

The Schengen Governance Package – another missed opportunity?

Issue 2015/1 · February 2015

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Context: the border control crisis in 2011

Presumably the biggest crisis the Schengen members have gone through came in 2011, when Italy granted a temporary residence permit to Tunisian migrants that allowed them to travel into other Member States of the Schengen Area. France reacted promptly by reinstating border controls. Technically, both France and Italy acted in compliance with the EU *acquis*. Nevertheless, the European Commission and European Parliament (EP) considered the behaviour of both countries to be in strict conflict with the spirit of Schengen and with the expected level of solidarity between its Member States. On 26 April 2011, the then French President, Nicolas Sarkozy, and Italian Prime Minister, Silvio Berlusconi, sent a letter to the President of the European Commission and to the President of the European Council. Both leaders demanded that the blurry rules indicating when controls at internal borders can be reinstated had to be clarified. The concern of the letter sent to the Commission was primarily better management of external borders, the fight against irregular migration, reinforcement of Frontex, the readmission policy and a requirement for a common European asylum system by the end of 2012. The letter also dealt with the internal dimension of Schengen cooperation. Namely, it demanded specific solidarity mechanisms “examining the possibility of temporarily restoring internal border controls in the event of exceptional difficulties in managing the common external borders” (Sarkozy-Berlusconi, 2011). It also called for a more structured political oversight of the Schengen Area by the Commission.

This Policy Brief reflects on the Schengen Governance Package as a reaction to the incident at the French-Italian border and assesses its possible impact in resolving future disputes. It argues that the package will not help to solve the problems of the Schengen Area since it only targets border controls whereas solidarity and burden-sharing should also be in focus.

The Schengen Reform Package

In September 2011, the Commission presented its first communication called ‘Schengen Governance – strengthening the area without internal border control’ which covered both an evaluation mecha-

The Schengen Area of free movement is considered to be one of the most substantial and, in the eyes of many, most successful achievements of European integration. In 2014, the ‘Schengen Governance Package’, which alters the rules of the Schengen co-operation, came into force. It is a response to conflict among Member States in maintaining the common zone of freedom of movement. This Policy Brief aims to analyse how this package was developed and to assess whether it represents a suitable response to the conflict and difficulties within the Schengen agreement. The Brief argues that the Governance Package only touches on one part of the problem, namely border controls, whereas it does not deal with solidarity and burden-sharing and hence represents another missed opportunity to improve cooperation in the Schengen Area.

nism and the rules for reintroducing internal border controls¹. The proposal highlighted a stronger ‘Union-led approach’ and called for a significant strengthening of the role of the Commission. It was meant to be responsible for implementation and supervision of the new rules as well as for defining measures which should be taken by the states that do not fulfil the Schengen *acquis*. Furthermore, the reintroduction of internal border controls had to be approved by the Commission².

This communication, and especially the proposed shift of competencies to the Commission, was met with extensive opposition from Member States. They perceived it as a threat to their authority over border control. Dissatisfaction was expressed particularly by Germany, France and Spain, with other Member States (the Netherlands, Switzerland, Austria) also raising objections against the approach. Although Commissioner Cecilia Malmström reassured Member States that the powers of national governments would not be curtailed, national parliaments argued that the proposal was in breach of the principle of subsidiarity (Carrera, 2012; BPB, 2011).

The Commission prepared a compromise proposal where the division of power between the Commission and the Member States shifted in favour of the states. This version was presented and accepted at the Justice and Home Affairs (JHA) Council in June 2012. This time, the EP felt excluded from the whole procedure since the decision to accept the Schengen amendments was taken unilaterally by the Council. The Parliament even threatened to complain before the European Court of Justice (ECJ) and stopped debating legislative acts in five main JHA areas. This EP reaction was unprecedented. Thus, further changes were made in order to balance the division of responsibilities and the Parliament achieved the right to be informed about the functioning of Schengen cooperation, e.g. about the reimposition of internal border controls (EurActiv, 2012)³. Two years after the border dispute, the package was formally adopted by the Parliament in June⁴ and by the JHA Council in October 2013. It was officially published and entered into force in November 2013 with a one-year transitional period for implementation by the Member States⁵.

The main changes to the governance of the Schengen Area are that the Commission and the Member States will be jointly responsible for the evaluation and monitoring mechanism. Up to now, the Commission was a mere observer. The Commission will also be responsible for multi-annual and annual evaluation mechanisms, which means that it can employ both announced and unannounced on-site visits (previously only announced visits were possible). Ensuing reports must be submitted to the Council and the Parliament. If a problem regarding border controls in a Member State is identified, an action plan to improve the situation is required. It will be the Commission that monitors and reports on the development until the shortcomings in border control practices are resolved. Up to now, the rules will apply to all Member States of the Schengen Area and must also be met by the states aiming to join Schengen in the future.

Regarding the reintroduction of border controls, states continue to be able to unilaterally reintroduce internal border controls. However, this is only in exceptional situations where there is a serious threat to public policy or internal security. Three situa-

tions can occur that legitimise the reintroduction of border controls:

- 1) In case of a foreseeable event (e.g. major political or sporting events), the Member State must inform other States and the Commission in advance and submit all relevant information including the reasons for the reintroduction. The reintroduction of border controls can last for thirty days and can be prolonged by another thirty days up to a maximum of 6 months (this limit did not exist before).
- 2) In case of an unforeseeable event (e.g. natural disasters or terrorist attacks), the controls can be implemented immediately for a maximum period of 10 days with the possibility to prolong this period by another twenty days up to 2 months (in this case, monitoring at the EU level is required). It is explicitly stated that migration flows per se and crossings of the external borders in general cannot be used as a reason to reimpose border controls.
- 3) A completely new provision applies when a Member State is not able to control the Schengen Area's external borders. Based on an evaluation report, the Commission can recommend to take specific actions, e.g. to employ the European Border Guard Teams. Further, if a state does not fulfil its obligations and hereby endangers the whole Schengen Area, the Commission can recommend that the Council proposes controls along the internal borders⁶. This can only happen as a last resort in exceptional circumstances when security or public order are under serious threat. The controls can last up to 6 months with the possibility of prolonging this period three times (Council of the European Union, 2013b; European Parliament, 2013).

To sum up, the main amendments to the evaluation mechanism, which was created in 1998 on an intergovernmental basis, consist of a strengthened role for the Commission. It used to be a mere observer yet now it will act actively and jointly with the Member States. Regarding the reintroduction of internal border controls, more detailed rules are determined. The reimposition is only possible "as a last resort" after considering both internal security and freedom of movement. Whereas, according to the original Schengen Borders Code from 2006, it was necessary only to inform other states about the reintroduction, states must now submit "all relevant data" and the Commission may request additional information. The reintroduction may now be discussed at "joint meetings" between concerned Member States and not only through informal consultations, as was once the case. Furthermore, the Commission and the Member States may appeal to the ECJ if the reintroduction is considered to be unjustified. Finally, additional time limits are set and the right of the Parliament to be informed is highlighted (Peers, 2013).

Conclusions and Recommendations

The Schengen Governance Package was adopted after two years of politically tense negotiations. Although the proposal to change the Schengen rules came from the states, it was the Commission that gained more power, particularly in the area of monitoring mechanisms. This is a clear signal that there is a demand for a neutral body of supervision over the Schengen Area and for more detailed rules.

Nevertheless, opinions differ on how fundamental this change is. Pascouau (2013) argues that it is an unequivocal shift towards an EU-led approach and a victory for the Commission. Zaiotti (2013), on the other hand, is convinced that the whole package only offers symbolic and vague changes and that the states will continue to be able to act discretionally. Peers (2013) stands somewhere in between by stating that the package is a compromise that does not shift power to the Commission significantly and its impact will be very limited.

In general, this Policy Brief aligns with Peers in that even though the package defines the reimposition of internal borders in more detail, and thus makes their reintroduction more difficult⁷, the interpretation of exceptional circumstances and last resort is broad. There remain many exceptions to time limits and the recommendations and reports from the Commission are in principle non-binding on Member States. All in all, the room for discretion remains extensive.

Furthermore, the package aims merely at border controls but this will not help solve situations such as that witnessed with Tunisian refugees. The problem Italy and other states at the external border deal with refers more to solidarity and burden-sharing between Member States. Although it was only France that eventually reimposed border controls, other countries – Germany, the Netherlands, Belgium and Austria – expressed concerns about the refugees, which illustrates that solidarity inside Schengen is problematic. There is no willingness to assist the states at the external border with incoming asylum seekers. In fact, resettlements and burden-sharing only function on a voluntary and ad hoc basis. Although solidarity and mutual responsibility are mentioned in some non-binding documents such as the European Pact on Immigration and Asylum or the Stockholm Program, there is a clear need for systematisation in a legally binding document.

It was easier to agree on technical details concerning border controls rather than on a substantial change such as burden-sharing. However, the latter needs to be addressed if Schengen cooperation is to continue as a European success story. In 2013, a renewed version of the Dublin regulation (Dublin III) entered into force but it also failed to address burden-sharing and solidarity. The relation between Dublin and Schengen rules is crucial

and must be dealt with. One question arises immediately: how? One possibility is to determine EU quotas for the resettlement of asylum seekers e.g. according to Member States' GDP and/or size of population⁸. The ad hoc resettlements that have taken place up to now are clearly not sufficient. A systematic and institutionalised system of quotas would help to relieve states along the external borders from their increased responsibility, while taking into account the capabilities of individual states. Of course, the quotas should not be random and would have to take into account various criteria, e.g. the principle of family reunification, which should be the first criterion, when considering which country is responsible for the asylum seeker.

Another proposal for better management of burden-sharing would be the right of asylum seekers to freely choose the country to seek asylum. As J. A. Linxweiler (2014) demonstrates, this does not necessarily contradict the Dublin system. According to the author of this paper, it would presuppose that the asylum systems and life standards in all EU countries are harmonised. Furthermore, the rule that an asylum seeker can only apply for asylum once within the EU must be preserved so that multiple applications – the so-called refugee in orbit –, and further overloading of asylum systems in Member States, is prevented. Since it can be assumed that asylum seekers would prefer to stay in a country where they have relatives, this system would probably also help to solve the problem of family reunification of refugees.

Apparently, these suggestions are not without drawbacks and would most likely be perceived as too radical by Member States⁹. But even though they may be unattainable at present, it is important to discuss them, since it is not sufficient to focus only on the security dimension of the Schengen cooperation. Protecting their own borders will not help to relieve the most overloaded states. To sum up, one must appreciate the aim of the Schengen Governance Package to clarify rules so that the reimposition of border controls is not overused or abused. On the other hand, it does not deal with the key problem that Schengen Members must face, namely solidarity and burden-sharing. In this sense, the package represents another missed opportunity to improve the functioning of Schengen cooperation.

Acknowledgements

I am indebted to Christof Roos for his useful and inspiring comments.

Footnotes

¹The communication was presented along with two legislative proposals: *Proposal for a regulation of the Council on the establishment of an evaluation mechanism to verify the application of the Schengen acquis and 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.*

²If the Commission would be against the reintroduction of internal border controls

they could not be implemented.

³For a comparison of the two drafts see European Parliament (2012a) and European Parliament (2012b).

⁴Not all parties agreed with the amendments to the Schengen acquis, e.g. The Greens claimed the regulations meant weakening of Schengen which the party could not support (Spiegel, 2013).

⁵The package consisted of two regulations: *Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances and Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen* (Council of the European Union, 2013a; Council of the European Union, 2013b).

⁶Also the States themselves can ask the Commission to propose this measure to the Council.

⁷On the other hand, a new possibility to reimpose border controls is added in case a state does not fulfil its duties.

⁸A similar principle is applied in Germany among the Bundesländer.

⁹Member States are not even able to agree on quotas referring only to Syrian refugees.

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Policy briefs are published by the
Institute for European Studies

Jean Monnet Centre of Excellence
at the Vrije Universiteit Brussel

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