and *de facto* excluded the Parliament from the decision-making process.

With the entry into force of the Lisbon Treaty at the end of 2009 and the establishment of a new legal framework, the proposal became obsolete. A new proposal was issued in November 2010 in order to comply with new rules and procedures. The proposal was further modified in September 2011 according to orientations deriving from the 'Schengen Governance' package.

The new proposals seek to boost the efficiency of the Schengen evaluation mechanism. The main modifications concern: (i) entrusting the Commission to lead the evaluation process with regard to the implementation of the Schengen *acquis*; (ii) establishing annual and multiannual programmes of both announced and unannounced on-site visits,

and the conditions under which these visits are carried out; (iii) improving the involvement of Member-State experts and EU agencies in the evaluation mechanism, as well as the rules for following up on evaluation findings. Finally, the revised 2011 proposal introduces the possibility of a Union-based mechanism for reintroducing border checks at internal borders should a Member State show serious deficiencies in

carrying out external border checks or seriously neglect its obligation to control its section of the external border.

While these proposals seek to improve the Schengen evaluation mechanism, the negotiation process is currently frozen due to problems regarding the legal basis.

STATE OF PLAY – A PROBLEM OF LEGAL BASIS

The Commission decided to base the proposal on Article 77.2 (e) of the Treaty on the Functioning of the European Union (TFEU). While this provision allows the EP to take part in the decision-making process, it seems that the Commission's choice of legal basis is false. It should have grounded the proposal on Article 70 (TFEU), but such a legal basis would have excluded the EP from the procedure. This creates a nexus between legal obligations and political issues.

A questionable legal basis

According to the Commission's proposals, the appropriate legal basis is Article 77.2 (e). Under this provision, the Council and the EP shall adopt measures concerning "the absence of any controls on persons, whatever their nationality, when crossing internal borders".

For the Commission, the absence of internal border checks is made possible by a series of accompanying measures related *inter alia* to external border management, visa policy, and police and judicial cooperation. Hence, the evaluation of these measures falls within the scope of Article 77, as they serve the objective of "maintaining the area free of internal border controls". However, there are a number of doubts regarding this choice of legal basis.

Firstly, Article 77 deals specifically with issues related to internal and external border checks. The fact that this provision pursues the objective of setting up an area of free movement of persons without internal border checks does not extend its scope to matters related to police and judicial cooperation, or even drug policy.

Secondly, the current situation regarding internal border checks is totally different from that which existed when the Treaty of Amsterdam entered into force. In 1999, the Treaty of Amsterdam set the objective of maintaining and developing "the Union as an area of freedom, security and justice, in which the free movement of persons is assured". In order to establish this area, the Council was entitled to adopt, on the one hand, measures with a view to ensuring the absence of any controls on persons when crossing internal borders and, on the other, flanking measures with respect to external border checks, asylum and immigration.

The exceptional development of EU policies in the field of migration, asylum, border control and criminal law since 1999 has radically modified the situation by satisfying the conditions for the existence of an area without internal border checks. This derives from the Lisbon Treaty, which states that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which free movement of persons is ensured". The objective of the Treaty of Amsterdam was to "maintain and develop" the area, whereas the Lisbon Treaty "shall offer" an area without internal checks.

Article 77 of the Lisbon Treaty reflects the new situation. Hence the absence of internal border checks is a matter of fact and is ensured by existing and forthcoming measures adopted in various fields listed in Article 77.2, i.e. visa policy, external borders check and a forthcoming integrated management system for external borders. In this context, Article 77.2 (e), which is specifically devoted to the absence of internal border checks, takes on a specific meaning.

"The absence of any controls of persons" referred to in Article 77.2 (e) does not concern the reintroduction of internal border checks but instead relates to the lifting of border checks. This provision relates to the putting-into-effect mechanism rather than the implementation mechanism, which is embedded in other provisions.

Hence, a proposal seeking to strengthen the implementation evaluation mechanism cannot be based on this provision. In addition, this legal basis does not allow the Commission to ask one Member State to take specific measures such as the "closing of a specific border crossing point for a limited period of time".

While Article 77.2 (e) is not the appropriate provision on which to base action, the Commission should be able to employ Article 77.2 in its entirety as a legal basis for the evaluation mechanism. But such a modification would disregard the existence of a specific legal basis devoted to evaluation mechanisms covering the scope of the Commission's proposal: Article 70 TFEU.

A more appropriate legal basis

Article 70 is a specific provision introduced by the Lisbon Treaty. It paves the way for the Council to adopt measures

"laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies (...) by Member States' authorities".

This specific provision was proposed by the Constitutional Convention. The final report of a working group on 'Liberty, Security and Justice' highlighted the importance of evaluation mechanisms in particular regarding the effective implementation of rules adopted in the fields of freedom, security and justice. In more concrete terms, it called for "an explicit mention in the Treaty of this technique of mutual evaluation which is to be implemented flexibly with the participation of the Commission through procedures guaranteeing objectivity and independence". This was done through Article III-260 of the Constitutional Treaty, which then became Article 70 of the Treaty on the Functioning of the European Union after minor changes.

This historical insight reinforces the statement that Article 70 is the appropriate legal basis for establishing the evaluation mechanism proposed by the Commission for three key reasons.

Firstly, Article 70 is the result of a large-scale process which started with the Constitutional Convention, which involved all relevant EU actors and national parliaments. This was followed by an intergovernmental conference and finalised by a decision taken by heads of state and government. Article 70 is therefore the result of the willingness of all parties involved to establish an evaluation mechanism specifically applicable to issues related to the area of freedom, security and justice. In this sense, Article 70 constitutes a *lex specialis* for the creation of an evaluation mechanism that ensures the existence of an area of free movement of persons.

Secondly, the historical insight highlights the provision's underlying rationale for setting up an evaluation

mechanism for implementation measures covering not only migration-related issues but also issues related to judicial and police cooperation. In this context, it is hard to decouple the Commission's justification laid down in the proposal from the scope of Article 70. The Commission explains that "the abolition of internal border controls must be accompanied by measures in the field of external borders, visa policy, the Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters and drugs policies. (...) Evaluation of correct application of these measures therefore serves the ultimate policy objective of maintaining the area free of internal border controls".

Finally, Article 70 indicates that evaluations must be conducted "in collaboration with the Commission". One could argue that this provision allows the Council to entrust the Commission with implementing powers. Despite their importance, implementing powers are not absolute. Thus the Commission may be entitled to exercise tasks such as sending evaluation questionnaires, establishing the annual evaluation programme, and drawing up lists of experts or accompanying national experts for on-site visits. However, it may not be entitled to exercise on-site visits on its own, as this would create problems related to sovereignty. Nor could the Commission take a decision requesting Member States to close a specific border crossing point, since that is related to legislative power.

The Commission's proposal should be modified as the appropriate legal basis is Article 70. While this relates to the correct legal implementation of the treaty provisions, a decision not to use Article 70 as a legal basis could set a precedent and definitively obliterate the provision and its *effet utile*.

However, modifying the legal basis would raise the issue of how to cope with the subsequent exclusion of the EP from the procedure.

PROSPECTS – INSTITUTIONAL PROBLEMS AND THE WAYS OUT

The exclusion of the EP from the procedure

Article 70 excludes the EP from the process leading to the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. This situation creates major legal and political problems, as the EP will oppose the modification of the legal basis.

The EP rejected the initial 2009 proposal precisely because it was not based on the co-decision procedure. There is no reason for the EP to abandon this position. The EP has a democratic obligation to try to involve itself in the legislative procedure as much as possible, in particular when proposals deal with issues related to the free movement of people. In addition, the EP's rapporteur

is the same person who was appointed in 2009 - and it would be a surprise if MEP Carlos Coelho were to change his position. Finally, parliamentary work on the proposal is ongoing and any delays in deciding to change the legal basis would strengthen the political position of the EP to maintain the current legal basis.

In the end, and whether or not the legal basis is modified, the procedure is trapped in a political nexus which in any case leads to a deadlock.

If the proposal is adopted under the current legal basis, the regulation would be at risk of being annulled by the European Court of Justice due to inappropriate legal foundation. A demand for its annulment is even more likely to be introduced by a Member State given

that the use of Article 77.2 (e) will have the effect of excluding the UK and Ireland from participating in the evaluation mechanism.

On the other hand, if the decision to change the legal basis is adopted, the EP would oppose it. It would be entitled to use this exclusion as grounds for making the adoption of other proposals presented in the 'Schengen package' - the modification of the Schengen Borders Code - far more difficult, as in this case the EP is involved as co-legislator.

In both cases, there is a major risk of the proposal not being adopted. This would mean that the evaluation of the implementation of the Schengen acquis would remain unchanged. Mutual trust would not be strengthened and the free movement of persons would consequently be weakened.

Although the situation appears highly complicated and politically sensitive, there are nevertheless still ways to get out of the trap and to limit the collateral damage.

How to get out of a tricky situation - The way forward

The first issue to resolve is how to convince the EP to accept modification of the legal basis. This may be possible on the basis of the Council's rules of procedure. According to Article 19.7, COREPER may adopt a decision to consult an institution or body wherever such consultation is not required by the Treaties. Hence, the issue is not a legal problem but relates to the capacity of the Council to persuade the EP that it will still be part of the process.

In this view, the Council is able to circumvent the limits set up by the Treaty and engage in an in-depth consultation process with the EP regarding the evaluation mechanism proposal. Moreover, the EP's role in this consultation process may be as strong as that of co-legislator. Indeed, the EP is currently co-legislator on the proposal to modify the Schengen Borders Code, which is the other part of the Schengen package. It may well make an extensive consultation process a condition of its acceptance of that proposal. At the end of the day, the EP is in a powerful bargaining position and the consultation process might be similar to a co-decision process.

Secondly, the modification of the legal basis for the evaluation mechanism should be accompanied by a

restructuring of all the Schengen package proposals. More precisely, the evaluation mechanism should be redesigned to concentrate on arrangements concerning the evaluation of the implementation of the Schengen acquis; i.e. how evaluations should be conducted. This means that Article 14 of the current proposal, which allows the Commission to ask Member States to take specific measures such as reintroducing internal border checks, should be removed from the proposal and reintroduced into the draft Schengen Borders Code.

This would make the Schengen package more consistent. One tool would address evaluation issues, whereas the other would deal with decisions to be taken should a Member State encounter difficulties in managing its external border properly. In addition, in shifting Article 14 from the evaluation proposal to the Schengen Borders Code proposal, the Commission would introduce a central element that is sorely lacking - solidarity. Indeed, Article 14 of the current 'evaluation proposal' emphasises the need to support Member States facing difficulties before envisaging the reintroduction of internal border checks.

It is worth noting that by restructuring the proposals with a view to inserting more solidarity into the Schengen package, the Commission would comply with the June 2011 European Council Conclusions. These made the reintroduction of internal border checks conditional upon a series of clear criteria, including undertaking as a first measure to assist Member States whose external borders are under heavy pressure.

In conclusion, there are ways out of the current legal and political deadlock. However, it is uncertain whether the route towards a compromise with the EP will be taken. More precisely, some Member States do not want the Schengen evaluation mechanism to be modified, as the proposal awards too much power to the Commission. Hence, maintaining the current situation gives them a good opportunity to torpedo the process. Forthcoming discussions will reveal whether or not the area of free movement will be strengthened or further weakened.

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POLICY PAPER

Schengen and solidarity: the fragile balance between mutual trust and mistrust

Yves Pascouau

Foreword

The way in which the area of free movement currently involving 25 European countries works is based on a few simple principles. The abolition of permanent border controls at "internal" borders and the share out of responsibilities for the control of common external borders. In strictly defined circumstances, the organization of far more effective spot checks to guarantee security and public order, on the condition that these spot checks are not considered as a disguised reintroduction of internal borders. The possibility to invoke a "safeguard clause", which enables countries to reintroduce temporarily fixed controls on their national borders, for instance in the event of sporting or political events, with here again the objective to protect internal security and public order in the member state concerned. And lastly, the shared management of external borders, which are *ipso facto* "our" borders: this is a matter of shared responsibilities according to rules established at the EU level, because anyone crossing these external borders can travel freely to and within the other member states on the sole condition that they comply with European visa and resource rules.

As I was able to state when I was in charge of managing the "area of freedom, security and justice" at the European Commission, the area's proper functioning presupposes the existence of a high degree of mutual trust among member states. The ideal situation is for each member state to be certain that all of the others have both the will and the ability to effectively implement the rules forged in common for managing the area.

Such mutual trust is especially necessary in the monitoring of our common external borders, which is something of an "asymmetrical" affair because some countries' land and sea borders are more exposed to major migrant influxes than others on account either of their geography (Greece, for instance) or, sometimes, of their history (for instance, Malta in the wake of the Arab uprisings or the European countries with a colonialist past). This "asymmetry", which is clearly visible in the sphere of applications for political asylum, is partly to blame for the tension that we have seen in the past few semesters, but also for the issue over solidarity among neighbouring countries which, in theory at least, are just as closely concerned by the matter.

The primary merit of the Policy Paper drafted by Yves Pascouau lies in its reminding us that there do already exist several European solidarity mechanisms among the Schengen area's member states designed to cater for this lack of symmetry. As he stresses, asylum, immigration and border control policies and their implementation "are governed by the principle of solidarity and fair sharing of responsibilities, including its financial implications, between Member States". It is in that perspective that it is more important than ever for us to work in the short and medium term.

The other merit of Yves Pascouau's Policy Paper lies in his correctly identifying the sources of the tension that has flared up among European countries in the past few semesters, in a context marked by the economic crisis, the migrant influxes spawned by the fall of the dictatorial regimes on the southern rim of the Mediterranean and by the recurrent problems on the Greek-Turkish border. As he stresses, these episodes may well be only one of the numerous facets in a more widespread phenomenon affecting the area of free movement and gradually undermining mutual trust.

At the heart of his analysis lie the issues in the "Schengen governance" package currently under negotiation, which we need to address in the light of what is absolutely crucial, namely safeguarding the free movement of people. In that connection it is important to move within the framework established by the conclusions of the European Council meeting in June 2011.

Facilitating the reintroduction of national border controls by member states while also extending the time frame within which those border controls can be reintroduced is an option that need not be ruled out, but only on condition that this reintroduction is only available as a measure of last resort, after a step-by-step procedure whose first step would involve a strengthening of pro-active European solidarity in favour of exposed or defaulting states.

It is equally crucial that public order and security issues remain the only reasons that can be claimed for re-establishing national border controls, and that no other reasons can be invoked, such as massive migrant influxes, which would lend themselves to all kinds of random interpretations. I would add, moreover, that it is important for the Commission to continue to be the main player when it comes to defining the measures to be adopted in "exceptional circumstances".

Yves Pascouau also explains in a clear, cogent and comprehensive manner how the European dynamic triggered by the migration issue is coming up against problems similar to those that can be detected in the context of Schengen cooperation. The development of mutual mistrust among member states has *de facto* had a negative impact on Romanian and Bulgarian membership of the Schengen area, on representation agreements among member states over visa issuing procedures, and on the "Dublin" system relating to share out of responsibilities among member states as regards the distribution and treatment of asylum seekers' demands.

In this connection, we may welcome proposals aiming to set up a new "common European asylum system", which is already two years late on account of differences among the member states... It is indeed crucial for member states' positions to move towards convergence in this area, because as long as the number of applications for asylum and, above all, the acceptance rate for those applications, are so different from one country to the next, we are going to be seeing very strong tension in connection with the monitoring of the Schengen Area's external borders.

Despite the existence of signals betraying a far from negligible level of mutual mistrust, Yves Pascouau concludes by highlighting the fact that there are also several good reasons for hoping that the integrity of the area of free movement will be maintained thanks to the positions held by the European institutions, the interaction among which will decide on any improvements that may need to be made to it.

In identifying both the main issues in the debate on solidarity in the Schengen area and the guidelines to be pursued if we are to come out of it on top, Yves Pascouau's Policy Paper also gives us good reason to hope that this major step in the construction of Europe will be safeguarded for the benefit of the millions of European citizens who enjoy a freedom of movement at once so unprecedented and so precious on a daily basis.

António Vitorino, President of Notre Europe

Introduction

With the fall of the Egyptian and Tunisian dictatorships in spring 2011 came new aspirations in terms of democracy and freedom throughout the whole Arab region. The hopes of the peoples have not, however, received the welcome they deserve from the European Union and from its Member States. Indeed, and with the exception of a communication from the EU's High Representative, Catherine Ashton, acknowledging the events and the prospects they offered¹, reaction at European level was instead characterised by security concerns.

More specifically, faced with the arrival of several thousands of Tunisians on the Italian shores of Lampedusa - a reflection of newly-acquired freedom - the response from Member States and from the European Union was to raise the external border of the Schengen Area as a defence against them. As Cecilia Malmström, European Commissioner in charge of migratory issues would later put it, the response was inadequate².

The events at Lampedusa not only revealed a 'protective reflex' but also highlighted the need for solidarity. Firstly, in relation to third countries that had to manage the internal revolutions and the movement of people affecting the region. In this case, EU support was strong and decisive insofar as it allowed Tunisia and Egypt to manage the situation and to assure the protection of several hundred thousand people fleeing Libya³. Secondly, in relation to Member States facing the sudden arrival of a large number of prospective immigrants. The Italian authorities were fast to call on the EU and its partners for support, but to no real avail. The European Commission reminded Italy that it simply needed to use the already available funds and that additional aid could be made available as necessary⁴. As for the Member States, they did not consider that the arrival of approximately 15,000 Tunisians on the Italian coasts was so insurmountable that it required the application of specific procedures.

Feeling ignored, the Italian authorities therefore made the decision to issue residence permits along with travel permits to the 'Tunisians' that had arrived in Lampedusa so that they could travel within the Schengen area and go to France in particular. This decision, whose legality in relation to the Schengen rules is questionable, sparked off a reaction from French authorities who temporarily intensified patrols on the internal borders of the Schengen area.

Although this episode may seem anecdotal insofar as it only concerned a limited number of persons⁵, it sparked off a chain of reactions that called into question the principle of solidarity between Member States. In reality, this episode could simply be just one of the many facets of a phenomenon affecting the area of free movement and taking the shape of the steady erosion of mutual trust. This phenomenon does not just lead to weaker solidarity, it could threaten the maintenance and the existence of the area of free movement.

The objective of this Policy Paper is to highlight this development. Firstly, it addresses the issue of solidarity in the context of the migration policy and it recalls the fact that mutual trust constitutes a structural element of the Schengen area (Part 1). Secondly, it underscores the fact that the proposals adopted within the framework of 'Schengen Governance' in response to the Arab Spring carry the seeds of mutual mistrust that threatens the area of free movement (Part 2). It also emphasises that other fields of the Schengen *acquis* are showing signs of contamination (Part 3). Lastly, and despite existing signs of a sometimes large dose of mutual mistrust, the Policy Paper points out that there are also reasons to hope that the area of free movement will be kept in its current state (Part 4).

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1. Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM(2011) 200 final of 8.3.2011.
 2. During an event entitled 'One Passport, one People?' organised by FutureLab Europe in collaboration with the European Policy Centre, Cecilia Malmström indicated: 'It's easy to feel depressed about today's EU', citing as reasons the euro crisis, unemployment, lack of trust in our leaders and politicians, rising xenophobia and populism, protectionism, calls to close our borders and our inadequate response to the 'Arab Spring'.
 3. See Y. Pascouau, 'Arab Spring and Migration: Will the New Global Approach to Migration and Mobility Respond to the Challenges?' in S. Biscop, R. Balfour & M. Emerson, *An Arab Springboard for EU Foreign Policy?*, Academia Press, 2012.
 4. See 'Immigration flows - Tunisia situation', Cecilia Malmström, EP Plenary Session, Strasbourg, 15 February 2011, SPEECH/11/106.
 5. According to Agence Europe, approximately 60,000 people arrived in Lampedusa and Sicily after the start of the 'Arab Spring'. The article indicates that the number of people arriving on Italian coasts has dropped significantly insofar as 709 people were intercepted during the first quarter of 2012. Agence Europe No. 10612, Friday 11 May 2012.

Part 1 - Solidarity and mutual trust in the context of the EU migration policy

Solidarity is a founding and functional element of the European Union. Founding, because it appears obvious that a Union of States cannot exist without solidarity between its partners. Functional, insofar as this principle of solidarity, which the Member States guarantee to respect⁶, concerns all EU actions, both internal and external⁷. Solidarity and mutual trust are the founding and structural elements of the migration policy (1.1) the expression of which can be found in many tangible achievements (1.2).

1.1. Founding and structural elements of the migration policy

Although the principle of solidarity provides the foundations and structures for the internal and external dimension of EU action, migration policy benefits from 'preferential treatment' with regards to this principle. Two provisions of the Treaty on the Functioning of the European Union (TFEU) explicitly refer to this.

Article 67, which defines the objectives of migration policy, indicates that it is based on solidarity⁸. Article 80 specifies that the policies of asylum, immigration as well as border controls and their implementation are 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States'.

These two provisions are the reflection of a dual reality. Article 80 is a reminder that in an area of free movement, all Member States are not 'equal' when faced with migration phenomena. Indeed, some carry out more decisive action in the field of external border control whereas others have to manage an ever greater number of requests, especially for international protection. Also, Article 80 makes it possible to organise financial or operational solidarity when it becomes necessary.

While recalling the fact that solidarity is the cornerstone of migration policy, Article 67 echoes the very origins of cooperation in the field of migration, and in so doing recalls the conditions for its maintenance. The objective of establishing an area of free movement with no internal border controls implies adopting common rules in the field of external border management, and of immigration and asylum policy. This objective however, can only be achieved if two factors are present; solidarity, i.e. the ability to adopt common rules and to apply them correctly, and mutual trust, i.e. the certainty that the partner will apply the rules effectively. In the context of migration policy, mutual trust precedes and accompanies joint action.

It is precisely mutual trust that is the basis of Schengen cooperation. For example, France and Germany considered that external border controls carried out by each partner were sufficient and similar enough to accept the removal of controls at the shared 'internal' borders between the two States. Thus, there was no reason for France to doubt the controls carried out by the German authorities and, consequently, a person accepted to move around Germany was also lawfully able to do so in France, and *vice versa*.

It was on this basis that common action was possible. The two partners first of all signed the Saarbrücken Agreement before entering into Schengen cooperation with the Benelux countries through the Schengen Agreement in 1985 and the Convention implementing the agreement in 1990. Mutual trust also had to be strengthened by adopting accompanying measures and policies in the field of visas, asylum, return procedures, criminal judicial cooperation or computerised systems such as the Schengen Information System (SIS).

A reading of the 1990 Convention Implementing the Schengen Agreement, whose content would be included in the Schengen Borders Code adopted by the European Parliament and the Council⁹, bears witness to an

6. Especially on the grounds of the principle of loyal cooperation laid down in Article 4(3) TEU.

7. In this respect, Article 21 TEU indicates that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world : democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law'.

8. Article 67, 'It [the European Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.

9. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union, L 105, 13.4.2006.

extremely high level of mutual trust between the partners. In this way, the reintroduction of internal border controls can only take place 'where there is a serious threat to public policy or internal security'. In other terms, it is not envisaged that a partner can show signs of failure in controlling external borders justifying the reintroduction of controls at the common internal border. Only when serious events happen, such as the shooting on the Norwegian island of Utoya during the summer of 2011, or the organisation of political or sporting events such as football championships or a meeting of the G20, can the temporary reintroduction of internal border controls in the Schengen area be justified.

In short, Schengen cooperation lays down the principle that would later be included in the field of migration policy according to which, the action of a Member State is not just restricted to this State but applies to all partners involved in this cooperation. The obligation to control entry to the territory and the decision to accept the entry and the stay of a person has consequences on the other partners due to the principle of freedom of movement and the absence of internal border controls. In substance, Article 67 TFEU recalls that the common policy on asylum, immigration and external border control is based on solidarity in that the action of one State applies to all the partners.

Furthermore, the system can only function if mutual trust is preserved and maintained to a high degree¹⁰. This involves two types of solidarity, which are respect for the obligation of loyal cooperation in applying the common rules and the implementation of operational and financial support mechanisms.

1.2. Solidarity mechanisms in the field of migration policy

The inequality of the Member States faced with migratory phenomena creates an 'asymmetry' as Yves Bertoncini puts it¹¹. Several solidarity mechanisms have therefore been adopted in order to remedy this situation.

Financial support is the first expression of this tangible solidarity between Member States. Four European funds were thus created in order to provide financial support to States, in proportion to their exposure to migration flows. These funds are the European External Borders Fund, the European Refugee Fund, the European Integration Fund and the European Return Fund.

Solidarity is also expressed through the operational implementation of the policy and more precisely in the area of external border management. The European Agency for the Management of Operational Cooperation at the External Borders (better known as Frontex) coordinates external border control operations and can, as part of its missions, provide operational assistance to Member States facing strong migratory pressure. This assistance has for example led to the coordination and the funding of joint sea patrol operations ('Operation Hermes' off the Italian coast in 2011). The agency can also send Rapid Border Intervention Teams also known as 'RABIT'. These teams constitute a rapid intervention reserve, made up of national border guards. They are deployed by Frontex at the request of a Member State confronted with a mass influx of third-country nationals trying to make irregular entry into the territory. Members of the RABIT teams are authorised, under the responsibility of the Member State hosting the intervention, to exercise all necessary competences in order to carry out surveillance of the external borders. In other terms, the national agents seconded to the territory of another Member State are authorised to exercise elements of border control that are normally carried out uniquely by national agents. These European teams successfully went into action in November 2010 when Greece requested assistance in order to better control the migratory flows at its common border with Turkey.

The field of asylum is also concerned by solidarity mechanisms. This is the case, for example, for what is called the Temporary Protection Directive. Adopted in 2001, this directive introduces special protection in the case of a mass influx of displaced persons and strikes a balance between the efforts made by Member States in managing these emergency situations. Within the meaning of the directive, temporary protection must be understood as an exceptional scheme providing immediate and temporary protection in the case of

10. On the issue of mutual trust see also H. Battjes, E. Brouwer, P. de Morree and J. Ouwerkerk, 'The Principle of Mutual Trust in European Asylum, Migration and Criminal Law', Meijers Committee, FORUM Institute for Multicultural affairs, Utrecht, 2011.

11. Y. Bertoncini, 'Migrants, 'Schengen area' and European solidarity', *Tribune - Notre Europe's Viewpoint*, June 2011.

a real or imminent mass influx of displaced persons from third countries and who cannot return to their country of origin in safe and durable conditions because of the situation prevailing in the country.

All these solidarity mechanisms have been adopted over the past ten years, as part of the progressive Europeanisation of the management of migratory flows. They make it possible to restore a sort of balance between Member States and consequently to strengthen mutual trust.

However, the observation of current events at European and national level shows some signs that may create the conditions for erosion of the principle of mutual trust.

Part 2 - The Schengen Area threatened by mutual mistrust

The events in Lampedusa that followed the Arab Spring have crystallised attention and highlighted certain weaknesses in mutual trust between the Member States (2.1). That being said, these weaknesses are deep-rooted as they do not only concern relations between two or more Member States, but more fundamentally Schengen cooperation (2.2).

2.1. The 'Arab Spring' as a revealing factor

From March 2011, the arrival of several thousand Tunisian nationals on the Italian shores of Lampedusa sparked off a chain of reactions that were excessive in every respect. Although the verbal blunders such as that of evoking the risk of a 'human tsunami' should be regarded as 'petty politics', national actions and European responses, however, created the conditions to call the Schengen system and its philosophy into question.

First of all, Italian and then French decisions adopted in reaction to the arrival of migrants in Europe raised serious issues of compatibility with EU law. Whether it concerned the Italian authorities' issuance of residence permits accompanied by a travel permit¹² to persons whose situation comes under the humanitarian clause¹³, or France's reaction leading to increased controls in the Franco-Italian border area and to the blockage of a train coming from Italy¹⁴, the legality of national measures is questionable¹⁵.

This episode would be just a distant memory today, if it had not been exploited by the Italian and French presidents. During a press conference organised on 26 April 2011, Silvio Berlusconi and Nicolas Sarkozy circumvented the issue of their responsibility and shifted the debate onto European level. More precisely, they announced that they were sending a joint letter addressed to both the European Council President Herman Van Rompuy and to the European Commission President José Manuel Barroso, requesting the development of a 'strengthened governance of the Schengen area'. This should include changes to the Schengen evaluation mechanism and to the conditions allowing the reintroduction of internal border controls.

Although there was no real emergency really justifying it, apart from debates on deficiencies in controls and the Greek-Turkish border, the response from the President of the European Commission was given... just three days later. In a single paragraph, the letter validates both options. Although it is true, as Mr Barroso indicates,

12. See also, B. Nascimbene and A. Di Pascale, 'The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa', *European Journal of Migration and Law*, 2011, pp. 341-360. The European Commission recently adopted guidelines on the coherent implementation of the Schengen acquis. In the paragraph on the issuance of residence permits and travel documents to third country nationals, it indicates as an echo to the situation encountered in Italy, 'If a Member State decides to issue residence permits and has the choice amongst different types of residence permits in accordance with its national legislation, it should opt for issuing residence permits or provisional residence permits that are not equivalent to a short stay visa if the migrants do not meet the conditions for travelling within the Schengen area', Communication from the Commission to the European Parliament and the Council, 'Biannual report on the functioning of the Schengen Area (1 November 2011 - 30 April 2012)', COM(2012)230 final, 16.5.2012.

13. In this respect, see Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, 3 May 2011.

14. See for example, S. Carrera, E. Guild, M. Merlino and J. Parkin, 'A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair', *CEPS*, April 2011.

15. The statement made by Commissioner C. Malmström on behalf of the European Commission, indicating that only the spirit of the Schengen acquis in this particular case had not been totally respected by France and Italy, is not to our mind, irrefutable evidence of the legality of national measures, see 'Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis', MEMO/11/538, 25 July 2011.

that the issue of evaluation was under review, it cannot be assumed that the President of the European Commission intended to reintroduce borders as an element to strengthen 'Schengen governance'. Quite the contrary, a report from the European Commission dated October 2010 deemed the existing legal framework sufficient and instead highlighted the Commission's concerns about the reintroduction or the existence of checks observed at certain internal borders¹⁶.

By giving a rapid and positive response to the requests of the two Member States, Mr Barroso drove the issue of 'Schengen governance' to the top of the political agenda and forcedly set the 'Community machine' in motion. Between May and September 2011, 'Schengen governance' was the subject of Commission communications (May), conclusions by the Justice and Home Affairs Council and then by the European Council (June), a European Parliament resolution (July) and legislative proposals by the Commission (September).

Nevertheless, by launching the process to revise existing rules with a view to enlarging criteria to reintroduce internal border controls, the Commission has paved the way for the weakening of mutual trust and solidarity in parallel. In other terms, this validates the assumption that a partner can fail in its mission of external border control and endanger the public policy of its neighbours. If this happens, and in accordance with the arrangements to be defined, the solution lies in the reintroduction of internal border controls. If mutual trust is eroded, solidarity is disregarded as the ultimate solution available for 'virtuous' States consists in retreating behind their borders.

Behind the discourse calling for changes to Schengen precisely to save cooperation, lies hidden another reality, that of foundations cracking and progressively revealing growing signs of mutual mistrust.

2.2. The Schengen Governance Package as an extension

The Schengen Governance Package is based on a communication and two legislative proposals. The first proposal concerns enlarging criteria allowing the reintroduction of internal border controls (2.2.1). The second aims to change the Schengen evaluation mechanism which ensures the application of Schengen rules by Member States (2.2.2).

2.2.1. The reintroduction of internal border controls

Once the prospect of changing the rules was acquired, the issue of how to reintroduce internal border controls still remained. This mainly concerned questioning the new criteria allowing the reintroduction of controls and the relevant procedure. The options discussed are not neutral when examined from the viewpoint of mutual trust and solidarity.

Which criteria?

The Franco-Italian letters and that of the President of the Commission mentioned the possibility of reintroducing internal border controls in the case of exceptional difficulties in the management of external borders. There was wide margin for interpretation and three uncertainties remained.

The first concerned the intense difficulties encountered by the Member States in their obligation to control external borders. The Commission proposed a solution based on persistent serious deficiencies concerning external border control¹⁷. The compromise accepted by the Council is more limiting. In fact, these persistent serious deficiencies must jeopardise, in exceptional circumstances, the overall functioning of the area without internal border control¹⁸. The Council therefore added a criterion.

16. Report from the Commission to the European Parliament and the Council on the application of title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2010) 554 final, 13.10.2010.

17. See 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) 560 final of 16.9.2011.

18. The version of Article 26 of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows: 'In exceptional circumstances where the overall functioning of the area without internal border controls is put at risk as a result of persistent serious deficiencies related to external border control (...) and insofar as these circumstances constitute a serious threat to public policy or internal security within the area without internal border controls or parts thereof, border control at internal borders may be reintroduced (...)', Doc. 6161/4/12, 4 June 2012.

The second issue amounted to determining whether the deficiencies encountered at external border level were enough to lead to the reintroduction of controls or whether they should be linked to a threat to public policy. The issue of maintaining a link with public policy is essential. It allows to assess the willingness to preserve the principles leading to the establishment of Schengen cooperation, but above all, it raises a substantial legal issue. Under the Treaties, exceptions to the principle of freedom of movement - set out four times - can only be based on protection of public policy. In other terms, separating the reintroduction of internal border controls from public policy raises serious legal difficulties.

Whereas several documents presented by the Member States do not always mention the link with public policy¹⁹, the Commission's proposal as well as the Council's working documents do maintain it. In this way, the reintroduction of internal border controls must meet three requirements, i.e. be the result of a persistent and serious deficiency, jeopardise the overall functioning of the area without internal border controls and be a serious threat to public policy and internal security.

Lastly, one more point deserving to be defined is that of the exceptional nature of reintroducing controls. The European Council of June 2011 was extremely clear on this issue, indicating that the reintroduction of controls should be a last resort and on an exceptional basis. The compromise accepted by the Council in June 2012 transposes this approach. The reintroduction of border controls can only take place as a last resort and when all other support measures have not allowed the resolution of the serious threat to public policy²⁰.

In short, the reintroduction of internal border controls is regulated, given that it can only take place in exceptional circumstances threatening the overall functioning of the area without internal border controls due to persistent serious deficiencies related to external border control. These circumstances must, in addition, constitute a serious threat to public policy or internal security within the area without border control. Lastly, controls can only be reintroduced as a last resort when prior measures have not been effective.

The Justice and Home Affairs Council of June 2012 puts an end to the attempts made by certain Member States to separate the reintroduction of internal border controls from the notion of public policy, as was the case in the Franco-German letter of April 2012. In this letter, the Home Affairs Ministers of both States wished to be able to re-establish internal border controls in the case of 'failure by a Member State to fulfil its obligations under Schengen'.

Which procedure?

Another difficulty concerned determining the depositary of the decision-making powers. In other terms, who decides to reintroduce internal border controls? This question puts the European Commission and the Member States in opposition.

The former proposed a significant extension of its decision-making powers. In particular, it provided that the reintroduction of internal border controls would require a request from the Member States followed by the Commission's decision to accept or reject, taken in application of the comitology procedure²¹. In the same way, the Commission proposed to expand its role as regards the decision to extend border controls in emergency situations²².

19. See for example the document sent by the Austrian, Belgian, French, German, The Netherlands, Swedish and the UK delegations entitled 'Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.

20. The version of Article 26 (2) of the Schengen Borders Code accepted at the Justice and Home Affairs Council of 7 and 8 June 2012 reads as follows 'The Council may, as a last resort and as a measure to protect the common interests within the area without internal border controls, where all other measures, in particular those referred to in Article 19A(1), are incapable of effectively mitigating the serious threat identified, recommend for one or more specific Member States to decide to reintroduce border control at all or specific parts of its internal borders', Doc. 6161/4/12, 4 June 2012

21. Article 24 of the Commission's proposal.

22. Article 25 of the Commission's proposal.

The Member States opposed this proposal and largely understated the action of the Commission, whose role remained unchanged²³. Although this option can be explained by a 'stringent' reading of the Treaty, it raises some issues.

Concerning the 'stringent' explanation, it is based on a legal requirement and a logical approach. Once it has been agreed that the criterion for reintroducing internal border controls remains linked to the threat to public policy, this falls within the exclusive competence of the Member States. This stems from Article 72 of the TFEU, which indicates that the measures adopted within the framework of implementing the area of freedom, security and justice, and therefore in the field of migration policy 'shall not affect the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

The logic then boils down to considering who, from the European Commission or from the Member States, is best suited to determine whether or not public policy is threatened? To put it crudely, is a civil servant from the European Commission working in Brussels really in the best position to assess the threat to Portuguese public policy? It would seem not. And as established case law of the Court of Justice recalls, 'nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty'²⁴.

The position of the Member States nevertheless raises two types of consideration. The first concerns the rigorous interpretation of the issue of enforcement powers. These are normally held by the Commission and it is only on an exceptional basis that the Council retains them. Granted, the issue concerns the public policy of Member States, but it is intrinsically linked to the freedom of movement of persons. In this context, a balance must be struck between the players so that the European Commission, without being the decision-making authority, can at least be given the power to make recommendations. There is a strong likelihood that the European Parliament will use its position as co-legislator in this case to negotiate the recognition of greater powers for the European Commission.

The second consideration is based on putting the issue of free movement of persons into perspective. Can one or should one be satisfied with this exclusivity in the decision to reintroduce internal border controls once the issue is raised as part of the implementation of a 'European' or 'common' area of freedom of movement? In other terms, it is 'national public policy' that defines the conditions for the temporary fragmentation of the European area of free movement. In reality, this raises the question of knowing whether the development of a common policy of free movement and of immigration does not in the medium term call for the definition of 'European public policy'. In this way, it would no longer be the threat to national public policy but rather the threat to European public policy that would justify the reintroduction of internal border controls. It is certain that it is a sensitive issue, particularly for Member States. Having said this, it deserves to be discussed in order to define the outline and the system of a 'European public policy' applicable in the field of freedom of movement and of the migration policy²⁵.

Which lessons?

It is difficult to say whether the Arab Spring constituted a reflex or a 'pretext'²⁶ to change the Schengen acquis. In any event, it led to the questioning of mutual trust between the Member States, and consequently, of the freedom of movement in the Schengen area.

23. See, in particular, the conclusions adopted by the Justice and Home Affairs Council of March 2012, '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. See also, Doc. 6161/4/12, 4 June 2012.

24. ECJ, 4 December 1974, 'Yvonne Van Duyn', aff. 41-74, Rec. 1974.

25. On this issue see, in particular, E. Néraudau, *Ordre public et droit des étrangers en Europe. La notion d'ordre public à l'aune de la construction européenne*, Bruylant, Bruxelles, 2006.

26. H. Brady, 'Saving Schengen. How to protect passport-free travel Europe', Centre for European Reform, 20 January 2012, p.33.

In the current state of negotiations, the main fears²⁷ on enlarging the possibility of reintroducing border controls have been allayed. On the one hand, the reintroduction of internal border controls in exceptional circumstances remains linked to the threat to public policy. On the other hand, the reintroduction of border controls can only happen as a last resort and after implementation of support measures, such as the deployment of European Border Guard Teams. In this context, support or solidarity measures precede sanction measures, i.e. the reintroduction of border controls.

The temptation to undermine the Schengen acquis by enlarging the possibility of reintroducing internal border controls has been contained. The result obtained following intense negotiations both at European Council level and at Council of Ministers level nevertheless remains fragile. Indeed, the approach that seeks to sanction States with deficiencies in their external border controls by reintroducing internal border controls or by excluding them from the Schengen area, has received certain steady support among certain players.

Charles Clarke, former British Home Secretary in charge of immigration under Tony Blair - whose country, it must be recalled, is not part of Schengen cooperation - mentioned the possibility of excluding Greece from the Schengen area if it did not fulfil its obligations under Schengen rules²⁸. The French president-candidate Nicolas Sarkozy affirmed during a speech given on 11 March 2012, 'We should be able to punish, suspend or exclude from Schengen a failed State just as we can sanction a eurozone country which does not fulfil its obligations'²⁹.

Although the idea of excluding a State from the Schengen area might seem attractive, especially at a time of elections and creeping xenophobia, it is difficult to implement. Such a prospect would require a revision of the Treaty. In the same way, the parallel made with sanctions applicable in the eurozone is not a pleasant one as here again revision of the Treaty is necessary. Even though the provisions of the Treaty relating to the eurozone provides for a system of specific sanctions against States not complying with the rules, this is not the case for Schengen cooperation. Here, the only sanction applicable falls within the scope of the ordinary rules of procedure, i.e. a finding by the Court of Justice of failure of a Member State to fulfil its obligations under the Treaty. Although it is still legally possible to revise the Treaties, it is however, much more difficult politically as it requires the unanimous agreement of the Member States.

Having said this, the 'outbidding' that politicians are engaging in should not be overlooked. On the one hand, it endorses the idea that a punitive approach towards a failing Member State or States could be a desirable solution. On the other hand, it is likely to receive a positive response from other delegations, just as the April 2012 Franco-German letter highlights, or from senior EU officials. Consequently, there is no guarantee that the punitive approach based on sanctions and exclusion will not supersede in the short, medium or long term the requirement for solidarity. History shows that ideas once brushed aside can be born again from their ashes.

2.2.2. Strengthening of the Schengen evaluation mechanism

The problem applicable to the strengthening of the Schengen evaluation mechanism is of a different nature. Here, the issue stems from the difficulty in adopting a text whose implementation would have very significant effects on mutual trust between Member States.

27. See also a Discussion Paper entitled 'The Future of the Schengen Area', distributed under the Polish presidency before the Informal Justice and Home Affairs Council, Sopot, July 2011, where the title of the sub-sections evoked wavering trust ('Why is trust in Schengen at risk?'), and the rebuilding of confidence ('Strengthening confidence in Schengen'). See also the commentaries published by the European Policy Centre, Y. Pascouau and S. McLoughlin, 'Migratory flows from North Africa: challenges for the EU', *EPC Commentary*, March 2011; Y. Pascouau, 'Schengen area under pressure: controversial responses and worrying signs', *EPC Commentary*, May 2011; Y. Pascouau, 'Schengen area under pressure # 2: The Commission recalls the EU nature of the Schengen system', *EPC Commentary*, May 2011; Y. Pascouau, 'Internal border controls in the Schengen area: much ado about nothing?', *EPC Commentary*, June 2011.

28. 'But the EU should conduct a special review that confronts the issue of whether the Greek authorities can fulfil their responsibilities under the Schengen agreement. If such a review finds that Greece does not satisfy the criteria now being applied to would-be Schengen entrants Bulgaria and Romania, considerations should be given to expelling Greece from the free-passport zone until it is in a position to carry out its responsibilities properly.' in C. Clarke, 'The EU and Migration: A call for action', *Essays, Centre for European Reform*, 2011, p. 27.

29. Speech given by Nicolas Sarkozy, national public meeting, Villepinte (Seine-Saint-Denis), Sunday 11 March 2012.

The need to strengthen the Schengen evaluation mechanism

Within the framework of Schengen cooperation, the Executive Committee, composed of ministers in charge from each State party, created 'a Standing Committee on the Evaluation and Implementation of Schengen'³⁰ in September 1998. The mission of this Committee, composed of Member State representatives, was firstly to ensure that all the necessary conditions for the implementation of the Convention in a candidate State were present and secondly to ensure the correct application of the Schengen acquis by the States already applying the Convention. In this latter scenario, one of the tasks of the Committee, within the framework of visiting committees, was to evaluate external border control and surveillance.

This evaluation mechanism seemed satisfactory, particularly as it preserved the intergovernmental and sovereign nature of Schengen cooperation. On the one hand, the evaluations were carried out by peers. The European Commission participated in the work with observer status, and the European Parliament was excluded. On the other hand, visits to Member States were carried out 'in an order and at intervals' to be laid down by the Executive Committee. In other terms, on-site visits were planned.

Following the entry into force of the Amsterdam Treaty, and the integration of the Schengen acquis into the EU, the tasks carried out by the Standing Committee were transferred to a Council working group, i.e. they retained an intergovernmental nature.

From 2009, the European Commission presented a proposal³¹ with two main objectives. The first was to follow the movement of the communitarisation of migration policies and to entrust the tasks formerly carried out by the Standing Committee and then the Council working group to the European Commission. The second was to strengthen evaluation methods in particular by providing for the possibility of paying unexpected visits to the external borders³².

Although the text presented in March 2009 underwent several changes of a political or technical nature³³, the currently pending proposal pursues the same objectives. But negotiation of the proposal is complicated by a series of problems.

Political and legal problems

Two main problems affect negotiation of the text. The first problem concerns the legal basis. The issue is technical and can be summarised as follows. The European Commission's proposal is based on a provision of the Treaty that provides for the participation of the European Parliament under the co-decision procedure. Given the content and the subject of the proposal, the legal basis chosen is debatable. In fact, there exists a provision of the Treaty, introduced by the Lisbon Treaty, that specifically concerns evaluations³⁴. However, the Commission has not based its proposal on this legal basis, in particular because it results in exclusion of the European Parliament from the procedure, which leads to a political problem.

Faced with this legal problem, two avenues were open: status quo, i.e. maintenance of the current legal basis with the European Parliament as co-legislator, or modification of the legal basis and exclusion of the European Parliament from the procedure. After several months of negotiations, the Justice and Home Affairs Council of

30. Decision of the Executive Committee, 16 September 1998, setting up a Standing Committee on the Evaluation and Implementation of Schengen.

31. Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, COM(2009)102 final of 4.3.2009.

32. See, in particular, Y. Pascouau, *La politique migratoire de l'Union européenne. De Schengen à Lisbonne*, Fondation Varenne, LGDJ, 2011.

33. See, in particular, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012.

34. See, to that effect, Y. Pascouau, 'The Schengen evaluation mechanism and the legal basis problem: breaking the deadlock', *European Policy Centre, Policy Brief*, 2012. For a contrary opinion, S. Carrera, 'An assessment of the Commission's 2011 Schengen Governance Package. Preventing abuse by EU member states of freedom of movement?', *Centre for European Policy Studies, Paper n° 47*, 2012.

June 2012 decided to act in accordance with the opinion of its legal service and to change, with the unanimity of its members, the legal basis on which the proposal is founded³⁵.

This decision immediately caused an uproar among the political groups of the European Parliament. Evoking 'a step backwards' in relations between the Parliament and the Council, a 'breach of the Treaties' or even a 'declaration of war', several political groups highlighted their intention to refer this matter to the Court of Justice. In real terms, this means that once the new evaluation mechanism is adopted by the Council, the European Parliament will ask for it to be cancelled before the Court of Justice of the European Union.

The decision made by the Council to consult the European Parliament to ensure that its position will be taken into account in the broadest possible manner, will probably not suffice to calm passions. It will then be up to the Court of Justice to decide on the issue and to determine whether or not the legal basis now chosen by the Council is the right one.

This 'issue of changing the legal basis' deserves to be examined with some hindsight, for on closer examination, the responsibility of the situation belongs with both the European Commission and the Member States. The Commission, firstly, because the choice of legal basis was questionable. Refusing to alienate the European Parliament, the European executive did not wish to present a modified proposal based on a different legal basis, even though discussions and national pressures to that end were strong. In this situation, it was the Council's responsibility to do this. But the process within the Council was long and difficult. On the one hand, the Polish Presidency of the second half of 2011 did not decide on the matter, mainly due to the lack of consensus between the Member States. Consequently, the dossier was handed over to the Danish Presidency. This slowdown in procedure allowed the Rapporteur of the European Parliament to fully deal with the dossier given that without modification of the legal basis, the EP remained co-legislator. On the other hand, it appeared to be extremely complicated to obtain unanimity in order to change the legal basis. Portugal and Luxembourg had been opposed to this for quite a while. Once these countries had rallied to the cause, Romania showed its opposition to the change, just a few days before the June Council. In substance, up until the day before the JHA Council, the issue of unanimity remained pending.

These difficulties were a boon for the European Parliament. As time passed, it became more and more difficult to withdraw the matter from it. Although one might legally challenge the attitude of the European Parliament, which knew the legal problem perfectly and had done so for a long time³⁶, it however took full advantage of the political opportunity in order to obtain powers that the Treaty had not explicitly entrusted to it. The Parliamentary Assembly is therefore today in its role when it vilifies the Council's decision to change the legal basis with the result that it is excluded from the procedure. It remains to be seen, now, how far the reprisals of the European Parliament can go. In a best-case scenario, the Parliament could limit its refusal to cooperation in the Schengen issue, i.e. it could refuse to adopt the changes to the Schengen Borders Code in relation to reintroducing internal border controls. In a worst-case scenario, the Parliament could call into question its relationship with the Council by refusing to negotiate the Schengen issue but also other fields under the co-decision procedure. Visibly, the Parliament chose the second option. On 14 June it decided to suspend its cooperation with the Council on five dossiers³⁷ until a satisfactory solution is found concerning Schengen governance.

Whatever happens in this 'issue', the European Parliament must nevertheless keep in mind several elements governing its action. On the one hand, the issue of the legal basis is key in a Union built on respect for the

35. Legally, modification of the legal basis of a Commission proposal is possible with a qualified majority in the Council if the Commission accepts it, or if not, with unanimity in the Council. In the present case, the Commission did not deem it necessary to modify its proposal, thus refusing to alienate the European Parliament, which obliges the Council to obtain the unanimity of its members in order to modify the legal basis featuring in the Commission's proposal.

36. The European Parliament mentions this in the Resolution adopted on 7 July 2011. On this occasion, it stressed 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': 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.

37. The five dossiers concern: amendment of the Schengen Borders Code; combating attacks against information systems; the European Investigation Order; budget 2013 relating to internal security and EU passenger name records.

rule of law. This in fact defines the scope of an act, its adoption procedure and the competence of the different institutions. If the institutions have a different interpretation of the choice of the legal basis, it is up to the Court of Justice, as a last resort, to resolve the issue. Increased politicisation of the debate would simply call into question this balance that guarantees the rule of law. On the other hand, the temptation to call cooperation with the Council into question finds limitations in the EU system as there is a principle of mutual sincere cooperation that applies to all these institutions³⁸. In other words, suspension of cooperation with the Council could not endure without violating the principle of mutual sincere cooperation.

This episode is certainly a blow to mutual trust between the Council and the European Parliament. It is not certain however, that Schengen cooperation has received a similar blow. A small exercise in forecasting would even prove the contrary.

On the one hand, the European Parliament is reversing its decision to suspend cooperation with the Council but still intends to mark its disapproval by blocking changes to the Schengen Borders Code. The conditions for reintroducing internal border controls have not been enlarged and the current situation remains. The outcome is positive insofar as the request for a useless change has not been followed up. Firstly, the current conditions for reintroducing internal border controls are sufficient. Secondly, no follow up has been given to the request formulated by two officials who today no longer hold political office.

On the other hand, today, the Council cannot legitimately retreat on the 'Schengen Evaluation' issue. It must therefore within a short time frame, amend, and improve the mechanism. In doing so, this will lead to stronger mutual trust. The latter can only be consolidated with the implementation of an integrated (with major involvement of the European Commission) and strengthened (including unexpected visits) evaluation system of external border controls.

Ultimately, the 'issue of the legal basis' could have a positive outcome in strengthening mutual trust in the management and functioning of the Schengen area.

The theory of radioactivity

Although Schengen cooperation is based on mutual trust, it would be naïve to consider that this cooperation is, in the same way as cooperation in the field of internal security, exempt from a certain degree of mutual mistrust between Member States. The same applies to this field as it does to radioactivity. The latter exists in a natural state but it is only when its intensity increases abnormally that it becomes dangerous.

Thus, the abnormal or artificial increase in mutual mistrust in the field of Schengen cooperation undermines freedom of movement. On the one hand, the temptation to reintroduce internal border controls is stronger and the opinions/avenues to achieve this are more pressing. On the other hand, the will to accept the strengthening of mutual trust through greater integration is less pronounced. Both phenomena do not help to solidify the framework of free movement of persons - quite the opposite in fact.

Current events and the sensitive nature of issues affecting Schengen make it a 'high-priority' field of analysis. Also, the question is raised of whether other fields of migration policy are following the same trends.

Part 3 - Signs of contamination in other fields of the Schengen acquis

Migration policy is a field that is characterised by strong activity both at European and national level. In certain fields, this momentum, both legislative and operational, goes hand in hand with a phenomenon identical to that encountered in the framework of Schengen cooperation. Thus, several signs raise fears of mutual mistrust developing between the Member States in several fields linked to the area of free movement.

38. Article 13(2) TEU indicates that 'Each institution shall act within the limits of the powers conferred upon it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

These fields touch upon Romania and Bulgaria's accession to the Schengen area (3.1), to the 'Dublin' system relative to the distribution of asylum seekers (3.2) and to representation agreements between Member States in the field of issuance of visas (3.3).

3.1. The delayed accession of Romania and Bulgaria to the Schengen area

The first sign of mistrust that is blighting Schengen cooperation concerns the refusal to accept the entry of Bulgaria and Romania into the Schengen area. Although both candidate States fully meet the conditions for accession to the area of free movement³⁹, several delegations are opposed to this, in particular on the grounds of corruption problems observed in these Member States.

This opposition raises two issues. The first falls under the link made between accession to the Schengen area and corruption. The latter has never been a criterion to be taken into account to determine whether a State meets the conditions required to join the Schengen area. By using the issue of corruption, States have therefore shifted debate from the technical arena (evaluation of conditions required to eliminate internal border controls with Romania and Bulgaria) to the political arena. This shift is the source of the second issue. As long as a delegation uses the argument of corruption to oppose the entry of Romania and Bulgaria into the Schengen area, their accession remains impossible, as the accession decision must be unanimously taken by Council members.

This situation therefore raises the issue of the reasons causing the political blockage. It would seem difficult, a priori, to invoke the fear of misapplication of Schengen rules insofar as the Commission and the European Parliament both recognise that Romania and Bulgaria meet the technical conditions for accession. It is therefore not on these States that the blame for mistrust should be laid. A quick glance at the Schengen map, however, provides us with an explanation. When Bulgaria enters the area of free movement, there will be territorial continuity in the Schengen area with Greece. Now, the difficulties encountered by this Member State in managing migration flows, especially at its border with Turkey, is a source of concern for several Member States⁴⁰.

Thus, the possibility of Romania and Bulgaria's accession to the Schengen area is in fact delayed because of the mistrust of certain States regarding Greece. Although Greece benefits from a support plan, it is not sufficient to allow it to restore effective controls and mutual trust. Consequently, Romanian and Bulgarian citizens are still deprived of the fundamental freedom to move in an area with no internal border controls. This situation should evolve in any case, as the European Council of 1-2 March 2012 requested that a decision concerning Romania and Bulgaria's accession to the Schengen area be adopted in September 2012.

3.2. The 'Dublin System' and the suspension clause

The European Union adopted a set of rules with a view to establishing a Common European Asylum System (CEAS). Featuring amongst these rules is the 'Dublin' regulation. This text establishes the rules applicable to determine the Member State responsible for an asylum application⁴¹. The Regulation lays down the principle that only one Member State is responsible for examining an asylum application. The objective is to avoid asylum seekers being sent from one country to another but also to avoid abuse of the system in the case where a single person makes several asylum applications. Although determination of the State responsible is carried out on the basis of prioritised criteria, the implementation of these rules, in practice, makes the State in which the asylum seeker has entered the common territory bear the responsibility.

39. See, in particular, the report by the European deputy Carlos Coelho in which the following is indicated: 'At this moment, both Romania and Bulgaria have proved that they are sufficiently prepared to apply all the provisions of the Schengen acquis in a satisfactory manner', 'Report on the draft Council decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania', A7-0185/2011, 4 May 2011.

40. See 'Note from the Belgian, the French, the German, The Netherlands, the Austrian, the Swedish and the UK delegations on Common responses to current challenges by Member States most affected by secondary mixed migration flows', Doc. 7431/12, 9 March 2012.

41. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, L 50 of 25.2.2003.

For example, a person enters through Poland and lodges an application for asylum in France. When the application is lodged, the French authorities will try to determine which State is responsible for the asylum application. In most cases, it is the State through which the asylum seeker entered that is responsible, in this case, Poland. This system serves to attribute the responsibility of examining the asylum application to the States situated along the periphery of the area of free movement.

However, this system of distributing asylum seekers has shown its limits, particularly for peripheral States which, in addition to receiving a large number of asylum seekers, have an 'asylum system' with major deficiencies. This is precisely the case of Greece, whose asylum system does not allow it to receive asylum seekers or to process the applications in compliance with EU law and the European Convention on Human Rights, as demonstrated by the European Court of Human Rights in the *M.S.S.* case⁴², and by the Court of Justice of the European Union, in the *N.S.* case⁴³.

Faced with these difficulties, which can lead to violation of EU law and of human rights, the European Commission had proposed to establish a mechanism allowing the suspension of the transfer of asylum seekers towards these Member States. More precisely, the Commission proposed that 'when a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation could add to that burden, that Member State may request that such transfers be suspended'.

The Commission's proposal was not accepted by the Member States. Certain delegations highlighted, in particular, that implementation of the suspension clause would result in encouraging asylum seekers and migrants to enter Europe through the State in difficulty. In this way, these persons would be assured that they could lodge an asylum application in a Member State other than that through which they entered, as the Dublin mechanism would be suspended.

Instead of a suspension mechanism, the Member States proposed the introduction of an early warning system. It provides that when a problem in the functioning of the asylum system of a State jeopardises the application of the Dublin Regulation, corrective mechanisms must be put in place. The main objective of this mechanism is to avoid risks of dysfunction rather than to deal with the consequences. In any event, this mechanism does not provide for suspension of the Dublin mechanism⁴⁴.

At first sight, the refusal to establish a suspension mechanism between the Member States could be considered as the expression of a lack of solidarity between partners. This assertion must however be qualified insofar as there is now the suspension obligation resulting from the case law of the European Court of Human Rights and of the Court of Justice⁴⁵. The two courts now compel Member States not to transfer asylum seekers when they risk inhuman or degrading treatment in the country of transfer. Once the obligation established by case law is formulated, it could appear unnecessary to try to include it in secondary legislation.

Although the issue of suspension of Dublin transfers is now resolved, this is not the case for the issue relative to relocation mechanisms. These would aim to redistribute beneficiaries of international protection among the Member States. For example, when a Member State has a large number of refugees on its territory, these refugees could be 'relocated' on the territory of another Member State as a token of solidarity and to free up the protection systems of Member States receiving large numbers of refugees or beneficiaries of subsidiary protection. Here again, however, the Member States refuse to be constrained by such a mechanism. There is a relocation mechanism concerning Malta, but this mechanism only functions on a voluntary basis.

42. ECHR, 21 January 2011, '*M.S.S. v Belgium and Greece*'.

43. ECJ, 21 December 2011, '*N.S. v Secretary of State of the Home Department*', C-411/10.

44. See S. Peers, 'The revised 'Dublin' rules on responsibility for asylum seekers: the Council's failure to fix a broken system', *Statewatch Analysis*, April 2012.

45. On the *M.S.S.* case, see, in particular, F. Maiani and E. Néraudau, 'L'arrêt *M.S.S./Grèce et Belgique* de la Cour EDH du 21 janvier 2011 - De la détermination de l'Etat responsable selon Dublin à la responsabilité des Etats membres en matière de protection des droits fondamentaux', *Revue du droit des étrangers*, 2011.

Solidarity among Member States does not seem to be a priority in asylum policy. The suspension mechanism for the transfers of asylum seekers only exists under the constraint of European jurisdictions and relocation still remains a remote project. The low level of solidarity in the field of asylum fuels the development of the 'every man for himself' rule, and consequently mutual mistrust.

3.3. Suspension of visa representation agreements

The field of visa policy is the source of interesting forms of cooperation between Member States as they do not have consular services in every country in the world. When a third-country national wishes to obtain a visa for a Member State that does not have a consular service in the applicant's country of origin, s/he must in practice go to the nearest neighbouring third country in which the Member State has established a consular service. In order to avoid these sometimes long and costly procedures, the Member States have signed bilateral agreements through which a Member State with a consular service in a third country accepts on behalf of another Member State to process the visa application and issue the visa once the application has been accepted.

France, which has the most extensive consular network in the world⁴⁶, has signed several agreements of this type with its European partners. At the end of 2011, France announced that from 1 January 2012 it would terminate a representation agreement signed with Denmark. The end of the cooperation is based on France's impossibility, under Danish legislation, to refuse to issue a visa. In other terms, the French authorities are only authorised to issue visas and cannot be a substitute for the Danish authorities and refuse to issue a visa even if the Danish authorities would have accepted. In a press release dated 4 April 2012, the Danish Foreign Minister mentioned that the representation agreements with France, but also with Germany and Austria, remain suspended or terminated⁴⁷.

While this situation creates major problems for third-country nationals who require a visa in order to go to Denmark, it also shows a lack of mutual trust between the European partners. In fact, the reason for the breakdown lies in the impossibility for a delivering State to refuse the issuance of a visa, when the destination State has accepted. The will to preserve a veto power demonstrates that a Member State may have no confidence in the decision made by another. It could be a further sign of mistrust between Member States.

These examples reveal how mutual trust has been undermined to give way to mutual mistrust. Although these signs are reasons to fear a weakening in the freedom of movement, are they irremediable? Nothing could be less certain insofar as there are reasons to hope that the free movement of persons will not be repeatedly infringed but can instead be preserved and guaranteed by the EU institutions.

Part 4 - Reasons not to lose hope: the institutions taking responsibility

The area of free movement has been put under pressure in recent months, sometimes in an extremely violent way and without joint consultation as the last letter from the French and German Home Ministers has shown. For all this, should we fear that the principle of free movement is being threatened?

The more pessimistic among us will recall that for several years now, freedom of movement, particularly that of European citizens, has been repeatedly attacked by Member States. While the Metock case, judged by the Court of Justice in 2008, allowed certain Member States, in this case Ireland and Denmark, to express their willingness to call into question the *acquis* in the area of freedom of movement⁴⁸, several other Member States

46. Y. Tavernier, 'Les services des visas, parents pauvres des Affaires étrangères', French National Assembly, information report No 1803, 1999.

47. <http://um.dk/en/news/newsdisplaypage/?newsID=5BC5B233-62F3-4223-8917-CF75026293B2>

48. The Metock case concerned the right of residence for family members of EU citizens. The Court of Justice, opting for an extensive interpretation, indicated that the right of residence for family members of a citizen of the European Union must be guaranteed, whether or not the person had previously resided lawfully in another Member State, and whether or not the person entered that Member State before or after the union. The lack of criteria concerning lawful residence was a main source of discontent among Member States. ECJ, 25 July 2008, 'Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform', case C-127/08.

followed in their footsteps for different reasons. This was the case in 2010 when France criticised the freedom of movement benefiting Roma people. In 2011, the Netherlands raised the possibility of sending Polish workers who were unemployed back to their country. Recently, in May 2012, the British Secretary of State indicated that the United Kingdom was examining the possibility of limiting freedom of movement for European workers, especially Greeks, in the case of a collapse of the eurozone. These elements, when aligned, show that a 'negative coalition' of the Member States could press for changes to the rules relating to freedom of movement of EU citizens. Recent proposals to change Schengen rules could therefore become part of a general movement of mistrust, which, if we need reminding, moves forward in fits and starts and is more often than not dictated by national electoral agendas.

The more optimistic among us will, on the contrary, highlight the fact that freedom of movement, as a major achievement of European integration, is not threatened. While this assertion corresponds to reality, in our view, it is nevertheless important to emphasise that preserving freedom of movement implies that each institutional player contributes. Furthermore, analysis of the role of players in the 'Schengen governance' framework shows that balances should be preserved.

4.1. The Council: enemy of freedom of movement?

At first sight, the Council, through the Member States, seems to be the institution that is most inclined to infringe on freedom of movement. The joint letter sent by Claude Guéant and Hans-Peter Friedrich is an eloquent example of the attempt made by certain delegations to weaken Schengen cooperation and mutual trust by forcing their national political agenda on their European partners⁴⁹.

That being the case, this type of manoeuvre, which consists in asking other delegations to approve a political approach and to transform it into a legal instrument can only come to fruition if it receives approval of a qualified majority in the Council. As it happens, the reactions shown during the Justice and Home Affairs Council of April 2012, during discussions relating to the Franco-German proposal demonstrate that the Member States are extremely divided on enlargement of the criteria to reintroduce internal border controls. Therefore, several Member States cautiously welcomed the letter from the French and German Home Affairs Ministers. Certain delegations, headed by Sweden, expressed their attachment to freedom of movement and their refusal to go any further in legislative changes. The position of certain delegations could be summed up in this way: 'Schengen is not the problem but the solution'.

In addition, the result of the French presidential elections on 6 May 2012, entrusting the role of President of the French Republic to François Hollande, will have a decisive impact on the issue of 'Schengen governance'. While France spent several months seeking to enlarge as far as possible the reasons for reintroducing border controls, the new President of the French Republic will most certainly join the fold of Member States concerned about preserving the principle of freedom of movement. From the role of hot-headed discussion leader, France will probably now slip into the garb of responsible peacemaker. That, in any case, is the tone of the press conference given by the new Home Affairs Minister Manuel Valls, at the end of the Justice and Home Affairs Council of 7 June 2012, during which he made clear in particular his desire to 'renew a climate of confidence and appeasement'.

In this context of protecting freedom of movement and of modifying the European political landscape, the adoption of a decision relating to the accession of Romania and Bulgaria into the Schengen area in September 2012 is a realistic prospect.

49. While the French presidential campaign led the president-candidate Nicolas Sarkozy to toughen his discourse on the theme of border reinforcement, there was nothing to indicate that a German minister could co-sign this type of letter with a French minister. On the contrary, Germany has shown a careful and responsible approach in this field. Furthermore, Guido Westerwelle, the Minister for Foreign Affairs, declared he was greatly in favour of freedom of movement. Should we see in this the isolated act on the part of the Minister for Home Affairs?

4.2. The Commission: the delicate exercise of 'damage control'

While the Commission seemed surprisingly receptive to the Franco-Italian requests following events in Lampedusa, it is not certain that it will welcome new proposals with the same fervour, such as those presented by Messrs Guéant and Friedrich. First of all, the great reluctance shown by several Member States during the Justice and Home Affairs Council of April 2012 is sufficient to justify this restraint. Moreover, it is imperative that the Commission remain focused on the ongoing negotiations. In this respect, it plays a role of 'go-between' for the Council and the European Parliament in order to guarantee that the text is adopted. Furthermore, it must ensure that the content of the proposal does not constitute a disproportionate interference to the principle of freedom of movement.

The Commission is also under pressure to achieve results. Firstly, the interruption of negotiation would be a failure for it. It is in fact in the Commission's interest to reach an agreement on the text it has presented. Failing this, it would prove that the proposal was unnecessary or that it did not convince the legislator of the importance of adopting it. Secondly, the Commission is obliged to monitor the negotiation process to limit interference to freedom of movement as much as possible. In fact, and whatever happens, the Commission will remain the institution that formally accepted to propose a change to Schengen rules. Furthermore, and so as not to appear as the 'initiator of the dismantling' of Schengen, it must be guarantor of the mechanism. This involves, on the one hand, preserving the link between reintroducing controls and a serious threat to public policy, and, on the other, recalling that any interference to freedom of movement must be as limited as possible.

4.3. The European Parliament: guarantor of freedom of movement?

In this exercise, the Commission should be able to hope for strong support from the European Parliament. In fact, the parliamentary institution clearly affirmed in July 2011, that 'on no account, can the influx of migrants and asylum seekers at external borders *per se* be considered an additional ground for the reintroduction of border controls'⁵⁰. It also indicated that any proposal by the Commission should aim at specifying the implementation of existing provisions.

It seems obvious that the European Parliament will bring all its weight to bear in order to avoid any excessive interference of the principle of freedom of movement and that its role in negotiations will be vital. A contrary outcome would be the negative sign of the European Parliament's ability to guarantee civil liberties in an area of freedom of movement that is unequalled at international level.

Changes to the legal basis determined by the Justice and Home Affairs Council of June 2012 in the 'Schengen Evaluation Mechanism', nevertheless muddy the waters on the outcome of the Schengen Governance Package, as indicated earlier. Although it seems clear that certain parliamentary groups will strongly push for the European Parliament to introduce an action for annulment against the future evaluation mechanism, the Parliament's position in relation to changes to the Schengen Borders Code - which could waver between total blockage and feeble or full collaboration with the Council - remains much more blurred and deserves to be closely monitored.

4.4. The Court of Justice: keeper of the temple

Since the beginning of European integration, the Court of Justice has worked incessantly to preserve the balance of the Treaties and to guarantee the full implementation of the four freedoms of movement. While little demand has been placed on it in the field of migration policy, which is highly regrettable, the Court has nevertheless sketched the main thrusts of case law which, firstly, restricts the attempts to limit the rights conferred by the European Union, and secondly, champions solidarity and mutual trust as the cornerstones of freedom of movement.

50. 'European Parliament Resolution of 7 July 2011 on changes to Schengen', P7_TA(2011)0336.

Case law of the European Court of Justice has always considered freedom of movement as a principle and limits to this freedom as exceptions that must be interpreted in a restrictive manner. Nothing suggests that the Court of Justice should follow a different path regarding migration policy and the issue of reintroducing internal border controls within the EU.

On this last point, the Court also pointed out in the *Melki and Abdelli* case⁵¹ that although the national authorities are still empowered to carry out identity checks in the border area between two Schengen States, the exercise of these checks would not be considered as equivalent to those carried out systematically at the borders.

The Court took a similar stance in the *Chakroun* case⁵² concerning the justification of personal resources as part of exercising the right to family reunification. It recalls that the authorisation of family reunification is the general rule and that the Member States' right to enforce the 'sufficient resources' requirement 'must be interpreted strictly'.

Lastly, in relation to mutual trust, the Court of Justice highlighted, in a case concerning the removal of asylum seekers to Greece⁵³, that it is the basis for achieving the area of freedom, of security and of justice and more particularly the Common European Asylum System. In the same case, the Court recalled the importance of Article 80 TFEU which sets forth that the implementation of migration policy is governed by the principle of solidarity and fair sharing of responsibility between the Member States.

In this way the Court is successively sketching a working framework applicable to migration policy. It indicates, first of all, that the leeway preserved by the Member States in the implementation of EU law shall not have the effect of disproportionately infringing the exercise of the rights conferred on individuals. It also indicates that this policy is based on mutual trust and governed by the principle of solidarity.

Conclusion

There are many reasons to hope that the freedom of movement of persons will not be weakened due to certain circumstances. The role and the responsibility of each institution helps to limit the 'infringements' that could affect freedom of movement. In other words, the Schengen area will not explode any time soon under the impact of increasing introduction of internal border controls. And that is good news.

However, it would be irresponsible not to consider the signs of mutual mistrust surrounding Schengen and the migration policy for what they really are. Firstly, if they are to be considered as a response to the 'radioactivity' in the field of freedom of circulation, it is necessary to measure their intensity. Moreover, it is not because the Member States challenge the European Commission's intervention that mutual mistrust has reached a high level throughout the entire political field. Very often it is an institutional issue that drives reservation. For example, the ministers willingly accept to cooperate with each other but refuse to allow the Commission to look after cooperation, as in this case it is considered as an outside player. By contrast, when the intensity of mutual mistrust threatens the functioning of a policy, as is the case in the field of asylum, it is necessary to pay attention to it and to take the necessary measures to contain it, especially by showing solidarity.

Secondly, signs of mutual mistrust must be put in context along with their possible effects. While it seems today that the progressive 'dismantling' of the Schengen area is requested by a very small group of Member States, it is the underlying logic that should be given consideration as it appears to be particularly worrying. This logic is reversing over fifty years of European integration devoted to the constant quest for greater freedom of movement. For the first time in 'the history of the Community', the European Union, driven by the founding States, could choose the path towards curbing freedom. This groundswell, which is reflected in recent events, is disturbing enough for it not to be taken at face value. Freedom of movement is an invaluable good and it is our common duty to preserve it.

51. ECJ, 22 June 2010, '*Aziz Melki and Sélim Abdeli*', cases C-188/10 and C-189/10.

52. ECJ, 4 March 2010, '*Rhimou Chakroun*', case C-578/08.

53. ECJ, 21 December 2011, '*N.S. V Secretary of State for the Home Department*', case C-411/10.

Executive Summary

Solidarity and mutual trust are the cornerstone of the Schengen area of free movement of persons and they ensure that it is upheld. They are the cornerstone because this area is based on a high level of mutual trust between partners, particularly concerning controls carried out at the entry into the common territory. They uphold it, because solidarity mechanisms, both financial and operational, offset the burden that weighs mainly on the States situated along the periphery of the area.

However, just as with many policies linked to internal security, mutual trust and solidarity are often confronted with mutual mistrust. The balance between mutual trust and mistrust could thus be compared to radioactivity. The latter exists 'in a natural state' and it is only when its intensity increases excessively that it becomes dangerous. In this way, there is a 'normal' degree of mutual mistrust in the area of free movement but its 'abnormal' or 'artificial' increase could damage the development and the maintenance of freedom of movement.

The advent of the 'Arab Spring' and the subsequent arrival of several thousands of Tunisian nationals on the shores of the Italian island of Lampedusa, was followed by several measures that resulted in a sudden increase in mutual mistrust. The request formulated by France and Italy aimed at changing the Schengen rules in order to enlarge criteria to reintroduce internal border controls and the acceptance to give substance to this, are the main symbolic elements.

This Policy Paper reviews in detail the various stages that followed this episode, but also analyses other fields linked to freedom of movement, in order to determine whether solidarity and mutual trust are giving way to growing mutual mistrust that would jeopardise the free movement of persons in the Schengen area.

Although this Paper illustrates the fact that signs of mutual mistrust are indeed tangible, their impact seems to remain limited as yet. The Policy Paper emphasises, however, that maintenance of freedom of movement is not yet a given, and that its preservation requires that the European institutions - Council, Commission, European Parliament and Court of Justice - act in their official capacity in order to ensure its protection. To that effect, the Policy Paper reminds us that 'Freedom of movement is an invaluable good and it is our common duty to preserve it'.

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DISCUSSION PAPER



The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach

Yves Pascouau

After two years of negotiations, which were often tense and occasionally characterised by political theatrics, the Schengen governance legislative package has finally been adopted. Stemming from a context of political crisis and with the objective (for the French and Italians) of reinforcing Member States' control of the Schengen mechanism, the legislative package yields quite a different result. Firstly, it has paved the way for quicker adoption of a new evaluation mechanism verifying the application of Schengen rules by Member States and has reinforced their implementation and efficiency. Further, the amendments to the Schengen Borders Code give greater clarification to the conditions under which States can reintroduce control at internal borders. Finally, the amendments to the Schengen rules were concurrent with a strengthening of the roles played by the European Commission and European Parliament in Schengen governance. Ultimately, this episode illustrates a strong movement toward integration, where confrontations between the Community method and intergovernmental approach have given way to more subtle balance.

In April 2011, in the wake of the Arab Spring, several thousand Tunisian migrants arrived on the shores of the Italian island of Lampedusa. The Italian government, which deemed the situation difficult to manage, appealed for support from its European partners. However, they did not reach the same assessment of the situation and denied Italy's request for support.

Deeply offended and with a backdrop of dramatic rhetoric¹, the Italian government decided to grant the Tunisian nationals residence permits with authorisation to travel. These documents were intended to allow the Tunisian nationals to travel in the Schengen area and, more specifically, to enter France. However, these residence permits were granted in violation of the rules of free movement within the Schengen zone, as stipulated in the Schengen Borders Code.

Given this situation, France retaliated in two ways. Firstly, for public security reasons, several trains from Vintimille were blocked and police controls at the Franco-Italian border were ramped up. Secondly, France seized the opportunity to force Italy into the legally questionable act of jointly asking for a revision of the Schengen rules.

On 26 April 2011, Nicolas Sarkozy and Silvio Berlusconi announced during a press conference that they had sent a letter to the President of the European Commission, requesting a revision of Schengen governance. The revision was to include a modification of the evaluation mechanism and a modification of the conditions permitting the reintroduction of internal border control.

On 29 April 2011, with unusual speed, the President of the European Commission agreed to the Franco-Italian request. In a letter to the French and Italian presidents, José Manuel Barroso highlighted that 'the temporary restoration of borders is one of the possibilities, provided this is subject to specific and clearly defined criteria, that could be an element to strengthen the governance of the Schengen agreement'.

In June 2011, in a strained political climate, with different national and European actors in opposition over the modification of Schengen governance, the European Council defined the framework of action to be taken. It highlighted the need to strengthen the system of Schengen evaluation and agreed to the proposal to create a new procedure for reinstating internal border control. Although the European Council accepts the principle of such a procedure, its implementation is strictly structured since it must only be applied as a 'last resort' and 'in exceptional circumstances'.² With the framework presented, the Heads of state and government invited the Commission to present a legislative proposal in September 2011.

On 16 September, the Commission presented a communication entitled 'Schengen Governance – strengthening the area without internal border control'³ and two legislative proposals, one related to strengthening the Schengen evaluation mechanism⁴ and the other related to the reintroduction of internal border control.⁵

Even as outlined by the European Council, the proposals presented by the Commission revealed a complicated context in which contradictory issues are pitched against one another. Firstly, on a logical level, the Commission remains responsible for ensuring the free movement of people whilst introducing legal amendments for a new procedure allowing for the reinstatement of internal border control. The paradoxical and delicate nature of the task is clear.

Subsequently, on a functional level, the Commission went on to take the opportunity, using the legislative proposals, to significantly augment its powers. In an area in which intergovernmental tendencies remain strong, the Commission's proposals were received by the Member States as a provocation. This was evidenced by the high number of subsidiarity warnings⁶ issued by several national parliaments in response to the Commission's proposals. The Commission's ambitious proposals were thereby counterbalanced by the Member States.

After two years of negotiations, fraught with tensions between the different actors – between the Council and the European Parliament⁷ in particular – Schengen governance underwent a transformation. Analysis of the two texts relative to the procedure by which internal border control⁸ is introduced (I) and the Schengen evaluation system⁹ (II) demonstrates that Schengen cooperation is still characterised by strong tensions between intergovernmental and Community methods. That said, the new measures define much more clearly the conditions under which internal and external border control can be implemented by Member States. Furthermore, the intergovernmental approach is weakened by European integration and gives way to the Community method.

I. Internal border control in the Schengen area

The amendments to the Schengen Borders Code¹⁰ affect two areas. Firstly, they touch on already existing regulations regarding the reintroduction of internal border control. The new draft of the Code brings in requirements which apply a stringent framework to Member States' realm of action (A). Secondly, the amendments confirm the creation of a new procedure for the reintroduction of border control. The application of this measure seems, however, illusive given the difficulty of fulfilling all the required conditions (B). In both areas, the new measures introduce greater control of the sovereignty clause within EU law and, in consequence, an advance of communitisation.

A. The demarcation of existing rules: subordination of the sovereignty clause

The option for Member States to reintroduce internal border control is a *sine qua non* for their participation in the Schengen agreement. Conceived as a veritable 'sovereignty clause', this option is described in a paragraph of the convention implementing the Schengen agreement adopted in 1990. The measures put forward the basic conditions under which border control may be reintroduced, namely: the need for the existence of a threat to public order or national security; the temporary nature of the reintroduction, be it premeditated or applied in an emergency; and the obligation to inform other parties in cooperation.

Following the integration of the Schengen *acquis* into the European Union through the Treaty of Amsterdam, the adoption of the Schengen Borders Code in 2006 provided the European Parliament and Council with the opportunity to bring the conditions governing the application of the 'sovereignty clause' under the framework of EU law. In four articles, the Schengen Borders Code defines and clarifies the conditions for the application of border control, the procedure to adhere to, especially in emergency situations and, finally, the conditions under which Member States may extend the duration of border control.

The new draft of the Schengen Borders Code¹¹, adopted under the Schengen governance package, brings in new elements relating to the conditions (1) and procedure (2) of reintroducing border control that limit the discretion of Member States in the implementation of the 'sovereignty clause'.

1. Conditions and criteria for the reintroduction of border control at internal borders

The new article 23 of the Schengen Borders Code reiterates the essential conditions for border control to be reintroduced, namely a threat to public policy and the exceptional nature of such a measure. It also introduces several clarifications.

The first clarification indicates that the reintroduction of border control may be applicable at 'all or specific parts' of internal borders. This addition simply reflects the reality of the situation inasmuch as the reintroduction of border control need not necessarily be applicable at all borders but only at certain sections.¹²

Secondly, the Schengen Borders Code clarifies the maximum duration for which border control may be reintroduced, whether it is planned or in an emergency. Planned reintroduction is still authorised for an initial 30-day period, and the new measure states that 30-day prolongation periods are possible, but with a maximum duration of 6 months. The new regulation thus introduces a new limit which did not exist before. With regard to emergency situations, it stipulates that control can be reintroduced for an initial 10-day period and extended for a maximum period of two-months. In reality, however, these limitations do not have a great impact, since until now Member States have not reintroduced control for periods exceeding this.

The third clarification is, however, more significant. The regulation highlights that such measures 'should only be adopted as a last resort'. Furthermore, this requirement should be read in combination with the new article defining the criteria which must be met for border control to be reintroduced. More precisely, in order to decide upon the reintroduction of border control as 'a last resort', the Member State must assess its necessity and proportionality. When a State decides to reintroduce border control it must evaluate whether it would firstly be 'likely to adequately remedy the threat to public policy', and secondly, assess the proportionality of the measure in relation to the threat. Over the course of the assessment, the Schengen Borders Code adds that the State should take two elements into consideration. Firstly, it should assess 'the likely impact of any threats to its public policy' including terrorist threats and threats posed by organised crime. Secondly, the assessment should take into account the likely impact of such a measure on the free movement of persons.

Concretely, these measures oblige Member States to weigh up the interests of free movement and security. Is the reintroduction of border control indispensable to counter a threat to public policy? Is the measure proportional? In other words, is there another measure which may counter the threat without

interfering with free movement? In this respect, the preamble to the regulation reiterates that 'in accordance with the case-law of the Court of Justice of the European Union, a derogation from the fundamental principle of free movement of persons must be interpreted strictly and the concept of public policy presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.¹³

The amended measures in the Schengen Borders Code thus impose new requirements upon States which must be able to prove both the necessity and proportionality of border control reintroduction. The assessment and monitoring procedure of these new requirements also underwent some modifications.

2. The procedure for reintroducing border control at internal borders

From the beginning of the Schengen agreement, States that decided to reintroduce border control at internal borders, whether planned or in an emergency, have had to inform their partners. This requirement, formed in rather general terms in 1990, was given greater precision in the adoption of the Schengen Borders Code. It provides a list of information to be presented and details the conditions under which consultations would take place in order to organise cooperation and assess the proportionality of the intended measures. The new amendments maintain this structure and comprise some specific points.

In the 2006 version, the Schengen Borders Code states that the Member State planning to reintroduce border control or doing so in an emergency must inform its partners of the reasons for the intended reintroduction and provide details of 'the events that constitute a serious threat to public policy'. The new text goes further. States must now provide 'all relevant data detailing the events that constitute a serious threat to its public policy'.

Henceforth, simply referring to an event will not be sufficient to reintroduce border control at internal borders. It will fall upon the State in question to present all relevant information concerning the event and to justify the decision to reintroduce border control on the basis of an evaluation of attending interests. The amendment also states that the Commission may, if necessary, 'request additional information from the Member State concerned.'

The obligation to supply more information is accompanied by the organisation of an extended consultation process. Firstly, information provided by the concerned Member State, including classified information, is presented to the European Parliament and Council. This demonstrates a certain 'communitisation' of procedure as well as allowing for political supervision, notably by the European Parliament.

Furthermore, the Commission, and now the Member States too, can issue an opinion on the submitted information. The Commission is also required to issue an opinion if it deems that the intended reintroduction does not meet the criteria of necessity and proportionality.

Finally, the consultation phase following the issuing of opinions can now be completed through 'joint meetings' between the Member State intending to reintroduce border control and the other States, especially those directly affected by such measures. Thus, intervention by concerned parties will no longer only be carried out through informal consultations but will, in certain circumstances, take place in meetings which will allow each party to examine the necessity and proportionality of the intended measures.

In short, States which want to reinstate border control must provide details of the situation to the Commission and its partners and, if required, convince them of the necessity of such measures through joint meetings. This 'explanation process' carries three major consequences. Firstly, the new measures strongly restrict Member States' discretionary powers. Or, from a different angle, the Member States' 'safeguard clause' is subject to a powerful instance of 'communitisation'. Further, the amendment gives the Commission and the Member States the opportunity to appeal to the Court of Justice when, for instance, a state reintroduces border control without having convinced its partners of the necessity and proportionality.

Finally, in a strained political context in which the free movement of persons is exploited, especially for electoral ends, the adoption of a constraining legal framework safeguards the area of free movement.

Certainly, the amendments to existing Schengen Borders Code measures, by subordinating the sovereignty clause, constitute a major step in the Schengen integration process. The limitation of Member States' sovereignty has been eclipsed, however, by the debate over the creation of a new procedure for the reintroduction of border control at internal borders.

B. The new procedure of reintroduction of border control

This point has certainly attracted the most attention. A product of the 'political posturing' by Sarkozy and Berlusconi who turned the reintroduction of border control into a symbol of State authority within the Schengen zone, the outcome is far from what they were hoping for. Indeed, the new procedure is deeply European in its internal approach (1) and may never be implemented (2).

1. A national decision taken 'under a specific Union-level procedure'¹⁴

The new article 26 of the Schengen Borders Code provides for the possibility of temporary reintroduction of control at internal borders 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk'. This is a complex procedure and raises numerous legal issues.

It is worth reiterating that this measure preserves the Schengen cooperation approach. On the one hand, the new procedure does not detract from the possibility for a State to reintroduce border control on the original basis of a serious threat to that State's public policy.¹⁵ On the other hand, the new procedure does not amend the principle by which the decision to reintroduce border control belongs to the Member States.

In its legislative proposal, the Commission had actually proposed to amend this measure by giving itself the power to decide to reintroduce border control. The proposal was both politically unacceptable for the Member States and difficult to uphold on a legal level. Indeed, article 72 TFEU (Treaty on the Functioning of the European Union) states that the responsibility for the maintenance of law and order and the safeguarding of internal security is incumbent upon Member States. If the reintroduction of border control is based on a threat to public policy, as proposed by the Commission, the decision to reintroduce control at internal borders falls upon the Member States.¹⁶

That said, the new regulations place this national prerogative within a 'specific Union-level procedure' which warrants clarification and discussion. Certainly, what is new here lies in the fact that the national decision to reinstate border control is adopted on the Council's recommendations, itself adopted on proposal from the European Commission.

It is therefore two EU institutions – the Council and the Commission (following the established procedure or requested by Member States) – that initiate the procedure. Although the recommendation does not constitute a legal obligation, it does assume a real political dimension. To begin with, the recommendation is adopted by the Council, which is to say, by peer review, and on proposal by the Commission. The effect of this organised procedure is to politically instruct the State in question to reintroduce border control. Furthermore, paragraph 3 of article 26 states that a Member State which does not implement the recommendation 'shall without delay inform the Commission in writing of its reasons'. The article adds that the Commission will then present a report to the European Parliament and Council assessing the reasons presented by the recalcitrant State and the consequences of the inaction on the common interests in the area without internal border control. Ultimately, the process is politically persuasive and fits entirely within a European institutional dimension.

The European dimension is strengthened yet again when one examines the conditions which may lead the Council to recommend the reintroduction of border control. Among the numerous conditions which can

form the basis of a recommendation, which we will come back to later in more detail, is the condition that the exceptional circumstances 'constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof'. It is therefore no longer the threat to national public policy that triggers the procedure, but the threat to public policy in the common area of free movement of persons.

Given this formulation, an observer could draw two radically opposed interpretations. The first leads one to consider that this condition forming the basis for the reintroduction of border control has no legal basis in the Treaty. Indeed, in application of article 72 TFEU¹⁷, dispensation from the principle of free movement of persons can only be based on a threat to the public policy of a Member State.

The alternative interpretation is more progressive and rests upon the dynamic of European integration. It would be to consider that the European Union and the Member States have reached a new stage in the formation of a common area and have taken a step towards the creation of a 'European public policy'. We have already highlighted that 'national public policy', which forms the basis for the reintroduction of control at internal borders, and in consequence breaks up the European area of free movement, brings into question the definition of 'European public policy'.¹⁸ The formulation given in article 26 of the Schengen Borders Code could be seen as the manifestation of this new approach. Thus, the reinstatement of border controls would be based, in exceptional circumstances, on this concept of public policy raised to Union level. Following this approach, much in the manner of European citizenship, 'European public policy' would not replace but be in addition to national public policy.

It is difficult to establish which of the two interpretations is the correct one. Natural optimism would lead us to lean toward the second. The Court of Justice alone can solve it, if ever it comes to that.

Whatever the case may be, and to return to the measures of the Schengen Borders Code, the national decision comes under a 'specific Union-level procedure'. This measure is certainly rather removed from the concerns that stirred Mr. Sarkozy and Mr. Berlusconi during the first stages of the Arab Spring, who saw in Schengen governance the opportunity to regain national power.

2. Conditions so strict as to render the application of the procedure illusive?

Any obscurity surrounding the criteria for implementing the new procedure was quickly dispersed by the European Council in June 2011. The Council clearly defined the framework which the new regulations must adhere to. The legislature did not deviate from directives from the European Council.

Article 26 of the Schengen Borders Code defines the conditions in which the Council can recommend the reintroduction of internal border controls to one or several Member States. Thus 'in exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control ... and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced ... for a period of up to six months'. It adds that the Council's recommendation comes 'as a last resort and as a measure to protect the common interests'.

Put more simply, the Council cannot act unless several elements are in play, notably: the exceptional circumstances putting the common area under threat; the serious and persistent deficiencies of a Member State's ability to control its borders; a serious threat to public policy in the common area; and finally, if no support measure recommended by the Commission during its evaluation of serious deficiencies, such as the deployment of European border guard teams or the proposal of a strategic plan has adequately remedied the identified serious threat. Furthermore, the new regulations oblige the Council to evaluate the necessity and proportionality of such 'recommended' measures on the basis of 'detailed information' provided by the various concerned parties. Finally, it should be highlighted that the Council recommendation can only be

taken on proposal from the Commission. In other words, the Commission has to be convinced that the conditions are met in order to present a proposal to the Council.

It is therefore rather difficult to imagine the context in which the Council would adopt a recommendation to reintroduce internal border control for one or more Member States. Indeed, only under exceptional circumstances could all the required conditions be combined.

Greece, which has shown some serious difficulty in managing its external border, could, for some, represent a situation in which all the exceptional circumstances are combined. It is, of course, impossible to prove such a claim. The assistance Greece receives is greatly improving its capacity to manage its external border. And more to the point, no procedure relative to a serious threat to public policy – national or European – was initiated. And finally, the lack of territorial continuity between Greece and other countries in the Schengen area¹⁹ tempers any suggestion of a serious threat to public policy and internal security in the area without border control.

Ultimately, it is possible to conclude that the specific procedure defined in article 26 of the Schengen Borders Code may never be implemented. This is supported by the idea that, even before this procedure can begin, Member States would have had to instigate the original procedural process of reintroduction of border control based on a threat to national public policy.

The new procedure is similar to a nuclear weapon; the important thing is not to use it, but rather to possess it. The usefulness of such a 'weapon' can be called into question, however, in an area where free movement of persons is the principle. Unless the procedure is intended to 'sanction' Member States who do not fulfill their responsibility to manage external borders. But here, too, it is disproportionate in as much as EU law possesses strong corrective mechanisms such as financial and operational support, and where appropriate, procedures for failure to meet obligations.

The amendments to the Schengen Borders Code enforce the communitisation of the original procedure of reintroduction of internal border control, especially through the addition of criteria that increase Member States' responsibilities. Similarly, the new procedure of reintroduction of border control follows the same approach, but in a slightly less pronounced way. Although it is subject to a procedure that requires the intervention of both the Commission and Council, the decision to reintroduce border control remains national. Also, in the Commission's assessment of the serious deficiencies in external border control management, it can recommend that the concerned Member takes specific action, but it cannot recommend the closure of a border crossing point. Although this possibility is noted in point 8 of the preamble, it is not mentioned again in article 19a, which hints at Member States' reticence to recognise the Commission's authority in this respect.

Despite a few points of resistance related to the sovereign nature of the issue, the revision of the Schengen Borders Code has resulted in an important instance of communitisation. A similar quality also marked the second part of the Schengen governance package relating to the Schengen evaluation mechanism.

II. The Schengen evaluation mechanism

The evaluation mechanism is of crucial importance to Schengen functioning and has, for a long time, been an area reserved for a select insider group. This process emerged from the shadows during negotiations as a result of disagreements between the Council and the European Parliament about the legal basis for the proposed amendment. Sidelined by the Council²⁰ from the legal procedure following amendments to the legal basis, the European Parliament reacted strongly. It threatened to bring annulment proceedings against the future regulation amending the evaluation mechanism and, in violation of the principle of mutual sincere cooperation²¹, to put a year-long freeze on discussions with the Council about five proposals relating to justice and internal affairs. Once the theatrics and gesticulations were behind them, the Council, in close collaboration with the European Parliament, adopted the amendment for the creation of a new Schengen

evaluation mechanism.²² This defines the new means to evaluate and verify the application of the Schengen *acquis* (B) and in doing so, defines the roles of the Commission and Council (A).

A. A new division of powers

The evaluation mechanism of the Schengen *acquis* was created in 1998 within the framework of Schengen intergovernmental cooperation. As it gave pride of place to national authority, the measure had to be amended in order to increase its effectiveness and to secure it within the new legal and institutional framework brought about by the communitisation of 1999 and the entry into force of the Treaty of Lisbon. Aside from the improvements to assessment, to which we will return later, is the central question of the division of authority. In other words, which powers would be attributed to the European Commission?

Unsurprisingly, and in a way that has become habitual in the European legislative process, the Commission presented an ambitious proposal in which it also generously defined its role. The Commission considered that, as of 2010²³, it should be 'responsible for the application' of the evaluation mechanism, and have the power to make recommendations with regard to evaluated Member States.²⁴ This organisation of powers reflects the Commission's desire to re-establish its role and area of responsibility in the new institutional framework and within its role as guardian of the treaties.

Although the Schengen *acquis* has been well integrated into the European Union, the approach that prevails in terms of EU cooperation reflects intergovernmental tendencies even more greatly. Therefore, to take away the monitoring and control of the evaluation process from the Member States was not acceptable. The final text therefore re-establishes Schengen cooperation in a more 'balanced' way.

Firstly, it is both the Commission and the Member States that are jointly 'responsible for the implementation of the evaluation and monitoring mechanism'.²⁵ Therefore, the Commission is included in the new measure, but in a more progressive way. It is responsible for the planning and preparation of the evaluations, in the evaluation process itself and for the adoption of evaluation reports.

Following this, the power to recommend corrective measures addressing any deficiencies of evaluated Member States comes under the Council's jurisdiction. The justification of the preservation of power gave rise to the composition of one of, if not the, longest preamble points in the history of legislation.²⁶ The Council's maintenance of power is justified in three points. Firstly, through the specific reasoning of article 70 of the Treaty which allows for the establishment of exceptional peer review in place of assessment usually carried out by the Commission. Secondly, this specific procedure guarantees that the political process is upheld since any shortcomings must first be peer reviewed, which is to say, discussed at ministerial level. Finally, conferring the power to the Council also deals with the sensitive nature of the issue since the recommendations are 'often touching on national executive and enforcement powers'.

Essentially, evaluating the application of the Schengen *acquis* is a sensitive area for Member States which fully intend to keep control of a process which could implicate one or more of them with regard to their border activity. Whichever way one looks at it, the new procedure constitutes a step in the direction of 'communitisation' of the Schengen evaluation system compared with what was in place previously. The permanent Schengen evaluation commission, founded in 1998 and composed of Member State representatives, has been replaced by the Commission and the Council. What was an intergovernmental structure is now managed by EU institutions. Furthermore, the Commission's presence at every stage of the evaluation process, especially in the planning and preparation stages, will, in practice, reduce the role of the Member States in the process. Also, each stage of the evaluation process is subject to legal review by the Court of Justice and political review by the European Parliament and national parliaments. The mechanisms for cooperation that were developed outside the legal framework of the EU, effectively to sideline the Commission, Court and Parliament, have been brought around to the Community approach.

With the sensitive question of power distribution settled, next comes the simpler question of the definition of the new evaluation process and its governance.

B. The organisation of the evaluations

The amendment details the scope of the evaluations (1), the kind of evaluations that can be used (2) and the consequences of these evaluations (3).

1. The scope of the evaluations

In compliance with the amendment, an evaluation verifies the 'application' of the Schengen *acquis* and verifies that the 'necessary conditions of application' of Schengen regulations are met. This distinction relates, firstly, to the application of the rules by States that are members of the Schengen area and, secondly, to the evaluation of the conditions of application for candidate states. The text does state, however, that the evaluation for entry into the Schengen area is not applicable to Member States whose 'evaluation will already have been completed at the time of entry into force of this Regulation.' In other words, the evaluations already completed concerning Romania and Bulgaria are not affected.²⁷ Since the evaluation concerning Cyprus has already commenced based on the old procedure, the new one will not apply until January 2016.²⁸

As stated in the regulation's preamble, the evaluation mechanism and monitoring 'should' cover all aspects of the Schengen *acquis*.²⁹ Although this concerns, first and foremost, the evaluation of external border control and the absence of internal border control, article 4 of the amendment makes it clear that the scope of evaluation is much broader. Evaluations may cover the effective and efficient application of accompanying measures in the areas of visa policy, the Schengen Information System, data protection, police cooperation and judicial cooperation in criminal matters. It is not only aspects related to border control *sensu stricto* that constitute the main focus of evaluations, but the combination of measures which allow and maintain the area of free movement of persons without internal border control. The breadth of scope justifies the use of article 70 of the Treaty as a legal basis.

The preamble then goes on to make a few important reminders. It emphasises first that the evaluation of the application of Schengen rules should encompass all relevant legislation and operational activities.³⁰ That is, the evaluation covers normative action relating to implementation as well as its operational counterpart. It then states that the evaluation should ensure that the application of the Schengen *acquis* is carried out with respect for fundamental principles and norms, which is to say, with respect for human rights. The preamble adds that, during the evaluation and monitoring process, 'particular attention to respect for fundamental rights in the application of the Schengen *acquis* should be paid'.³¹

The emphasis put on respect for human rights gives rise to a certain number of consequences. First and foremost it is the Commission's responsibility to guarantee that the framework of the evaluation, whether it takes the form of questionnaires or detailed inspection programmes, is committed to respect for fundamental rights. If this requirement is not satisfactorily fulfilled, it could constitute powerful means of leverage and pressure from the European Parliament. It is easy to imagine legal proceedings at the Court of Justice to annul an evaluation's questionnaire for failing to properly address fundamental rights.

2. Types of evaluation

Article 4 states that evaluations can be carried out through questionnaires or on-site visits which can be planned or – and this is what constitutes real progress in the area – unannounced.

Inspections are organised on a multiannual basis covering a five-year period as established by the Commission. The programme states the order in which Member States are to be evaluated each year and that each Member State must be evaluated once in the five-year period. The Commission also establishes annual evaluation programmes on the basis of risk analyses provided by Frontex.³² These programmes include a provisional time-schedule for on-site visits, list the Member States to be evaluated and include proposals for the areas of evaluation with regard to the application of the Schengen *acquis* by a given Member State or group of states when an evaluation targets a specific area of the Schengen *acquis*. The annual evaluation programme also includes an un-communicated section which lists the unannounced on-site visits.

Although sending out questionnaires and organised on-site visits were already part of the framework of the old procedure, the possibility of sending out unannounced on-site visits surely must significantly reinforce the evaluation mechanism and, therefore, mutual trust between Member States. However, this can only be possible if the visit is, in fact, unannounced and its secrecy upheld. This condition must be met for all visits to internal borders which are not subject to any prior announcement. However, this supposition is not guaranteed for external border visits. The regulation states that the detailed programme of visits, as established by the Commission, is to be communicated to the State in question 'at least twenty four hours before'. This means that the intention to carry out a visit could be communicated several days before, thereby reducing the unannounced nature of the visit. Another measure in the regulation presents a possibility for leaks; national experts participating in unannounced visits are appointed at least 11 days before they begin.³³

Aside from the risk of information leaks, unannounced on-site visits are clearly an important element of improving the evaluation mechanism. Indeed, this type of inspection replaces peer review, which was particularly ineffective because it was planned. Also, the role conferred to the Commission in creating the questionnaires, the management of visits and establishment of detailed programmes for on-site visits, guarantees the 'objectivity' of the evaluation.

Ultimately, the new measures guarantee a good balance between the different actors invited to participate in the whole evaluation process. The measure should also assure a 'high level of mutual trust' is maintained, without which Schengen cooperation cannot properly function.

3. The outcomes of evaluation

The evaluations, questionnaires or on-site visits conclude in evaluation reports drawn up by experts from the Member States and representatives of the Commission. These reports collate lists of deficiencies identified during the evaluation which are classed as 'compliant', 'compliant but improvement necessary' and 'non-compliant'.

The draft evaluation report is sent to the evaluated Member State which can provide comments which may be included and reflected in the draft evaluation report. These documents are then sent to Member States who can also submit comments. Following these exchanges, the Commission then adopts the evaluation report. The report may be accompanied by recommendations for remedial measures to address identified deficiencies, such as engaging Frontex assistance. Based on this, the Commission can then present a proposal to the Council for adoption, by qualified majority, of the recommendations.

The recommendations require the state in question to present, in variable timescales according to the seriousness of the situation, an action plan to address the identified deficiency or deficiencies. The Member State is also invited to report on the implementation of the action plan at regular intervals. In the case of persistent deficiencies, the Commission may organise further on-site visits. If the deficiencies continue and are deemed to constitute a threat to the overall functioning of the area without internal border control, the procedure to reintroduce border controls at internal borders can be instigated.

The new measures aim to provide the evaluation with tools that will adequately address the identified deficiencies and that can lead to – if necessary and as 'a last resort' – the initiation of the procedure to reintroduce control at internal borders. Although it has been mentioned that the likelihood of internal border control actually being reintroduced seems rather slim, the procedure is not lacking in measures to exert political pressure. Indeed, the Commission is required to keep the European Parliament and national parliaments informed at all stages and of evaluation results. Such institutions could well play an important political role in addressing the deficiencies.

The Schengen evaluation mechanism has been anticipated for several years now, and it is finally in position. It distributes the powers and responsibilities between the different European institutions in an area in which they were previously absent. It provides mechanisms to respond – one hopes in an efficient manner – to identified deficiencies in the application of the Schengen *acquis* at internal and external borders. The amendments are

crucial to assure a high level of mutual trust between Member States and therefore, for the continuation of free movement of persons in the Schengen area.

Conclusion

It took two years for the Schengen governance package to be adopted. The highly politicised negotiations were certainly no easy process. From the very beginning, the European Commission presented legislative proposals which, since they conferred greater power to the Community executive, antagonised Member States. Then, the Council's decision to amend the legal basis and exclude the European Parliament from the adoption procedure of the Schengen evaluation mechanism caused further political tension. Upon learning of the amendment, the Parliament reacted fiercely and tried, for several weeks, to re-establish its role at whatever cost. It attempted to link the text relating to the evaluation mechanism with the Schengen Borders Code using a 'bridging clause'. This would have enabled a linking-up of the two texts and meant that any amendment in one would bring about the same change in the other and, in doing so, would have enabled the European Parliament to play a part in decisions relating to the two texts. Despite repeated effort, Parliament managed only to assure itself the right to be informed.³⁴ Member States, for their part, were highly vigilant in order to protect their rights as far as possible.

Despite a particularly heated political climate in which institutions were obliged to concede, if not surrender, certain powers, negotiations came to a rather balanced result. Member States made sure their rights were respected in the areas of public policy, the Commission gained a greater role in all areas, including the evaluation process, a role that is very likely to increase in practice, and the European Parliament became an actor in its own right in Schengen governance. Ultimately, the outcome of the Schengen governance package is a far cry from the political histrionics that characterised its beginnings in April 2011. It reflects an instance of European integration in which the confrontations between the Community method and intergovernmental tendencies have given way to a more subtle balance.

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Endnotes

- 1 The Italian President, Silvio Berlusconi, referred to the situation as a 'human tsunami'.
- 2 The European Council mentions specifically that “a mechanism should be introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons. It should comprise a series of measures to be applied in a gradual, differentiated and coordinated manner in order to assist a Member State facing heavy pressure at the external borders. These could include inspection visits and technical and financial support, as well as assistance, coordination and intervention from Frontex. As a very last resort, in the framework of this mechanism, a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules. Such a measure would be taken on the basis of specified objective criteria and a common assessment, for a strictly limited scope and period of time, taking into account the need to be able to react in urgent cases. This will not affect the rights of persons entitled to freedom of movement under the Treaties.” European Council 23 & 24 June 2011, doc. EUCO 23/1/11.
- 3 Communication from the Commission to the European Parliament, Council, the European Economic and Social Committee and the Committee of the Regions 'Schengen Governance - strengthening the area without internal border controls', COM(2011) 561 final, 16 September 2011.
- 4 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, COM(2011) 559 final, 16 September 2011.
- 5 Proposal of regulation from the European Parliament and Council to amend the regulation (EC) n° 562/2006 in order to establish the common criteria relative to the temporary reintroduction of internal border controls under exceptional circumstances, COM(2011) 560 final, 16 September 2011.
- 6 According to the protocol relating to national parliaments within the European Union, annexed to the Treaty of Lisbon, national parliaments may issue reasoned opinions, also called warning mechanisms, if they believe the principle of subsidiarity has not been observed in a proposed legislative act.
- 7 The European Parliament indeed reacted fiercely against the Justice and Home Affairs Council's decision in June 2012, to amend, by unanimous action, the legal basis of the Schengen evaluation mechanism. This amendment effectively excluded the European Parliament from the legislative procedure. In a strongly worded communication to Council, the European Parliament even threatened to submit an appeal before the Court of Justice.
- 8 Regulation (EU) N° 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) N° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295, 6.11.2013.
- 9 Council Regulation (EU) N° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013
- 10 Regulation (EC) n° 562/2006 of the European Council and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ, L 105/1, 13 April 2006.
- 11 Regulation (EU) n° 1051/2013 of the European Parliament and the Council of 22nd October 2013 amending the regulation (EC) n° 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295/1 6 November 2013.
- 12 Regarding this point see the Commission's biannual reports on the functioning of the Schengen area.
- 13 Point 6 of the preamble of regulation (EU) n° 1051/2013.
- 14 See point 9 of preamble.
- 15 As indicated in article 26, paragraph 5, “This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 23, 24 and 25.”
- 16 Without going into the hypothetical decision that would implicate States associated with the Schengen area which have not taken part in the vote.
- 17 “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”
- 18 Y. Pascouau, (2012) Schengen and solidarity: the fragile balance between mutual trust and mistrust, Policy Paper 55, *Notre Europe/European Policy Centre*, p. 19.
- 19 Until the inclusion of Romania and Bulgaria in the Schengen area.
- 20 The proposal to amend the Schengen evaluation was initially based on a legal foundation involving a 'co-decision' procedure (art. 77 TFEU). In June 2012, under advice from its legal services, the Council unanimously decided to amend the legal basis of the text (art. 70 TFEU) reducing the European Parliament's role to that of simple observer.
- 21 Article 13, paragraph 2 of the TEU states that, 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'
- 22 Council Regulation (EU) n° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 06 November 2013.
- 23 Proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2010) 624 final, 16 November 2010.
- 24 Amended proposal for a regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen *acquis*, COM(2011) 559 final, 16 November 2010.

- 25 Article 23 of regulation n° 1053/2013.
- 26 Point 11 of the preamble of regulation n° 1053/2013.
- 27 Point 28 of the preamble of regulation n° 1053/2013.
- 28 Point 27 of the preamble of regulation n° 1053/2013.
- 29 Point 13 of the preamble of regulation n° 1053/2013.
- 30 Point 15 of the preamble of regulation n° 1053/2013.
- 31 Point 14 of the preamble of regulation n° 1053/2013.
- 32 Within the framework of its responsibilities, Frontex publishes an annual report on migration flow over the external borders of the European Union.
- 33 Article 10, paragraph 2, 'In the case of unannounced on-site visits, the Commission shall, no later than two weeks before the on-site visit is scheduled to commence, invite Member States to designate experts. Member States shall designate experts within 72 hours of receiving that invitation.'
- 34 The new article 37a of the Schengen Borders Code states only that, "the European Parliament shall be immediately and fully informed of any proposal to amend or to replace the rules laid down in Council Regulation (EU) n° 1053/2013."

NOTES

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Schengen: travel is free

The abolition of borders between different European states was undoubtedly a revolutionary process, not only for citizens but also for trade and consequently the economy. But what now seems a matter of fact has had a thirty-year history, specific access requirements and a clear idea of freedom and security.

- by **Cecilia Toso / Oxygen 24 / 24.10.2014**
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*Interview with **Yves Pascouau***

Director of Migration and Policy Mobility of the European Policy Centre

What has become a habit today, moving back and forth between the territories of different European countries without having to worry about border controls, is actually a revolutionary milestone. But, as often happens, we have forgotten what life used to be like for travelers, if we exclude the nostalgic moments when we think back to the long lines at the border, or when we set foot in one of the European countries that were unwilling or could not join the Schengen area. And above all, we know very little about how this important achievement of free movement came about.

Therefore, we have spoken with one of the people who is responsible daily for our mobility in Europe, Yves Pascouau, the Director of Migration and Policy Mobility of the European Policy Centre, an independent think tank specialized in integration.

How was Schengen converted from an agreement by 5 States to an essential part of European Union law?

The story of the Schengen Area started in 1984 in France and Germany. At that time, both States were performing checks at their common land border, creating major traffic problems. The existence of long queues of lorries, buses, and cars was a double failure: the proclaimed freedom of movement was not ensured in Europe and internal border checks had a strong economic impact in delaying goods and products from being rapidly delivered in the Common Market. In order to overcome this situation, in 1984, France and Germany decided to sign a bilateral agreement establishing the progressive suppression of border checks between them. Belgium, Luxembourg, and the Netherlands, already engaged in a similar type of cooperation, asked to join the project. It started a few months later with the 1985 Schengen Agreement which was supplemented five years later with the Schengen Implementing Convention. Under the Schengen Agreement, signed on June 14, 1985, five countries committed themselves to gradually abolishing the borders between them, accompanied by more effective surveillance of their external borders. It established: short-term measures simplifying internal border checks and coordinating the fight against drug trafficking and crime; and long-term measures such as the harmonization of laws and rules on drug and arms trafficking, police cooperation, and visa policies.

The Convention implementing the Schengen Agreement, signed on June 19, 1990, set out how the abolition of internal border controls would be applied, as well as a series of necessary accompanying measures. It aimed to strengthen external border checks, define procedures for issuing uniform visas, establish a Schengen Information System, and take action against drug trafficking. The implementation of the Schengen Agreements started in 1995 with the abolition of border controls between the five founding States and also Spain and Portugal. From that point onwards, the Schengen Area has constantly expanded to new States. While developed as an intergovernmental cooperation, the Schengen Acquis (the 1985 Agreement, the 1990 Implementing convention and decisions taken by the Schengen executive Committee) was integrated into the legal framework of the EU by the 1999 Treaty of Amsterdam.

What requirements do States have to meet in order to join the Schengen Area?

Joining the Schengen Area is a technical and political decision. From a technical point of view, applicant countries must fulfil a list of pre-conditions, such as their readiness and capacity: to take responsibility for controlling the external borders on behalf of the other Schengen countries and the issuing of uniform Schengen visas; to cooperate efficiently with law enforcement agencies in other Schengen countries, in order to maintain a high level of security once border controls between Schengen countries are abolished; to apply the Schengen Acquis including *inter alia* control of land, sea, and air borders (airports); issuing of visas; police cooperation, protection of personal data; to connect to, and use the Schengen Information System. The European Commission evaluates whether the applicant State fulfils the requirements. If so, the European Commission issues a report stating that the conditions for joining the Schengen Area are technically met. The full participation in the Schengen Area is made conditional upon a political decision taking the form of a unanimous decision made by the Council of Ministers of the European Union. This double mechanism explains why Romania and Bulgaria remain outside the Schengen Area. Although these States have satisfied the technical requirements, there is still no unanimity among the States to let them in.

Does any European Union Member countries have not adhered to it yet and why? Is the free movement of their citizens in the Area restricted accordingly?

While some States are in the process of becoming a Member of the Schengen Area, the United Kingdom and Ireland choose not to take part in this project. This decision does not affect the rights of freedom of movement their citizens enjoy under EU law.

More concretely, UK and Irish citizens have the right to enter and reside in another Member State for up to three months or for work, family, or study purposes for a longer period. By remaining outside the Schengen Area, United Kingdom and Ireland continue to perform border checks at their external borders. Conversely, people flying from Ireland or the United Kingdom to the Schengen Area are subject to border checks at Schengen Area entry points.

It is also commonly perceived that the abolition of controls on persons, whatever their nationality, when crossing internal borders represents a danger for the security of the European Union. Do you share this concern?

It is a widespread idea that the Schengen Area brings ‘security deficit’. It should be underlined that from the very beginning, the Schengen cooperation (the 1985 Agreement and the 1990 Convention) has devoted several provisions to police and justice cooperation in a number of fields related *inter alia* to combating crime, particularly illicit trafficking in narcotic drugs and arms, the unauthorized entry and residence of persons, customs and tax fraud, and smuggling. Cooperation in the security field has constantly evolved over the years. Hence, and since the opening of internal border checks, the Schengen zone has not been transformed into an insecure Area to live and travel in.

In what situations is a Member country authorised to reintroduce internal border controls?

Member countries are allowed to reintroduce internal border checks for one reason; where there is a serious threat to public policy or internal security. This can happen in three specific situations: immediate action (Utoya massacre), planned situation (sports events) or where deficiencies in controlling external borders constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof. In all of these cases, reintroduction of internal border checks has to follow a specific procedure and should be temporary.

The European Policy Centre continuously works on a range of themes, also covering mobility and immigration. In order to clarify for States their obligations on these issues stemming from their membership in the European Union. Last year you and some other researchers launched an interesting project.

The European Migration Law project has been developed alongside my position at the European Policy Center. Gathering a group of lawyers and academics, the project is based on one strong belief, rights created by EU immigration and asylum law will

produce their full effect if professionals and practitioners know those rules and use them. But professionals and practitioners (judges, lawyers, trade unions, social workers, academics, researchers, NGOs, governments, international organizations ...) may struggle to keep on top of constantly evolving EU rules and their interpretation by the Court of justice of the EU. EuropeanMigrationLaw.eu has been developed to respond to their needs. It is a useful tool that offers direct, simple, and updated information on legal and jurisprudential developments in this particular field. In addition, the website offers users the possibility of subscribing to regular updates sent by e-mail informing them about relevant news (texts, jurisprudence, reports, press releases, etc.) adopted at EU level.